Ethical Considerations in Government Investigations

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SCENARIOS

1. Who's the Client?
2. In-House Attorney's Obligations to Report Misconduct
3. Maintaining Confidentiality, Privilege – Here and Abroad
4. Internal Investigations – Obligations to Company Employees
5. Client Ignores Your Advice
6. Client Misrepresents Your Advice to Obtain Benefit

The "Who's the Client?" Conundrum

- One of in-house counsels' biggest challenges:
  - making clear who they represent
  - and, of equal importance, who they do not represent.
- Challenging because we are fellow employees and may have collaborated on other matters.
- Most often arises in:
  - HR/Employee Discipline matters
  - Ethics hotline/internal whistleblower complaints
  - Government or SRO inquiries
- For in-house counsel, we know who our client is: the company. ***See Texas Rule 1.12(a); Model Rule 1.13(a).***
  - Typically not an issue where all interests align. ***Texas Rule 1.12, Com. 5.***
- But do our officers, directors and co-workers truly understand where our loyalties lie?

But what if there is or could be a conflict?

- Rules burden the lawyer to clarify the relationships.
- A lawyer must explain the client's identity when:
  - it is apparent that the company's interests are adverse to those of the constituents with whom the lawyer is dealing, or
  - when explanation appears reasonably necessary to avoid misunderstanding on their part. ***Texas Rule 1.12(e); Model Rule 1.13(f).***
- When the lawyer knows or reasonably should know that an unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding. ***Texas Rule 4.03; Model Rule 4.3.***

What to say when there is a potential conflict

- Where you think the company may be, or later become, adverse to the co-worker, you should inform them:
  - That there is a conflict or potential conflict of interest;
  - That you represent the company and cannot represent or provide legal advice to the co-worker;
  - That the co-worker may not be able to assert privilege over communications with you; and
  - That the co-worker may wish to obtain independent representation. ***Texas Rule 1.12, Comment 4.***
- Advisable to contemporaneously document this disclosure.

Internal Investigations or Government/SRO Inquiries

- Heightened consequences amplify the "Who's the Client?" question.
  - DOJ's Yates Memo and SEC's Cooperation Program both incentivize companies to turn over information about individual culpability.
- *Upjohn* warnings are critical in these contexts.
  - ABA Model *Upjohn* disclosures are a good starting place.
  - Consider putting them in writing and having employees acknowledge receipt.
  - Is potential conflict or consequence so great as to merit separate counsel?
- Doing this poorly can have grave consequences.
  - *Sandusky/Penn State* cases

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