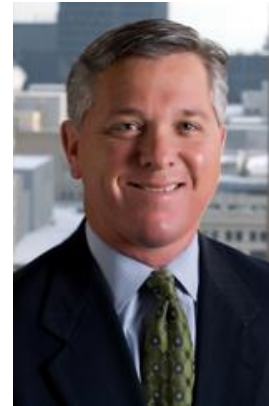


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ATTORNEYS & COUNSELORS

Ethics in Internal Investigations

June 15, 2017



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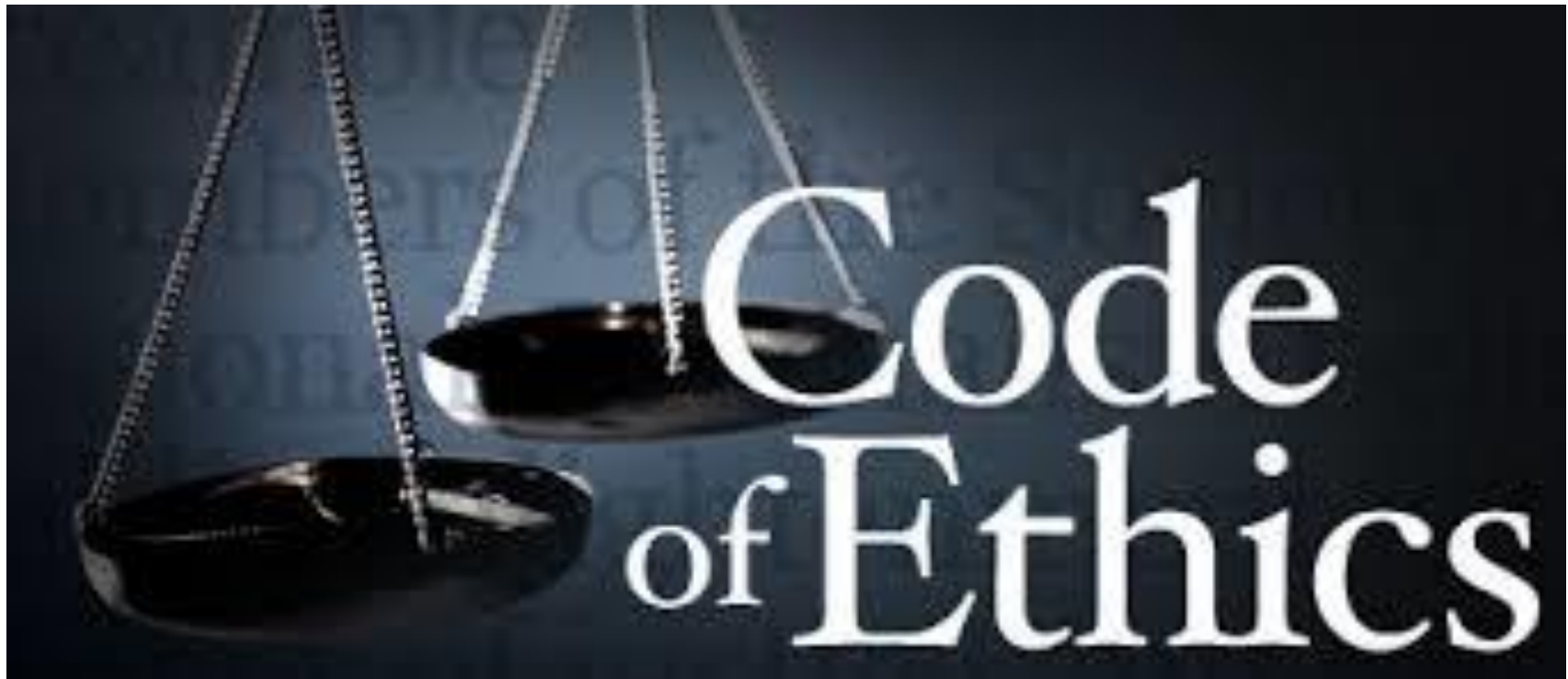
Agenda

- Introduction
 - Setting the Stage
 - Identifying Issues/Considerations
- Ethical Rules
- Privilege Issues
- Practical Guidance

Setting the Stage

- 2 parallel concerns to evaluate
 1. EEO/HR practices issue
 - Work-from-home policy
 - Gender-based unfairness issue
 - Raised by Chief Financial Officer, implicates Chief Operating Officer
 2. Fraud/Embezzlement issue
 - Raised by COO and implicates CFO (maybe others)
 - Inflated pricing, vendor with ownership questions
 - Billed to government contract

Ethical Rules



Ethical Rules

- Rule 1.13 – Organization as Client
- Rule 1.2 – Scope of Representation
- Rule 1.1 – Competence
- Rule 1.7 – Conflicts
- Others
 - Rule 2.1, Rule 5.4 – Advisor and Independence
 - Rule 3.7 – Lawyer as Witness
 - Rule 4.1 – Truthfulness in Statements to Others
 - Rule 5.3 – Responsibilities Regarding Nonlawyer Assistance

Rule 1.13: Organization as a Client

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Organization as a Client

- Rule 1.13(a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Organization as a Client

- Rule 1.13(b): If a lawyer for an organization
 - knows that an officer, employee or other person associated with the organization
 - is engaged in action, intends to act or refuses to act in a matter related to the representation
 - that is a violation of a legal obligation to the organization or is a crime, fraud or other violation of law
 - that **reasonably** might be imputed to the organization and that is likely to result in substantial injury to the organization
 - then the lawyer shall proceed as is **reasonably** necessary in the best interest of the organization

Organization as a Client

- **Rule 1.13(b): Generally provides that a lawyer must report violation of legal obligation, crime, fraud or other legal obligation to highest authority in the organization that can act.**
- **Rule 1.13(c): If that authority fails to act, then the lawyer can report outside the organization notwithstanding the confidentiality obligations of Rule 1.6 only if the lawyer reasonably believes the information is reasonably certain to cause substantial injury to the organization and only to the extent the lawyer reasonably believes necessary to prevent injury to the organization.**
- **Rule 1.13(d): Paragraph c does not apply when the lawyer is representing the organization in investigating an alleged crime, fraud or other violation of law, or defending an organization or its officers or employees against such a claim.**

In other words...

- A lawyer must act reasonably. But what does this mean?



RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

- (1) discuss the legal consequences of any proposed course of conduct with a client,**
- (2) and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and**
- (3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.**

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Relevant Comments:

- [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
- [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. **A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.**

Rule 1.7: Conflict of Interest: Current Clients

- Except as provided in paragraph (b) of 1.7, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.
- A concurrent conflict of interest exists if: there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a **third person or by a personal interest of the lawyer.**

Rule 4.2: Communication with Persons Represented by Counsel

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3 Dealing with Unrepresented Persons

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
- **When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.**
- **The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.**

Other Rules that Need to Be Considered

- Rule 2.1 Advisor
 - In rendering advice may refer to moral, economic, social and political factors
- Rule 3.7 Lawyer as Witness
 - Should not use an investigator who you want to be trial counsel
- Rule 4.1 Truthfulness in Statements to Others
 - Cannot misrepresent role to witnesses
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistance
 - Duty to supervise consultants and nonlawyers
- Rule 5.4(c) Professional Independence
 - A lawyer shall not permit a person who employs or pays the lawyer to direct the lawyer's professional judgment
- Rule 1.6 Confidentiality of Information

Privilege Issues



Rule 1.6 – Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation . . .
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client

Attorney-Client Privilege – Basic Standard

- Protects communications
 - Made *in confidence*
 - Between a client and a client's employees
 - And an attorney *acting as an attorney*
 - *For the purpose of obtaining legal advice*

- Communication made at the direction of employee's supervisors
 - For purpose of obtaining legal advice for employer
 - Information needed to provide legal advice
 - Concerns matters within scope of employee's duties
 - Employee knows communication is made to enable employer to obtain legal advice
 - Communication is intended to be confidential and such confidentiality is not waived by employer

Attorney-Client Privilege – State Law Test

- “Control group” test – *Consolidation Coal Co. V. Bucyrus-Erie Co.*, 89 Ill.2d 103 (1982)
- Protects communications between decision makers and those who substantially influence corporate/organizational decisions
- Decisions by “top management who have the ability to make a final decision”
- Decisions by employees “whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion and whose opinion in fact forms the basis of any final decision of those with actual authority”
- Individuals upon whom a final decision maker may rely for supplying information are NOT members of the control group
- Focus is on actual duties or responsibilities, not job titles

Attorney Work Product – Federal

- Documents and tangible things prepared in anticipation of litigation or for trial
- By or for another party or its representatives (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)
- Discoverable if party shows it has substantial need and cannot obtain substantial equivalent without undue hardship
- Mental impressions, conclusions, opinions, or legal theories of attorney or other representative "concerning the litigation" never discoverable
- Independent privacy interest of attorneys
- Not waived by sharing information with client

Attorney Work Product – State (IL)

- Narrower than federal privilege: limited to “opinion” work product
- Protects an attorney’s theories, mental impressions, or litigation plans

- Factual investigations performed by attorneys *as attorneys* fall within the protection of the attorney-client privilege
- Applies to summaries of interviews of employees of client
- Best to inform employees that attorney represents their employer, not them
- “The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.”

Sandra T.E. v. South Berwyn School Dist. 100, 600 F.3d 612 (7th Cir. 2009)

- School board retained law firm to conduct investigation into alleged sexual abuse by teacher
- Review criminal charges, investigate school's response to allegations of sexual abuse, address whether any employees had failed to comply with applicable policies or legal obligations, and analyze the effectiveness of the school's existing compliance procedures
- Engagement letter stated that law firm was being retained to "provide legal services in connection with" the investigation
- Law firm interviewed many current and former employees and some third parties and prepared memoranda of those interviews
- Law firm delivered oral report of the findings at closed executive session of school board and sent a written executive summary designated as an attorney-client communication and work product

What's Protected?

- Verbatim witness statements?
- Non-verbatim witness interview summaries?
- Attorney memoranda that include counsel's impressions of a witness?
- Information regarding interviews conducted by HR professional? At counsel's request? After litigation is filed? (*Carter v. Cornell Univ.*, 173 F.R.D. 92 (S.D.N.Y. 1997))
- Does it matter if the witness has had the opportunity to review and sign?
- Investigation report?
- Communications between investigator and counsel?
- Counsel's comments regarding draft investigation report?
- Documents collected during investigation?
- Waiver
 - Failure to assert
 - Voluntary waiver
 - Inadvertent disclosure

How to Protect Privilege?

- Engagement letter
- Warnings to witnesses
- Limit circulation of interview summaries and report
- Label privileged documents as such
- Privilege log
- Motion to quash
- Appeal
 - Collateral order doctrine
 - Contempt

Practical Guidance



Illustration – Back to “Stage”

- Issue #1: Chief Financial Officer comes by General Counsel’s office to chat late Friday afternoon.
 - Reports that he has learned that the Chief Operating Officer is seeking to improve efficiency by imposing restrictions on work-from-home options available to all employees, which has had negative impact on employees with new children.
 - Even worse, it seems the policy is being enforced unfairly and more strictly against female employees (including the CFO’s daughter, who works in Sales).
 - CFO tried to talk to the COO about this earlier in the week, but they ended up arguing (they’ve disliked each other for years), and CFO now wants the GC or some in-house attorney to investigate this situation and correct it.

- GC already had plans to have a drink with the COO that evening, so he finds a way to mention the topic of work-from-home policies generally to try to informally get a sense of the COO's position without disclosing anything.

- Issue #2: COO stares back at the GC, indicates that what she's about to say must remain completely confidential, and starts talking before the GC can say a word. The COO explains:
 - Uncovered what appears to be embezzlement and fraud scheme led by the CFO ("at least that high") relating to overcharged expenses billed to and collected by the business as part of a large government contract.
 - Phantom expenses and skimmed profits are involved, which seems to have been achieved through excessive payments to a vendor, which are billed to the government.
 - COO has heard that company leadership's family members are invested in the vendor to some degree, including at least the CFO and possibly the CEO, though she is not sure.

- COO was trying to learn a bit more informally about the situation before confronting anyone, by having her underlings put out some feelers to people in the finance function.
 - Thinks the CFO may have heard about it because she had the oddest discussion with the CFO about work-from-home policy changes within the last week that had previously been unimportant to the CFO. COO thinks the concerns are blown way out of proportion, though she has heard that some employees (particularly some female employees in Sales) may be upset by the change.
- Vendor issue:
 - Unsure if the vendor issue is real or how high it goes, but does not feel right keeping this to herself.
 - Asks GC if she should file a formal complaint internally, put something in writing, etc., but also expresses concern about getting the institution in trouble with the government.
- COO says she has to leave for another engagement.

Who Is the Client/Any Conflicts?

Work-from-home:

- COO may be conflicted, but not entirely clear
- CFO seems conflicted by daughter's interest
- Does GC's friendship with COO create conflict – or “perception” of one?

(Rules 1.13, 1.7)

Fraud/embezzlement:

- CFO clearly conflicted
- Government reporting potential creates more complications and potential conflicts for nearly everyone
- Board involvement potentially necessary???

Scope of Investigation

- Very important initial step
- Think carefully about who decides and how that decision about scope is documented
- Can define extent of privilege and set “ground rules,” if engage external attorney investigator
- Can help define absence of conflict or identify where potential conflicts may exist that will frame many communications
- Cost implications always present
- Be ready to adjust along the way

Scope of Investigation

Work-from-home:

- Entire institution's policy and practice? Limit to practice in Sales?
- Over what time period?
- Define scope based upon CFO report or from first-hand witness (an employee impacted)?
- Who decides the scope? (CFO? COO? GC? Someone else?)

(Rule 1.2)

Fraud/embezzlement:

- "Fraud" is distinct from "embezzlement."
- Legal, ethical, public relations, and gov't reporting issues – review all of them together?
- Base scope solely on COO's report to GC?
 - Start with investigation as to scope?
 - Who performs?
- What are federal reporting or investigation obligations, and can they help determine scope?
- Who decides the scope?

Should Investigation Be Privileged?

Work-from-home:

- Yes
 - Unsure if result will find problems and, if so, who is the source
- No
 - May want result as evidence to use in potential litigation
 - Policies – probably require investigation
- Question
 - Can the report by CFO that starts investigation itself be privileged anyway?

Fraud/embezzlement:

- Yes
 - Unsure if result will find problems and, if so, who is the source
 - Potential for public relations issues, need to control information flow
- No
 - Potential for federal agency reporting obligations, need for transparency about investigative steps
- Question
 - Can decision about scope be privileged, even if investigation itself is not?

If Initially Privileged, Could It Be Prudent to Plan to Waive It?

Work-from-home:

- Preserve privilege unless issue is litigated, then plan to use investigation result
- Be careful that attorney involved with investigation or who receives results can limit waiver from spreading into related subjects
- Hard to control – may not be worth risk of broad waiver here if likely to need to defend litigation

Fraud/embezzlement:

- Fraud – if reporting obligations apply to eventual findings if substantiated, may know that privilege waiver is possible.
- Embezzlement – “facts” revealing stolen funds may be objective, so could use for employment decisions even if privileged without waiver?
- Can initial review of whether there is anything to be concerned about be privileged – with plan for reconsidering privilege issue if full investigation is necessary?

Who Should Investigate?

Work-from-home:

- Conflict: need some measure of independence, perhaps complete if involvement of CFO's daughter considered important
- Competence: clearly an "HR-related issue," so could involve HR personnel
- Privileged: if so, need attorney to conduct
- Inside/External: either

(Rules 1.1, 1.6, 1.7)

Fraud/embezzlement:

- Conflict: clearly exists, independence and appearance of independence CRITICAL
- Competence: financial rabbit holes can be tricky
- Privileged: if so, need attorney to conduct
- Inside/External: almost certainly outsider, probably someone with "gravitas"

Who Investigates – “Consultant” too?

- Always at least consider
- Can be privileged (even if not attorney)
- Limited subject matter?
 - Can be essential
 - Not always costly
- Forensic analysis – particularly technology
- Public relations
- Part of the “scope” decision at times

(Rule 5.3)

Confidentiality – Internal Reporting Expectations

- CRITICAL at outset
 - Establishes credibility of Investigation
 - Preserves privilege
 - Avoids conflicts
- Small group to manage Investigator usually best (“embodiment of The Client”)
 - Sufficient authority (cloak investigator with high-level support)
 - Provide institutional knowledge
 - Help decide interim personnel/policy adjustments
 - Help determine evolving scope of investigation
- Should NOT be leader of implicated group

(Rules 1.6, 1.7, 1.13)

- What to report as Investigation unfolds
 - Overview of facts
 - Information that impacts scope (*Rule 1.2*)
 - Information that may require interim adjustments
 - NOT – conclusions, recommendations
- “Summary” report before Final Report?
 - Can help determine level of detail needed with client input
 - Can help contain cost
 - SHOULD NOT INFLUENCE conclusions or recommendations (*Rule 5.4*)

Confidentiality – Internal Reporting?

Work-from-home:

- Internal Management Team
 - GC
 - HR head
 - CEO?
- What report along the way?
 - Employee complaints?
 - Potential solutions?
- Interim Conclusions
 - Gender bias possible?
 - Need to expand beyond Sales?

(Rule 1.6, 5.4)

Fraud/embezzlement:

- Internal Management Team
 - CEO
 - Maybe GC (if privileged)
- What report along the way?
 - Vendor ownership facts
 - Embezzlement basics
 - CEO implicated? Others?
- Interim Conclusions
 - Sufficient evidence for reporting to government?
 - Any potential whistleblowers?

Investigation – Update

- Work-from-home Investigation:
- Investigated by senior HR person under direction of Deputy General Counsel.
 - Learn from high-level managers from 95% of the company (more than half women) that there are no problems with the new policy, it has been implemented appropriately and equally with regard to male and female employees. Documentation about days off for those groups of employees backs up the managers' perspective.
 - One rogue manager (Sales) with mostly female employees reporting to him had been operating under a stricter version of how he thought the policy should be implemented. The CFO's daughter works in that area. Sales manager is also prone to making sexist remarks, including about how people complained about the stricter work-from-home policy.
- The HR investigator and Deputy General Counsel prepared a report of their results, including their direction to the rogue manager to comply with how the policy is implemented by the other 95% of the company's managers. They plan to follow up with 10 employees who were interviewed in the next 30-60 days to ensure compliance.

Work-From-Home Questions

- If Rogue Manager or CFO's daughter sought own attorney for interview:
 - How deal with such request?
 - Any difference between the two?
- Should CFO be allowed to see final report?
- If the Rogue Manager's "sexist remarks" warrant discipline, who should decide?
 - Investigation Management Group?
 - His Direct Supervisor (even if that is the COO)?

(Rules 1.6, 1.13, 4.2. 4.3)

Investigation – Update

- Fraud/Embezzlement Issue:
 - External Investigator hired for privileged review
 - Reports to group comprised of GC and CEO
 - External investigator hires an accountant to review transactions with and relating to the vendor, focusing on the document and financial trail, with results being shared only with the External Investigator.

Questions

Fraud/Embezzlement Issue:

- GC facilitates initial introduction of External Investigator to the CFO by e-mail, without explaining what the scope of the issue under review will be.
 - CFO calls to ask GC who else will be attending the meeting, whether he has any personal risk, and whether CFO needs to find an attorney
 - GC then explains that there is allegation of fraud and embezzlement but does not explain any details
 - CFO says he will only meet if he can bring his own lawyer and wants the institution to pay for that attorney's time
- Should GC have done anything differently?
- Does CFO have right to funds for his own attorney?

(Rules 4.1, 4.2, 4.3)

Confidentiality – Reporting “Up” or “Out”

Work-from home:

- Investigation reveals that policy has been implemented unfairly and recommends changes
- COO refuses, saying it will cost too much
- CEO agrees

- What do you do now?

(Rule 1.13)

Embezzlement:

- Investigation reveals that funds were improperly paid in ways that harmed the company, but no harm to any third party
- CEO is embarrassed, wants to sweep this under the rug, not tell the Board

- What do you do now?

(Rule 1.13)

Fraud:

- Investigation reveals that federal government was very likely defrauded
- CEO is not interested in reporting but prefers to stop working with the vendor, eliminate any issues moving forward

- What do you do now?

(Rule 1.13)

Investigation – Update(s)

Work-From-Home:

- A group of female Sales employees files gender-harassment lawsuit about sexist remarks and unfairly implemented policies.

Fraud/Embezzlement Issue:

- COO interviewed by External Investigator and reports the same basic facts as conveyed in initial discussion with GC.
- Thereafter, COO reports the existence of potential issue to the government agency and informs the External Investigator that COO has done so, which triggers a government investigation.

Questions

Work-From-Home:

- Is internal investigation privileged?
- Is the GC a witness?

Fraud/Embezzlement Issue:

- Is investigation privileged?
- Does COO's report = waiver?
- What if judge reviews and says not privileged?

Questions?

