

Internal Investigations: How Prepared Is Your Company?

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A photograph of a person's eyes and hands peering through the slats of white horizontal blinds. The person's hands are visible at the top, pulling the blinds apart to reveal their eyes. The blinds are closed, with only a narrow gap visible.

Internal Investigations

Why Conduct It In First Place?

**Protect
company
from:**

- Criticism
- Government
- Whistleblowers
- Plaintiffs' bar
- Wrongdoing

**Protect the
company on
behalf of:**

- Shareholder
- Board
- Management
- Public
- Lawyers (SOX 307)

Other Reasons To Conduct Investigation

- Need to know facts to advise
- Outside auditors may require it (Section 10A)
- Identify possible corrective actions
- Prepare defense if needed
- Comply with obligations to conduct

Decisions Regarding Internal Investigations Are Case Specific

- Very few hard and fast rules
- Who is client?
- Decisions will vary with the situation

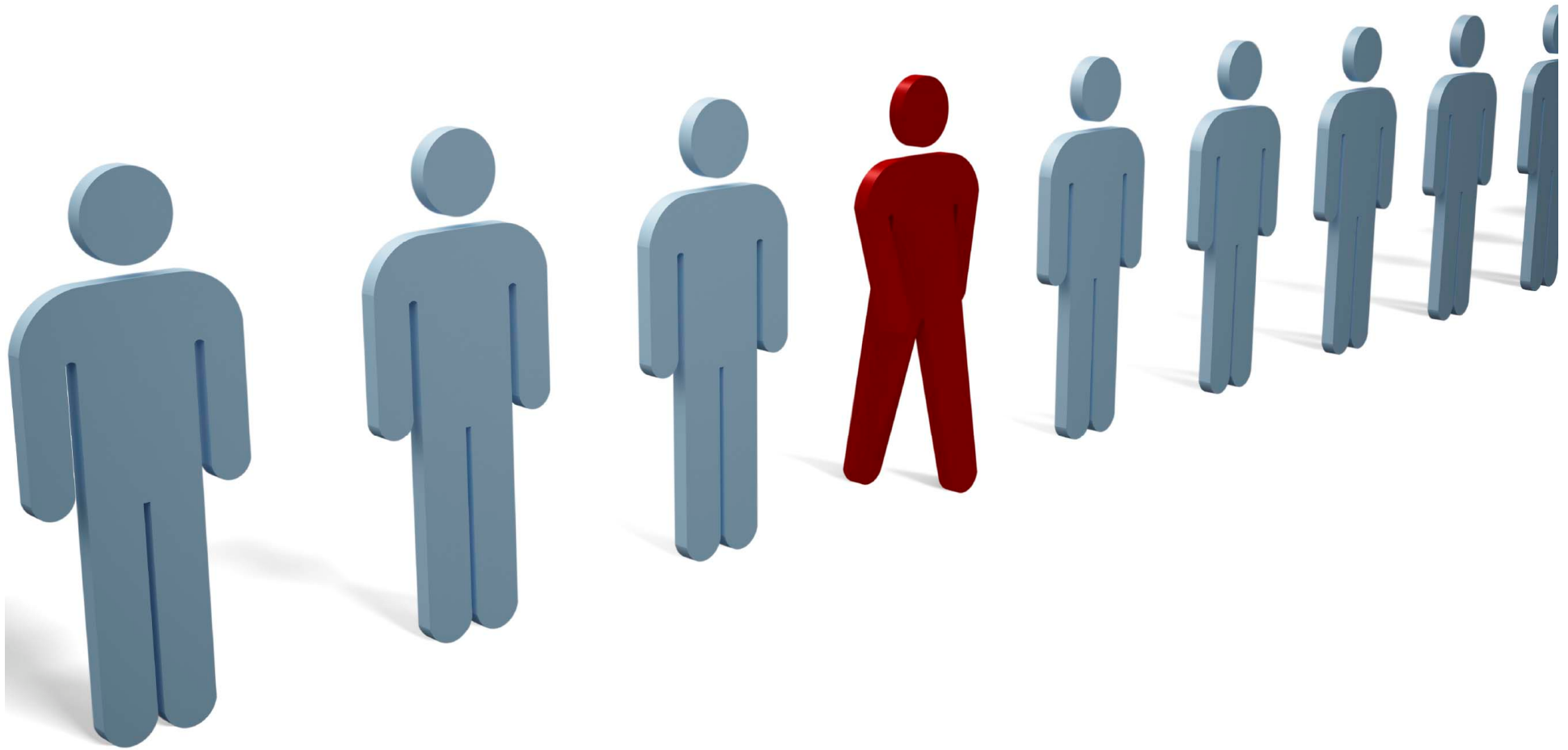
Key questions:

What do you want to accomplish?

In-House Challenge

- Privilege Issues in EU
- Meeting Multi-Jurisdiction Standards/Risks
- US law firms abroad – the Privacy Trap
- Lawyers for Employees
- Indemnity
- Walk or Talk
- Asking employees to keep Co. current vs obstruction risk
- The Board

Roles In The Investigation



Risks if In-house Counsel Conducts Investigation

**Where it
involves senior
management or
criminal issues**

- **Risk of losing protection of privilege**
- **May inhibit full disclosure by employees**
- **May affect view of independence**
- **Should not put self in position**

Independence Of Attorney

- Firm not involved in transaction
- Whether normal company counsel will vary
 - Seriousness of suspected activity
 - Seniority of employees potentially involved
 - Likelihood of derivative action – SLC
- Ability to deliver difficult news

Lines Of Reporting

To whom will outside counsel report?

General Counsel
Management
Board

Role Of Board

Depends on seriousness and Board

- Magnitude of potential problem
- Involvement of senior management

May be appropriate to report to audit committee or special committee

Who Receives Information

Depends on nature of issues

- Who at company is potentially involved
- Management must have sufficient information to do job
- Concerns regarding obstruction
- Privilege & government

Employee Interviews

- Competing considerations
- Make clear attorney is for company, not employee (Upjohn)
 - AOL; Kaye Scholer; Nicholas
- Emphasize confidentiality and not to discuss issues with others
- Make sure notes accurately reflect factual statements

Upjohn Warnings

- Purpose of interview is to assist counsel in providing legal advice to company
- Counsel represents company, not individual employees
- Discussions between employee and counsel are privileged communications and privilege belongs to the company, not the employee
- Company has the right to keep the communications confidential and privileged, but it also has the right to waive the privilege and disclose to third parties
- Employee should not discuss the interview with anyone, including fellow employees

Recent Developments: U.S. v. Nicholas (C.D. Cal. April 1, 2009)

- Court suppresses statements of Broadcom CFO made to company's outside counsel during internal investigation.
- Government has appealed the suppression ruling.
- Court also refers outside counsel to state disciplinary commission for ethical breaches.

Employees & Individuals



Counsel For Employees

Depends on situation

- Impact of KPMG ruling in SDNY
- Walk or talk
- Most efficient if don't have
- If have own counsel, may request joint defense agreement

Importance Of Counsel For Individuals

- Can give advice company counsel can't
- Crucial that employees have good counsel
- Crucial that have counsel who will work with company counsel
- How to suggest that employee get counsel

Recent Developments: Stanford Financial

- Outside counsel for company accompanies CIO to SEC interview and says he represents CIO only “insofar as as she is an officer or director of one of the Stanford-affiliated companies.”
- CIO is later charged with obstruction for lying to SEC
- CIO sues outside counsel for malpractice

What To Do With Suspected Employee

- Case specific
- May need to terminate
- May need to place on leave
- May need remediation training
- Advantages of keeping if can



Privilege

Privilege Issues

Are communications privileged?

Employees?

Former employees?

What law governs? Federal law and/or law
in a particular state?

- In certain states, only an attorney's communications with the "control group" are privileged.
- Control group is limited to senior management and employees that advise senior management on final decisions.

Work Product Doctrine

- Materials prepared “*in anticipation of litigation*” enjoy a qualified protection against disclosure. Fed. Rules Civil Procedure 26(b)(3).
- Work product, to the extent it is mental impressions, conclusions, opinions and theories, usually is protected.
- Other work product, however, must be disclosed if a party has a substantial need and cannot obtain the information without substantial hardship.

Waiver Scenarios

Assuming your communications are privileged, will you waive the privilege if you share information with:

- Representatives of a parent or wholly-owned subsidiary?
- Auditors?
- Insurance carriers?
- Media consultants?
- Government/regulators?

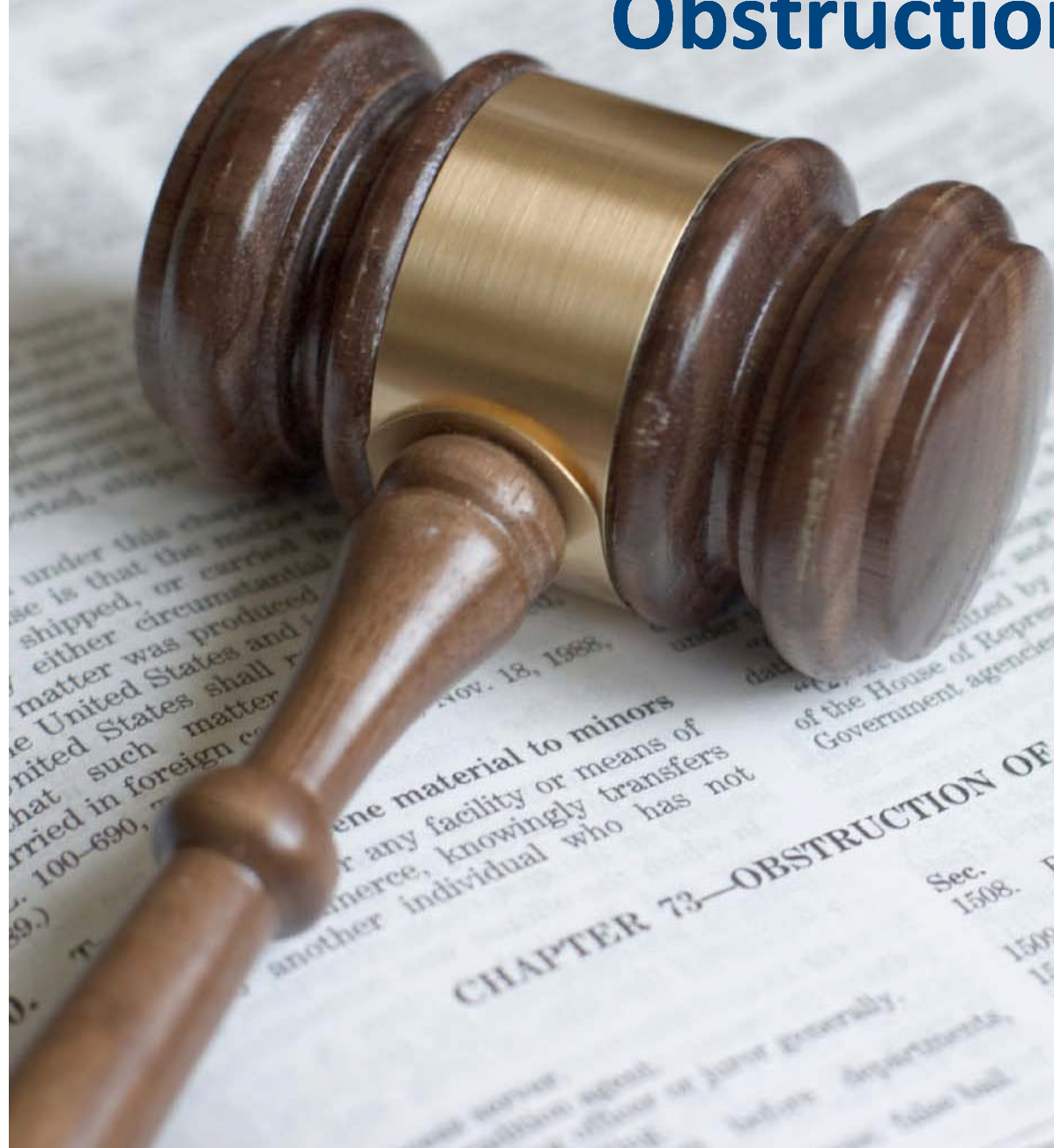
Waiver: General Rule

- The general rule is that once the client waives the attorney-client privilege, it is waived as to all third parties
- Unlike the attorney-client privilege, the protection of the work product doctrine is not automatically waived by disclosure to any third persons
- Courts will find waiver of work product doctrine only if:
 - the disclosure is made to an adversary, or
 - the disclosure substantially increases the opportunity for potential adversaries to obtain the information.

Update: Attorney-Client Protection Act of 2009

- **February 2009:** Sen. Arlen Specter has introduced, with bipartisan support, the Attorney Client Privilege Protection Act of 2009, S. 445.
- The bill seeks to protect the sanctity of the attorney-client relationship by prohibiting federal prosecutors and investigators from requesting waiver of attorney-client privilege and attorney work product protections in corporate investigations.
- Sen. Specter first introduced the bill on January 2007. He re-introduced a modified version of the legislation in August 2008.

Obstruction



CHAPTER 73—OBSTRUCTION OF JUSTICE

Sec.
1508.

Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting.
Obstruction of court orders.
Obstruction of criminal investigations.
Obstruction of State or local law enforcement.
Tampering with a witness, victim, or an informant.
Retaliating against a witness, victim, or an informant.

See Title 18 U.S.C.A.

Avoid Obstruction Of Justice

- Crime du jour
- Note 2/3 rev on appeal
- Prosecutors very sensitive to any suggestion
- Easier to prove than underlying offense

Obstruction Of Justice: Examples

- Influencing a witness not to talk to law enforcement
- Retaliating against a witness
- Destroying documents

Obstruction Of Justice: Special Dangers In Internal Investigations

- Witnesses will want to talk to each other (senior management)
- Lawyers interviewing witnesses may convey information from other witnesses
- Paying for witnesses to have lawyers
- Documents may be destroyed before you think to keep them

International Considerations



International Investigations

- Suddenly, it's 3 dimensional checkers
- Additional layers of:
 - Laws and regulations
 - Law enforcement agencies and regulators
 - Prioritizing key decision-makers in the "end game"

Practical International Concerns

- Appropriate local counsel
- Custom and language barriers/interpreters

http://travel.state.gov/travel/cis_pa_tw/cis/cis_1765.html

Practical International Concerns



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A - Z Country Index

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counsel

Preparation Is Critical

- Often expatriated work force (Middle East)
- Restricted access to "company" computers
- Data transfer complications and prohibitions
- Privilege varies widely
- Personal privacy concerns

Recent Developments: Mcknight V. Torres (9th Cir. April 20, 2009)

- Standard U.S. proffer agreement leads to French conviction!
- Participant in drug importation from France to U.S. entered written proffer agreement
- U.S. Attorney's Office gave his statement to French authorities who convicted him in absentia

Lesson

Get it in writing: U.S. prosecutors won't share statements with other sovereigns (foreign or State)



Recent Developments

Recent Developments: Stanford Financial

- **February 10, 2009**: Outside counsel for company accompanies CIO to SEC interview where sworn testimony is given.
 - Informs SEC that he represents CIO only “insofar as as she is an officer or director of one of the Stanford-affiliated companies.”
- **February 14, 2009**: Outside counsel withdraws from case. Writes to SEC: “I disaffirm all prior oral and written representations made by me and my associates to the SEC staff regarding Stanford Financial Group and its affiliates.”

Recent Developments: Stanford Financial

- **February 16, 2009:** SEC names CIO as co-defendant in complaint alleging securities fraud. SEC alleges CIO facilitated a massive Ponzi scheme by which the Chairman and CFO, through the companies they controlled, misappropriated billions of dollars in investor funds.
- **February 26, 2009:** CIO is arrested and charged in a criminal complaint with obstruction of justice based on lies to the SEC. Grand jury indictment returned May 2009.

Recent Developments: Stanford Financial

- **March 27, 2009:** CIO sues outside counsel for malpractice.
 - Lawsuit contends that counsel, while accompanying her to meetings with the SEC as counsel for the company, didn't adequately represent her own personal interests and inform her of her Fifth Amendment rights.
 - Lawsuit also contends that counsel represented Stanford Financial Group Chairman and his companies, rather than her own personal interests.

Recent Developments: Stanford Financial

- **May 2009:** Criminal Indictment includes allegations about outside counsel's conduct (but does not charge him)
- "Attorney A" and others made misleading statements to the SEC in February in order to cause the agency to delay interviewing Allen Stanford and the Stanford CFO about the firm's financial condition.
- Attorney A misled the SEC by telling the agency that company's CIO and President would be better witnesses who could offer the agency better information regarding the firm.

Recent Developments: Stanford Financial

- Attorney A allegedly said that Stanford and his CFO were executive level officers who were not involved in the 'nuts and bolts' of business operations and could not tell the SEC attorneys about details of the firm's assets. The SEC agreed to delay the depositions of Stanford and his CFO.
- Attorney A then sent an email to CIO and CFO regarding the need to tell the SEC about all of the firm's investments. He wrote that they needed to "rise to the occasion" and that "our livelihood depends on it."

Recent Developments: U.S. v. Nicholas (C.D. Cal. April 1, 2009)

- **May 2006:**

Outside counsel is retained to represent Broadcom in an internal investigation of stock option granting practices. Same outside counsel had represented CFO in two shareholder lawsuits filed against him regarding the same practices.

- **June 2006:**

CFO meets with outside counsel to discuss the stock option granting practices and his role in them.

- **August 2006:**

Without CFO's consent, Broadcom directs outside counsel to disclose the substance of CFO's statements to its auditors and govt/SEC.

Recent Developments: U.S. v. Nicholas (C.D. Cal. April 1, 2009)

Court held outside counsel failed to inform the CFO that:

1. they were only representing Broadcom at the meeting and not the CFO individually, and therefore he may want to consult his own attorney; or
2. his statements could be used against him by Broadcom; or
3. Broadcom had the right and may choose to disclose his statements to third parties, including the government.

Recent Developments: U.S. v. Nicholas (C.D. Cal. April 1, 2009)

Court determines that the CFO reasonably believed the lawyers were meeting with him as his personal lawyers, not just Broadcom's lawyers.

- He had a legitimate expectation that whatever he said to the lawyers would be maintained in confidence.
- He was never told, nor did he ever contemplate, that his statements to the lawyers would be disclosed to third parties, especially not the Government in connection with criminal charges against him.

Recent Developments: U.S. v. Nicholas (C.D. Cal. April 1, 2009)

Court refers outside counsel's law firm to state disciplinary commission because counsel committed 3 "egregious" violations of an attorney's duty of loyalty to a client.

1. Failed to obtain CFO's informed written consent as required by California's rules of conduct to counsel's simultaneous representation of CFO in the shareholder lawsuits and Broadcom in the internal investigation, even though counsel should have known that the interests of the two clients likely were adverse.

Recent Developments: U.S. v. Nicholas (C.D. Cal. April 1, 2009)

Breaches of duty of loyalty (continued)

2. Outside counsel “interrogated” one client (CFO) for the benefit of another client absent the required written informed consent.
3. Outside counsel disclosed the CFO’s privileged statements to third parties without his consent.

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