The Impact Of Society's Demands For Transparency On Internal Investigations And Their Investigators

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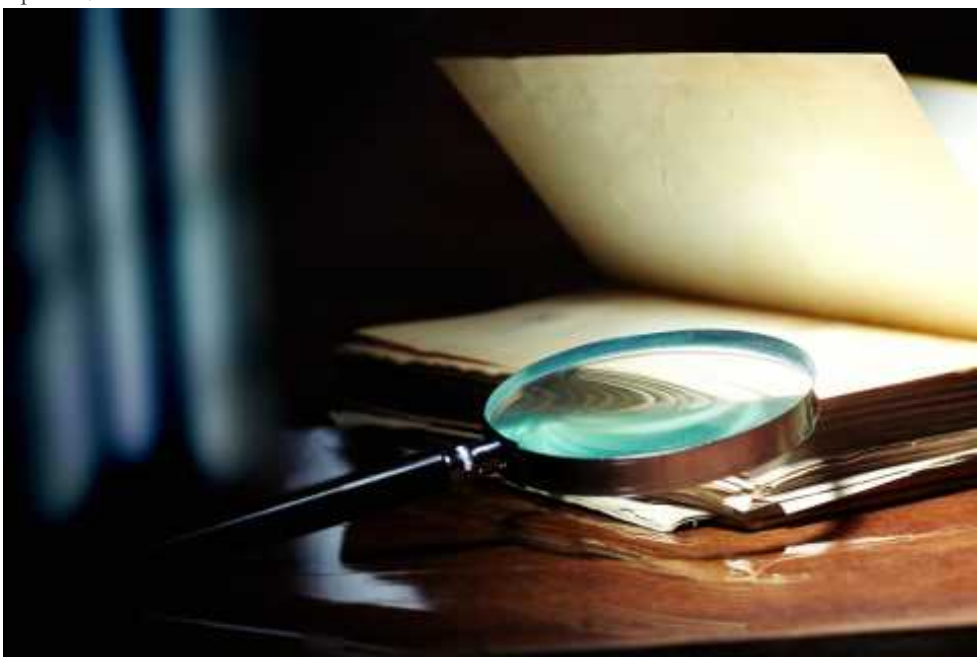

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There has been much attention — and rightfully so — on the impact of the #MeToo movement within the workplace. That impact has significantly changed employment policies and practices from large national corporations to small local businesses. Though this impact cannot be overestimated, the #MeToo movement's impact on the handling of internal investigations has possibly been underestimated.

Increased public scrutiny and demands for transparency regarding corporate investigations of sexual assault and harassment allegations are challenging how these investigations have traditionally been handled. The protections provided by the attorney-client and work product privileges may not be available to today's investigators, at least in the same fashion they previously have been. As a result, investigators face challenges in protecting themselves from ethical attacks when the privileges fail.

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There appear to be three types of pressures on internal investigations these days. These pressures have always existed in some form or fashion, but they are providing extra stress in conjunction with the #MeToo movement's focus on outward transparency.

First, there appears to be more media scrutiny — whether through traditional press coverage or social media — about how corporations handle and resolve internal investigations. For example, in December 2018, The New York Times reported the results of an internal investigation into sexual abuse misconduct allegations against former CBS Corp. CEO Les Moonves.1

The Times report was based on a draft written in late November 2018, and it included detailed and graphic information about the allegations as well as information gathered during witness interviews. It is unclear from the article how the Times acquired the information, but what is very clear is that the document it reviewed was merely a draft that the investigators had no intention of releasing to the public — and they were not pleased.2

Second, there are more public disclosures due to regulatory and fiduciary pressures. An investigation, particularly if it affects the senior leadership of a corporation, may have to be disclosed if the public fallout from the investigation could affect a corporation's value.

The Moonves investigation is an example of this as well. As the investigation unfolded, CBS, a publicly traded company, had to disclose to the Securities and Exchange Commission the forced resignation of Moonves and noted the following about the investigation:

[CBS is obligated to] seek to preserve the confidentiality of all written and oral reports by the investigators in the Internal Investigation and all information and findings developed by the investigators or included in such written or oral reports in relation to Executive (the 'Investigator Information') and *not to make public such Investigator Information to the maximum extent possible consistent with fiduciary duties of directors and all applicable laws*.3

Third, there is more pressure on internal investigations because the government has a vested interest in investigating matters with criminal overtones when it hears about them publicly.

Moreover, the government may not wait for a sometimes-lengthy internal investigation to conclude before it launches its own. In addition, the government may seek access to the investigation through the investigator.

PENN STATE'S INVESTIGATION OF SEXUAL ABUSE

The Penn State investigation of allegations of child sexual abuse by Jerry Sandusky is a prime example. While Penn State investigated the allegations, Pennsylvania state prosecutors were actively doing so as well.

In late 2010, former Penn State Athletic Director Timothy Curley, Vice President for Finance and Business Gary Schultz and President Graham Spanier were subpoenaed to a grand jury to testify regarding two alleged incidents of sexual abuse by Sandusky that had been reported to them.4 At the time of their respective grand jury appearances, they were not targets of its investigation.

Each of them were accompanied and represented by Penn State's general counsel, Cynthia Baldwin. Baldwin met individually with each of them prior to their testimony. They each testified about their supposedly limited knowledge of the incidents, and they all said they did not have any materials in their possession about the incidents.

After their grand jury appearances, the government concluded that it had reason to believe the former administrators had lied about the full extent of their knowledge regarding the allegations and related documents.

In November 2011, the government filed criminal complaints against them for perjury and failure to report suspected child abuse. At that point, all three retained separate individual counsel.

Meanwhile, the government summoned Baldwin to appear before the grand jury after making threats to Penn State and Baldwin that they could face obstruction charges.

The administrators and Penn State argued that Baldwin's communications with the administrators were protected by the attorney-client privilege. Though the prosecutor, Frank Fina, had represented to Baldwin and the court that he would not ask questions about any conversations between Baldwin and each administrator, he did anyway.

Baldwin testified, among other things, that each administrator individually told her that they had no materials in their possession relating to the allegations. She also testified with respect to Spanier that she believed that he lied to her during her earlier communications with him about his knowledge.5

A short time later, the government filed additional charges against the three administrators for endangering the welfare of a child, obstruction of justice and conspiracy.6 The obstruction of justice and conspiracy charges were based on Baldwin's testimony.

The Penn State case and the Moonves investigation are high- profile matters in which information that usually would have been protected by privilege was disclosed despite the desires of the investigators and presumably their clients.

Because of these pressures, internal investigators should prepare themselves early for the possibility of disclosure. That preparation should not wait until it is time to report the investigative findings and the fight over a potentially doomed privilege battles begins. Instead, that contingency should be addressed and planned around from the start of an investigation.

With respect to sexual misconduct investigations, this means taking additional precautions and planning for witness interviews other than those that are typical in a white- collar or employment law internal investigation. A sexual assault investigation is different. It is more reliant on witness interviews than on a server or discovery database full of corporate documents and financial information.

In addition, there are heightened criminal implications for witnesses, the accused and even the client — which means that witnesses may be more reluctant and troublesome than usual.

NECESSITY OF *UPJOHN* WARNING

The best way to prevent ethical troubles from unanticipated disclosures when dealing with corporate witnesses is to give an adequate *Upjohn* warning.7 An *Upjohn* warning can help to protect the investigation from privilege attacks and insulate the investigator from any ethical attacks if the privilege fails.

There are some variations to an*Upjohn* warning depending on the circumstances of the investigation, but an adequate *Upjohn* warning should clearly include at a minimum the following:

The investigator represents the corporation — not the witness personally.

Any privilege over the interview belongs to the corporation — not the witness.

The corporation can unilaterally waive the privilege at any time.

The witness may consult with their own attorney at any time.8

The importance of a clear*Upjohn* warning cannot be overemphasized, and the Penn State case is a good example of why this is true. Before trial, the three senior administrators sought to preclude Baldwin's testimony because it constituted breaches of the attorney-client privilege.9 They argued that Baldwin could not testify about her conversations with them because she represented them individually.

Baldwin and Penn State asserted that she only represented them for grand jury purposes in their capacity as agents of Penn State. The trial court mostly agreed and determined that she represented them only as agents of her one and only client, Penn State.

As a result, she did not represent them in their individual capacities and therefore her grand jury testimony did not violate the attorney-client privilege and it could be evidence against them.

The Pennsylvania Supreme Court reversed the trial court's opinion, deciding that Baldwin did represent each witness in an individual capacity and that she did not give them adequate *Upjohn* warnings. As a result, the court concluded they were not aware that they could lose the privilege protections surrounding their conversations with her.

The court found that since Baldwin had violated the attorney- client privilege with respect to all three administrators, she was incompetent to testify. It quashed the charges based on Baldwin's grand jury testimony.

Subsequently, Baldwin faced a state Office of Disciplinary Counsel hearing in May 2018 for allegedly violating Pennsylvania professional ethics rules by not informing the administrators of any potential conflicts of interests by

representing them and Penn State jointly and for providing privileged information about her conversations with them to the grand jury.10

Her defense was that the administrators had tried to use her as in instrument of their deception. She informed all three administrators that she represented them only in their capacity as agents of Penn State.11 She informed them of a potential conflict of interest but, based on the information they had given her, she did not foresee a conflict in which they could not be jointly represented.

An investigator should be wary of telling a witness that anything you discuss will be confidential.

However, they had reportedly deceived her (as well as the government) regarding their knowledge of the sexual assault allegations and documents related to them. If they had been truthful with her, she would have known there was an actual conflict and acted more appropriately.

In October 2018, a three-member panel of the ODC concluded that Baldwin did not violate ethics rules. It found that she investigated and properly disclosed the potential conflict in the interests of the senior administrators and Penn State and that they effectively consented to a joint representation.

The panel did find, however, that she did not adequately disclose to them that she represented them as Penn State employees and not in their individual capacities, but it decided that in itself was not incompetent representation.

The panel also found that her disclosures to the grand jury were implicitly authorized by her representation itself because making the disclosures was the only way to rectify or mitigate the use of her services in the crime of obstruction of justice. In other words, she had to defend herself against criminal allegations as well.

Ultimately, the Disciplinary Board of the Supreme Court, in an advisory opinion, overruled the ODC and determined that she broke the attorney-client privilege. However, it has only recommended public censure — not disbarment.12 The Pennsylvania Supreme Court now will ultimately determine what Baldwin's professional fate is.13

What happened to Baldwin demonstrates the importance of a proper *Upjohn* warning. She reluctantly became a witness in a government investigation about her client's internal investigation. An *Upjohn* warning may not have saved her from having to make disclosures before a grand jury, but it may have given her a strong viable defense to keep her bar license in the face of very serious ethical allegations.

Similarly, an investigator should be wary of telling a witness that anything you discuss will be confidential for the same reasons that you should give a proper *Upjohn* warning. Chances are you may be unable to keep the information or the identity of the witness entirely confidential, particularly if you are faced with a subpoena or a shareholder demand.

An investigator obviously wants any information collected from a witness to be as confidential as possible, but requesting that confidentiality could trigger charges that the investigator or the corporation obstructed justice by coercing or directing a witness not to report or be truthful about a crime to the proper law enforcement agencies.

The potential for disclosure should be adequately explained up front in an interview with an *Upjohn* warning. This can help build a rapport with a witness who may be evaluating whether to trust the interviewer. Building this rapport is critical because a sexual assault investigation will involve traumatized victims, the potentially angry accused and reluctant witnesses.

All will have reasons — some valid, some not — for not trusting an investigator with potentially embarrassing and deeply personal information. To elicit truthful testimony, the investigator needs to find a way to build trust with and gain the confidence of witnesses. An adequate *Upjohn* warning is a good step in that direction.

Though these tips are geared toward sexual assault investigations in the #MeToo era, they are applicable to any internal investigation. The #MeToo movement has forced more transparency into internal investigations generally. Investigators need to ensure not only that they can navigate their corporate clients through the disclosure risks but

that there are adequate protections in place for themselves.

NOTES

1 Rachel Abrams & Edmund Lee, *Les Moonves Obstructed Investigation Into Misconduct Claims, Report Says*, N.Y. TIMES, Dec. 4, 2018, https://www.nytimes.com/2018/12/04/business/media/les-moonves-cbs-report.html

2 Brian Steinberg, *Report Alleges Leslie Moonves Misled CBS Sexual Misconduct Probe*, VARIETY, Dec. 4, 2018, https://bit.ly/2BQAWpx.

3 CBS Corp., Current Report (Form 8-K), Ex. H at 3 (Sep. 9, 2018) (emphasis added). See also Cynthia Littleton, *Leslie Moonves Investigation: CBS Can Disclose the Findings*, VARIETY, Dec. 4, 2018, https://bit.ly/2QlCDjL.

4 *Commonwealth v. Schultz*, 133 A.3d 294, 301 (Pa. Super. Ct. 2016); *Commonwealth v. Curley*, 131 A.3d 994, 995 (Pa. Super. Ct. 2016); *Commonwealth v. Spanier*, 132 A.3d 481, 484 (Pa. Super. Ct. 2016). Please note that these three opinions were issued on the same exact date of Jan. 22, 2016, and the general shared facts relevant to this article are mostly identical. Furthermore, the opinions in *Spanier* and *Curley* refer directly and often to the *Schultz* opinion. Therefore, any references to these cases will be to the *Schultz* opinion unless there is a marked difference between them for the purposes of this commentary, which will be noted.

5 *Spanier*, 132 A.3d at 490.

6 *Schultz*, 133 A.3d at 307.

7 *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (affirming that a corporation can have an attorney-client privilege and that privilege could attach to the communications between a lawyer and constituents within the entity). "The *Upjohn* case did not deal with warnings or explanations about the lawyer's role. It simply discussed the context in which explanation or warnings for the individual might be needed. Thus, the clarification of roles is sometimes called an *Upjohn* warning." Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony* 65 U. MIAMI L. REV. 109, 168 n .2 (2010). It is also referred to commonly as a corporate *Miranda* warning.

8 "The warning has three elements: first, corporate counsel represents only the corporation not the executive; second, the communications will only be privileged on behalf of the corporation. At its discretion, the corporation may assert or waive it; and third, the employee should consult his own attorney if he has concerns about personal liability." JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 2:15 (3d, 2019-1 ed.).

9 *Schultz*, 133 A.3d at 307.

10 Charles Thompson, *Expert: Former Penn State Counsel Cynthia Baldwin Failed Her Clients in Jerry Sandusky Probe*, PENN LIVE, May 22, 2018, https://bit.ly/2I7vouj.

11 Paula Reed Ward, *Committee: Ex-PSU counsel Cynthia Baldwin did not violate ethics rules; Final Decision Pending* PITTSBURGH POST-GAZETTE, Oct. 26, 2018, https://bit.ly/2CQHioR.

12 Dan Clark, *Pennsylvania Disciplinary Board Recommends Public Censure of Former Penn State General Counsel*, CORPORATE COUNSEL, Mar. 22, 2019, https://bit.ly/2uUZEAz. Charles Thompson, *Penn State attorney in Sandusky case should get public censure, state board says*, PENN LIVE, Mar. 13, 2019, https://bit.ly/2uUguzB.

13 Clark, supra, and Charles Thompson, *Attorney for former Penn State lawyer vows fight against call for public censure in Sandusky case work*, PENN LIVE, Mar. 13, 2019, https://bit.ly/2KpjyhJ.