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



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





Auditors

-- Privilege Issues

No Universal Privilege

Some states have statutory protections, but can be limited

-- Other Issues



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!



Periodic SEC filing or is form 8-K necessary

Other potential regulators



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



- 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

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

Notifications To Third Parties Concerning Evidence Preservation

Managing the initial, but crucial e-discovery considerations



Litigation Loss Reserve



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

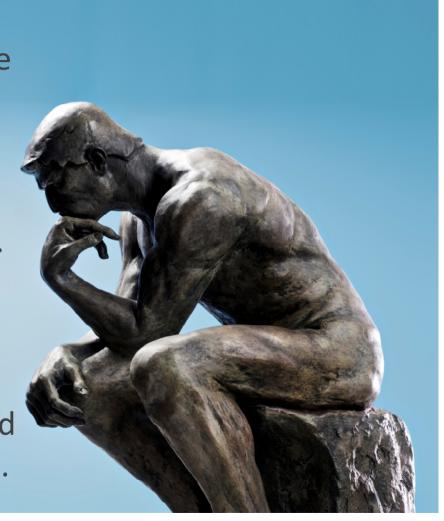


How Best to Effectively Manage the Early Case Assessment and Notification Protocol

 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.

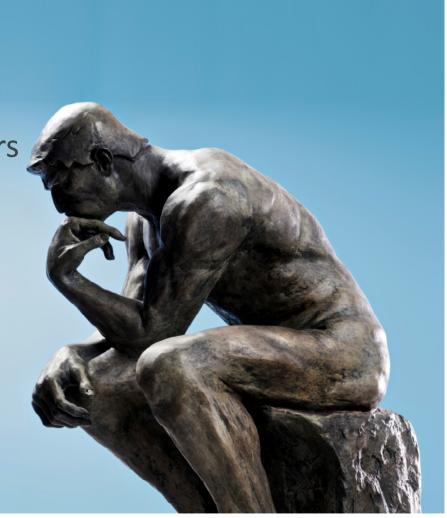
 Makes sure that relevant subject matter experts are included in the initial discussions so that proper and timely notifications are made.



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



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