



Ethical Considerations in Advising Clients Regarding Fraud

2011 Health Law CLE

Per Ramfjord
October 7, 2011

Overview



- **It's a different world**
- **Special ethical issues in conducting internal investigations**
 - Interviewing employees
 - Joint representation of company and employees
 - Conflict waivers
 - Confidentiality obligations
- **General Considerations**
 - Avoiding obstruction of justice
 - Dealing with an untruthful client

It's a Different World

- Clients may not be telling you the truth
- Documents may not be what they appear to be
- It may take time for you to learn what actually happened
- The government does not have a sense of humor

It's a Different World



- Need to know and follow the rules
- Need to document compliance
- Need to be prepared for the unexpected

Internal Investigations



- Topics:
 - Interviewing employees
 - Joint representation
 - Conflict waivers
 - Confidentiality obligations

Internal Investigations



- **Interviewing employees**
 - **RPC 1.13(f) Organization as Client**
 - “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.”

Internal Investigations



- **Interviewing employees**
 - **RPC 4.2 Dealing with Unrepresented Persons**
 - “The lawyer shall not give legal advice to an unrepresented person, 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 probability of being in conflict with the interests of the client or the lawyer’s own interests.”

Internal Investigations



- ***Upjohn* warnings**
 - **Purpose:** Avoid the creation of an attorney-client relationship with employees that could impair the use of information obtained in the investigation or lead to disqualification.
 - **Why the warnings are important:**
 - *United States v. Stein*, 463 F. Supp. 2d 459, 464-65 (S.D.N.Y. 2006)
 - *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir, 2005)
 - *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)

Internal Investigations



- ***Upjohn* warnings**
 - **Content:**
 - Represent company, not individual
 - Purpose of interview—to provide legal advice
 - Interview is subject to privilege
 - Only the company, not the individual, can waive the privilege
 - How the information may be used
 - Individual should be permitted to ask questions

Internal Investigations

- ***Upjohn* warnings**
 - **Recommended procedures**
 - Have two people present for interview
 - Deliver warnings before questioning
 - Utilize a prepared written script to ensure warnings are consistently and accurately delivered
 - Document that the warnings have been provided as part of a written interview memorandum

Internal Investigations



- **Questions raised by *Upjohn* warnings:**
 - “Do I need a lawyer?”
 - “Why can’t you represent me?”
 - “Have I done something wrong?”
 - “Am I going to be fired?”
 - “Will you tell anyone what I say?”
 - “What if I refuse to answer questions or don’t tell the truth?”

Internal Investigations



- **Answers:**

- You do not represent them and cannot advise them
- You are conducting a factual investigation and are still gathering facts
- No conclusions have been reached
- The company may disclose the information they provide
- As employees of the company, they have a duty to cooperate with the investigation, and their failure to answer questions truthfully could result in termination

Internal Investigations



- **When to get separate counsel**
 - **Decision factors:**
 - Is there a conflict? RPC 1.13 (g), 1.7
 - Will one develop (remember, witnesses don't always tell the truth in the first interview)
 - Cost
 - Sharing of information/cooperation
 - Impact on relationship with the prosecution
 - Potential use of a single outside lawyer to represent multiple non-target employees

Internal Investigations



- **Joint representation—RPC 1.13 (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 may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.”

Internal Investigations



- **Joint representation—RPC 1.7**
 - A current conflict of interest exists if:
 - Representation of one client would be directly adverse to the other;
 - A significant risk that representation of one client will be materially limited by duties to the other.
 - Current conflict is subject to waiver if:
 - Reasonable belief can provide competent and diligent representation
 - Not prohibited by law
 - Not obligated to make conflicting contentions
 - Can waive future conflicts (ABA Op. 372; Or 2005-122)

Internal Investigations

- **Conflict waivers**
 - Waiver must be based on “informed consent”—RPC 1.0 (g)
 - Waiver must be “confirmed in writing”—RPC 1.0 (b)
 - To meet these requirements, conflict waiver letters should . . .

Internal Investigations



- **Conflict waiver letters should:**
 - Be done promptly
 - Identify clients, issues involved and consent sought
 - Explain how potential future conflicts could develop and risks of joint representation
 - Make clear that counsel will continue to represent the company if a conflict develops
 - Address joint defense privilege issues
 - Recommend independent counsel

Internal Investigations



- **Confidentiality obligations—what do I do if I uncover wrongdoing?**
 - RPC 1.6 Confidentiality of Information
 - A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized;
 - A lawyer may reveal information if the lawyer reasonably believes it is necessary to
 - Disclose the client’s intent to commit a crime
 - Prevent reasonably certain death or substantial bodily harm;
 - Comply with another law or court order

Internal Investigations



- **Confidentiality obligations—what do I do if I uncover wrongdoing?**
 - RPC 1.13 Organization as Client
 - Lawyer who “knows that an officer, employee of other person” is engaged in or intends to engage in a violation of law that may be imputed to and is likely to result in substantial injury to the company shall proceed as is reasonably necessary in the best interests of the company
 - Unless lawyer reasonably believes that it would not be in best interests of the company, should refer to the highest authority, and if that fails, may disclose
 - Does not apply to defense of alleged violation

Internal Investigations



- **Confidentiality obligations—practical implications**
 - Although you may believe it is in the client's best interests to disclose, you need to obtain informed consent
 - May disclose to prevent continuing fraud if client refuses to stop (assisting in the illegal conduct may expose you to liability)
 - May disclose if required by statute, *e.g.*, section 307 of Sarbanes-Oxley

Internal Investigations



- **Hidden risks:**

- In at least one case, the government has alleged that an in-house counsel making allegedly inaccurate disclosures engaged in obstruction of justice.
- *United States v. Stevens*, No. 10-cr-0694 (D. Md. 2011)
 - In-house counsel for GSK tried for obstruction of justice and false statements based on disclosures in letter responses to FDA inquiry
 - Judgment of acquittal granted by district court

General Considerations

- **Obstruction of justice and destruction of documents**
 - The motivation of clients to destroy documents may be strong
 - The consequences—whether the destruction is purposeful or inadvertent—can be devastating
 - Allegations of obstruction of justice are likely, particularly if the destruction takes place while the investigation is ongoing

General Considerations



- **Obstruction of Justice**

- **Before Sarbanes-Oxley – 18 U.S.C.**

- § 1512(b)(2):

- “Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so . . . with intent to . . . cause or induce any person to . . . alter, destroy or mutilate, or conceal an object with the 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 ten years or both.”

General Considerations



- **Obstruction of Justice**

- **After Sarbanes-Oxley – 18 U.S.C. § 1519:**

- “Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record . . . with the intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or in contemplation of any such matter or case” will face imprisonment of up to 20 years.

General Considerations



- **Obstruction of Justice**
 - **18 U.S.C. § 1519 is broader than 18 U.S.C. § 1512:**
 - Does not explicitly require that the destruction was done “corruptly”;
 - Refers to “impeding, obstructing or influencing” an investigation;
 - Does not require proof of a pending or imminent proceeding or matter.
 - **Federal prosecutors have been using § 1519 aggressively**

General Considerations



- **Avoiding the pitfalls**

- Take measures to preserve documents at the outset and document those efforts
- Issue document preservation instructions similar to a litigation hold
- Suspend routine retention policies
 - Hard copy destruction procedures
 - Archiving and back up of email
- Limit access by suspect employees
 - Limit network access
 - Image hard drives

General Considerations



- **Dealing with an untruthful client**
 - **RPC 3.3 Candor Toward the Tribunal:**
 - A lawyer shall not knowingly
 - “make a false statement of fact or law to a tribunal or fail to correct a false statement of fact or law previously made to the tribunal”
 - “offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer’s client or a witness called by the lawyer, has offered material evidence and the lawyer comes to *know* of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer refuse to offer evidence, *other than the testimony of a defendant in a criminal matter*, that the lawyer reasonably believes is false.”

General Considerations

- **Dealing with an untruthful client**
 - **RPC 3.3 Candor Toward the Tribunal:**
 - “A lawyer who represents a client in an adjudicative proceeding and who *knows* that a person” intends to or has engaged in “criminal or fraudulent conduct related to the proceedings shall take remedial measures, including, if necessary, disclosure to the tribunal
 - Duty continues until the conclusion of the proceedings

General Considerations

- **Dealing with an untruthful client – practical considerations**
 - When do you “know” that a client’s statements or documents are false?
 - Even if you reasonably believe that a client’s testimony will be false, can you refuse to offer it?

Conclusions

- Know and follow the rules
- Document what you do with care
- Be mindful of how the landscape can change as the case develops
- Be aware that the government may be looking over your shoulder to ensure that you comply with your obligations

Thank You

Per Ramfjord
Stoel Rives LLP
paramfjord@stoel.com