THE GOOD, THE BAD & THE UGLY OF INTERNAL INVESTIGATIONS

By: C. Evan Stewart

©2023. All rights reserved.

I. The "Goods" of Investigations

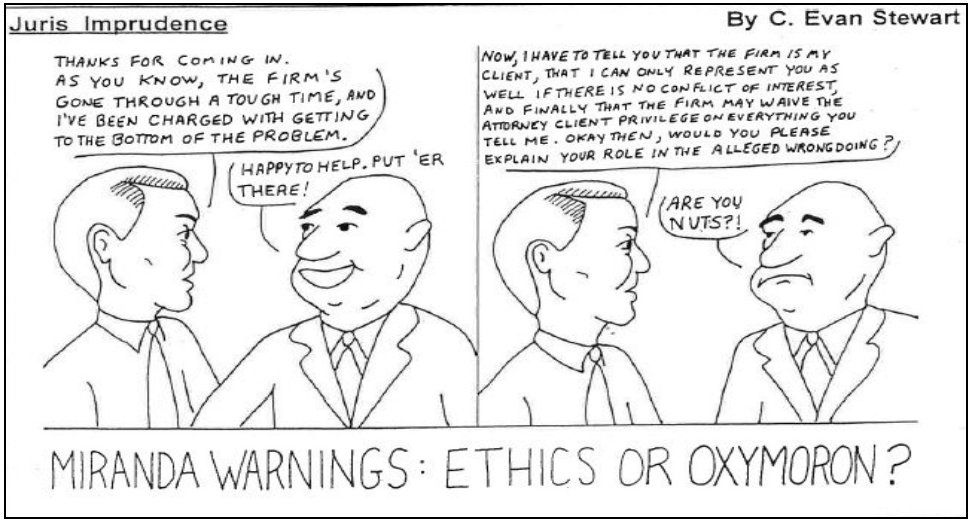
- There are, in fact, numerous (and compelling) reasons for public companies to initiate internal investigations. They include:
  - To ascertain facts and to make informed legal and business decisions. See Upjohn v. U.S., 449 U.S. 383 (1981).
  - To fulfill obligations or responsibilities and duties of care to the corporation. See Smith v. Van Gorkom, 488 A.2d 845 (Del. 1985).
  - To fulfill ethical duties to investigate client (mis)conduct. See NYC Bar Ass'n Op. 2018-4 (July 18, 2018).
  - To avoid the risks (and worse) of doing nothing. See, e.g., Salomon Brothers.
  - To be able, if an investigation uncovers mistakes, wrongdoings, or worse, to take corrective steps, both as to addressing past conduct, but also with respect to prophylactic action.
  - To buy (hopefully) the company some degree of goodwill and/or leniency by self-reporting to governmental/regulatory agencies.
  - To get ahead of the public relations curve.
  - To shore up the company's stock price.

II. The "Bads" of Investigations

- the "Silver Platter" doctrine (regulators and private plaintiffs)
- "cooperation" with the government (Thompson/McNulty/Yates memo)
  - do "oral downloads" work? (SEC v. Herrara (S.D. Fla. 2017))?
  - does "selective waiver" work? (8th Cir. vs. everywhere else)?
  - does client understand the implications of waiver?
- disclosure obligation in SEC/merger filings
- risks to corporate personnel (increasing risk: criminal, regulatory, civil, reputational)
- risk of disclosure to auditors (a/c privilege vs. work product) [versus failure to disclose auditors: General Motors]
- adverse impact to PR and stock price
- the "Bloodhound" factor (Enron) (and attendant expense factor)
- creating documents/destroying documents?
- loss of confidentiality/media leaks (e.g., CBS/Moonves)(reputational damage to lawyers)
- additional litigation risk: affected individuals (e.g., libel, wrongful discharge) (e.g., CBS/Moonves)
- missteps by lawyers leads to: (i) settlement with the government being "torn up"; and (ii) reputational damages to lawyers (e.g., Erickson SA)

III. THE "Uglies" of Investigations

- Corporate Miranda Warnings
  (when? to whom? ethical obligation – **not** an "Upjohn" warning)



  - real world implications (e.g., Ruehle, Quattrone, Stanford Financial)
- 18 U.S.C. §1001 (Computer Associates)
- internal investigations and advocacy (with regulators and civil litigation)
  - dangers to lawyers (regulators)
  - dangers to clients ("sword and shield" → Kidder Peabody)
  - sometimes the government does not like them (WorldCom, Marsh & McLennan)

IV. Recent Investigations Reviewed by the Courts

- SEC v. RPM International, No. 1:16-cv-01803-ABJ, Minute Order (D.D.C. Feb. 12, 2020)
  - 2016 SEC suit against RPM and its general counsel for failing to accrue and disclose properly for a False Claims Act investigation.
  - Qui tam complaint filed 2010; disclosed to RPM in March of 2011.
  - Negotiations to settle with DOJ in 2013. Shortly thereafter, RPM books and discloses a contingency reserve.
  - November 2013, RPM settles with DOJ.
  - January 2014, SEC investigation of RPM's handling and timing of accrual and disclosure.
  - July 2014, EV (for 10-K filing) demands Audit Committee hire outside law firm (Jones Day)
  - Jones Day investigation revealed to EV.
  - August 2014, Jones Day oral summary to SEC.
  - Thereafter, EV memoranda of Jones Day presentations turned over to SEC.
  - 2018, SEC demands Jones Day work product.
  - On February 12, 2020, Judge Berman (over RPM and Chamber of Commerce's objections) orders production.
  - Judge Berman: (i) not "because of" litigation; (ii) not opinion work product; (iii) not privileged.
  - Judge Berman (notwithstanding the Chamber of Commerce) was right!

IV. (cont'd)

- In re: Fluor International, 2020 WL 1487700 (4th Cir. March 25, 2020)
  - 2017 internal investigation with respect to military contracts in Afghanistan; led to employee being fired and reporting to the government.
  - Employee sues Fluor and seeks investigatory materials.
  - Magistrate rules for Fluor; district judge disagrees; 4th Circuit granted Mandamus.
  - Procedural mistake (based upon KBR; see infra Section VI).
  - Substantively sound: (i) disclosure of facts to government ≠ disclosure of privileged information; (ii) "conclusions only a lawyer could make" ≠ disclosure of privileged information; (iii) general conclusions direct quotes from witness interviews.

IV. (cont'd)

- United States v. Sanmina, 986 F.3d 1107 99th Cir. Aug. 7, 2020)
  - $503mm stock deduction claim challenged by IRS.
  - Sanmina provided IRS valuation report prepared by DLA Piper, which included a footnote referencing two internal memoranda by in-house tax counsel.
  - Sanmina also shared the two memoranda with two accounting firms.
  - District court found the documents privileged and work product, but also ruled that sharing the documents with DLA Piper = a waiver.
  - Alternatively, waiver was justified on "fairness" (FRE 502).
  - 9th Circuit affirmed and reversed: (i) DLA Piper not retained as a law firm, therefore no privilege **[wrong]** [plus, no mention of sharing with 3rd parties!]; (ii) analysis of DLA Piper as an "adversary"?! [weird, but ultimately passed on]; (iii) selective disclosure discussion [turns on head its privilege analysis]; (iv) "fairness" mandated production of only non-opinion work product [finally got one right].

- See C.E. Stewart, "How Sausage is Made: The Latest Judicial Takes on Privilege and Work Product," NY Business Law Journal (Vol. 25, No. 1, March 2021)

V. Investigations in Europe

- The RBS Rights Issue Litigation, [2016] EWHC 3161 (Ch)
  - Wilmer Hale followed U.S. protocols for investigation
  - civil litigation in England/interview notes held to be discoverable
  - no "legal advice privilege" because interviewed employees were not "clients" (not within control group) (Three Rivers)
  - Wilmer Hale notes ≠ "work papers privilege" (refused to apply Upjohn)
- The Director of the Serious Fraud Office v. Euasion Natural Resources Corporation, [2017) EWAC 1017 (QB)
  - Deckhert investigation into ENRC activities in Kazakhstan and Africa; updated SFO officials on investigation
  - after Deckhert fired, SFO launched a criminal investigation
  - SFO sought Deckhert interview materials
  - trial court rejected "litigation privilege" claim because SFO litigation was "a mere possibility" vs "a real likelihood"
  - no "legal advice privilege" (citing RBS Rights, Three Rivers)

V. (cont'd)

- on appeal, the Court of Appeal ruled that the Deckhert materials were protected by "litigation privilege" (adversarial process was reasonably contemplated with the initiation of an internal investigation) [Court of Appeal was also sympathetic "legal advice privilege" arguments, but must defer to the Supreme Court to reverse itself on Three Rivers.]

- Take Aways
  - the Court of Appeal's decision in ENRC is helpful (vis-à-vis the "litigation privilege"), *but* English standards on the "legal advice privilege" and "work papers privilege" are in direct conflict with American standards (see Upjohn); hence, counsel needs to be very careful *how* an investigation is structured, *where* it takes place, and *who* controls the work papers generated.

- See C. E. Stewart, "Mad Dogs and Englishmen: Part Deux," NY Business Law Journal (December 2017).

VI. How *Not* to Do a Corporate Internal Investigation

- In re Kellogg Brown & Root
  - 756 F.3d 754 (D.C. Cir. June 27, 2014), rev'g 2014 WL 1016784 (D.D.C. March 6, 2014)
  - 796 F.3d 137 (D.C. Cir. August 11, 2015), rev'g 2014 WL 7212881 (D.D.C. December 17, 2014)

- Investigation by non-lawyers
  - interviewed employees/obtained interview statements
  - wrote up seven reports/forwarded to law department

- District Court (March 2014)
  - not work product (correct and **not** appealed)
  - not attorney-client privilege ("but for" test)

VI. (cont'd)

- D.C. Circuit (June 2014)
  - one right ruling (**no** "but for" test)
  - five wrong rulings
    1) did not understand 5 C's
    2) misapplied Upjohn
    3) confused AWP and ACP ("cf" citations to Hickman)
    4) "magic words" mistake
    5) wrong on interlocutory appeals (Mohawk)
- KBR puts up lawyer for a 30b6 deposition/one of the express topics is the internal investigation
  - He testifies that he reviewed the investigation material prepared by KBR's non-lawyers (and also testifies contrary to/inconsistent with those materials!)
  - KBR, five days later, argues in SJ papers that there were no kickbacks because there was no disclosure of any to the government(?!)

VI. (cont'd)

- District Court (November 2014)
  - waiver of ACP and AWP → SJ papers a sword and shield
  - waiver under FRE 612 (witness use in preparation)
- District Court (December 2014)
  - plaintiff has shown substantial need for interview materials (fact work product) [**wrong** – already ruled in March 2014 that it was not AWP]
- D.C. Circuit (August 2015)
  - **wrong** on waiver (FRE 612)
  - **wrong** on sword and shield
  - **wrong** on "substantial need"
  - **wrong** (again) on interlocutory appeal

VI. (cont'd)

- Take Aways
  - **never** send non-lawyers to do what lawyers should handle (do investigations the right way)
  - **never** handle a 30b6 witness this way
  - the Chamber of Commence has influence in the D.C. Circuit
  - courts can be very difficult places to litigate ACP and AWP issues (lawyers must know ACP & AWP; judges frequently do not know and/or do not care)
  - See C.E. Stewart, "The D.C. Circuit: Wrong and Wronger," NY Business Law Journal (Winter 2015)