

MAYER • BROWN

**Managing the Early Stages of Commercial Litigation:  
Critical First Steps**

**Whom To Notify When:  
What Notifications Might Be Required**

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# Agenda

- How to decide who to notify and when
- Creating a notification protocol
- What are the triggers for notification?
- Early “case” assessment
- The range of possible notifications
- Special notification considerations
- How best to effectively manage the early case assessment and notification protocol

## How to Decide Whom to Notify and When

- Depends on the nature of the threat
- The needs of the internal and external audiences

## How to Decide Whom to Notify and When

- Create a notification protocol – the chain of people who need to be brought into the loop
- Planning ahead will avoid mistakes when the notification need arises

# What Are the Triggers for a Notification Protocol?

Depends On The Nature Of The Threat



**Complaint**



**Whistleblower Complaint**



**Pay us money!!!**

# What Are the Triggers for Notification?

- Factors to Consider

- Analysis of nature of the threat through early “case” assessment
- The facts will dictate the type, content, and scope of notification needed
  - type of threat, subject matter, potential liability, potential public relations importance , and context

**Early “Case” Assessment Is Crucial**

# Early “Case” Assessment

- Some Key Questions
  - Does your company have a case assessment protocol in place?
    - Who knows about the protocol?
  - Who should be involved in the initial “case” assessment?
  - Does the matter involve merely potential, threatened or actual litigation?

# Early “Case” Assessment

- Some Key Questions

- How serious is the threat? Nuisance, large but manageable, bet the company?
- Is this litigation where a complaint is sent, but not filed, or filed?
- Is this a whistleblower complaint or a demand from a disgruntled current or former employee?
- How sensitive are the allegations – financial irregularities, workplace?

**The facts will dictate the kind and scope of the notification**



# The Range Of Possible Notifications

- Board or board committee
- Auditors
- Insurers
- Periodic SEC filing or is form 8-K necessary
- Any Other Regulators
- Any contractual obligations triggered which require notification to third parties including lenders
- Key Fact Witnesses
- Notifications to third parties concerning evidence preservation
- Litigation loss reserve
- Internal and external message managers

**The Key: Know Your Internal  
And External Audiences**



# Special Notification Considerations



Board Or Board Committee  
How soon and how much?

# Special Notification Considerations

Auditors

-- Privilege Issues

No Universal Privilege

Some states have statutory  
protections, but can be limited

-- Other Issues



# Special Notification Considerations

- Insurers
  - What are the kinds of coverage implicated by the threatened or actual litigation?
  - When and what should be the content of the notification: follow the policy requirements.
  - Are there layers of coverage? If so, who is responsible for notice to the various layers?
  - Coverage issues are not for amateurs!



# Special Notification Considerations

- Periodic SEC filing or is form 8-K necessary
- Other potential regulators



# Special Notification Considerations

Any Contractual Obligations Triggered Which Require Notification to Third Parties Including Lenders, Indemnitors, Etc.



# Special Notification Considerations

- Key Fact Witnesses
  - Internal and external
  - Explain the scope and limits of the privilege
  - Caution about creating “new” evidence
  - Refrain from discussing facts with others
  - Be prepared for questions about representation

# Special Notification Considerations

- Key Fact Witnesses
  - Identify and preserve evidence both paper and electronic
  - Obtain written confirmation of the agreement to preserve



# Special Notification Considerations

## Notifications To Third Parties Concerning Evidence Preservation

Managing the initial, but crucial e-discovery considerations



# Special Notification Considerations

- Litigation Loss Reserve



- FASB's New Proposed Loss Contingency:  
The Current Debate
  - Existing guidance
  - The new proposal
    - Key elements
  - The opposition

# Special Notification Considerations

## Internal And External Message Managers

- Special considerations for public companies
- Internal communications
  - IT security issues
- External communications

# How Best to Effectively Manage the Early Case Assessment and Notification Protocol

- It Takes A Village: no one person can or should try to be the sole analyst and decision maker.
- Have a detailed, and vetted protocol for case assessment.
- Makes sure that relevant subject matter experts are included in the initial discussions so that proper and timely notifications are made.



# How Best to Effectively Manage the Early Case Assessment and Notification Protocol

- Develop a comprehensive notification protocol which accounts for the range of possible threats and considers the internal and external audiences to whom notification should be made.
- BE PREPARED.



# Questions & Answers



# Mayer Brown Speakers



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