

Compliance Investigations *Opening the Can of Worms*

Gerry Zack, CCEP, CFE
Incoming CEO
SCCE & HCCA
Minneapolis, MN
gerry.zack@corporatecompliance.org

Anna Cook
Partner
Bristows LLP
London, UK
anna.cook@bristows.com



BRISTOWS



Today's Agenda

- Initial phases of an investigation
 - Notifications, legal counsel, etc
 - Scoping, record/document collection, planning
- Privilege
 - Defensive positioning
 - Privilege in notes, working papers and transcripts
- Use of data analytics in compliance investigations
- Lessons learned from past investigations



Why does privilege matter?

It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct. The client may not always act upon that advice... but there is always a chance that he will. And there is little or no chance of the client taking the right or sensible course if the lawyer's advice is inaccurate or unsound because the lawyer has been given an incomplete or inaccurate picture of the client's position.

Three Rivers 6





Pearse v Pearse (1846)

Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.

...the meanness and the mischief of prying into a man's confidential communications with his legal adviser.... are too great a price to pay for truth itself.



A fundamental right

Common Law

Privilege cannot be overridden by other claims re public interest

Privilege can be asserted in response to any demand for documents

Privilege belongs to client (not the lawyer)

“Once privileged, always privileged”

No adverse inference

EC Law/Human Rights Act 1998

Article 6 (right to a fair trial)

Article 8 (right to respect for a private and family life)



In the Beginning...

- Anonymous allegation
 - Specific or nonspecific subject
 - Specific or nonspecific act(s)
- Tip from known internal source
- Tip from external source (customer, supplier, etc)
- Finding from internal audit or monitoring activities
- Issue raised in other manners (regulatory investigation, bankers, external auditors, etc)
- Anomaly identified using data analytics



What Next?

- What type of compliance issue?
 - Employee theft, fraud, bribery, privacy, data breach, environmental, etc
- What level within the organization is implicated?
- Possible next steps:
 - If there is an allegation, assess credibility
 - Notify/engage legal counsel
 - Assemble team; Determine who investigates
 - Is subject currently employed with us?
 - Consider whether it is necessary to investigate without subject's knowledge



Scope Considerations

- How specific/vague is the allegation or concern/red flag?
- Could additional individuals be involved?
 - Internal
 - Third parties (individuals or organizations)
- What other acts could the subject(s) have perpetrated?
 - Very common that if someone is engaged in wrongdoing, there are multiple schemes/acts
 - Perform role-based risk assessment
- How far back might the activity have been occurring?
- Are violations/losses potentially still occurring?
- How likely is it that other individuals may have witnessed the alleged wrongdoing?



Future legal proceedings?

- Is the business at risk of criminal or civil proceedings?
- If so, will you be able to rely on legal privilege to protect the documents produced in your investigation?
 - What is the role of the lawyers?
 - How do you manage the fact that the investigation itself may come under scrutiny?
- Are any of the affected individuals likely to need separate legal representation?
- How do you manage the investigation and the need to defend or pursue legal proceedings?



Legal advice privilege

Legal advice privilege attaches to:

...all **communications** made **in confidence** between **lawyers** and **their clients** for the purpose of **giving or obtaining legal advice** even at a stage where litigation is not in contemplation. It does not matter whether the communication is directly between the client and his legal adviser or is made through an intermediate agent of either.

Three Rivers 6



Legal privilege does not include...

- Underlying facts
- Pre-existing documents
- Documents which **would have been created independently** of the lawyer/client communication



Litigation privilege

*...all **communications** made **in confidence** between **lawyers** and **their clients** for the **purpose of giving or obtaining legal advice** (see previous slide)*

PLUS

- oral and written **communications** between himself or his lawyer and **third parties** or **other documents** created by or behalf of the client or his lawyer
- which come into existence once **litigation is in contemplation** or has commenced
- which come into existence for the **dominant purpose** of obtaining information or advice in connection with, or of conducting or aiding in the conduct of such litigation (for example, obtaining evidence to be used in litigation or information which might lead to such evidence).



Litigation privilege does not cover....

- Material produced in **non-adversarial proceedings** (inquiries etc)
- Materials where confidentiality has been lost
- Documents which were never confidential (notes of proceedings or discussions between the parties)
- **The underlying facts**
- **Dual purpose documents** (risk management or “post mortems”)
- Material instructions given to experts
- [Early expert opinions]



Identifying Records and Data Needed

- Develop process map of the transaction/activity cycle(s) involved in the target of the investigation
 - MUST understand how the transaction cycle operates in order to identify relevant records/people needed
- Based on this process map, identify:
 - People involved in each step
 - Internal controls
 - Preventive
 - Detective
 - Documents and forms
 - Received
 - Created
 - Electronic records
 - Systems and databases affected



Identifying Records and Data Needed

- **Example** – For corruption in the purchasing cycle:
 - Identification and documentation of need
 - Development of specifications, if necessary
 - Solicitation of bids or negotiation with alternative vendors
 - Selection of vendor
 - Contract, statement(s) of work, etc
 - Purchase orders
 - Change orders, subcontracts, etc
 - Receipt of goods or services
 - Submission, review and approval of invoice
 - Payment
- In addition, what other internal records would we expect along the way? E-mails, electronic approvals, etc.



Preserving/Collecting Electronic Evidence

- If internal investigation prompted by regulatory agency or whistleblower complaint, legal counsel should assist organization to issue a document hold notice
 - Identify relevant records
 - Identify relevant record custodians
- Negative implications of information being lost/altered
- ESI (electronically stored information):
 - What ESI is relevant?
 - What format is it in?
 - Where is relevant ESI stored?
 - How do we ensure we collect it all?
 - Proper collection (use forensically recognized technologies)



Uses of Data Analytics

- To assess credibility of an allegation or concern
- To determine which documents and records should be inspected
- To identify additional individuals who may have been involved
- To prioritize or identify suspect transactions
- To determine where internal controls broke down or were intentionally violated
- To assess whether noncompliance was intentional or accidental
- To estimate the full extent of the problem



Types of Data

Structured

- Accounting/financial
- Inventory
- Sales/purchases
- Payroll/H.R./timekeeping
- Security
- Customer service
- System access/use
- Travel, asset use, etc

Unstructured

- Journal entry explanations
- Purchase descriptions
- P.O. explanations
- Variance explanations
- E-mails, IMs, etc
- Photo, video, audio files



Data Analytics to Assess the Allegation

- Data analytics can be used to assess the credibility of an allegation, helping to determine whether to launch an investigation
- If the allegation is true:
 - What data would be created or touched in the processes involved
 - How would characteristics of the data associated with noncompliant activities differ from data involved with compliant activities
 - Perform data analytics to see if these characteristics are present, consistent with noncompliant activity
 - Data analytics does not prove fraud, corruption, noncompliance, etc; But it can provide evidence of characteristics that are consistent with such improper activity



Framework for Using Data Analytics

- Which data is affected, and how, in each stage of a compliance issue:
 - Preventive control that should have prevented the act
 - Perpetration/violation - the act itself
 - Concealment – often separate step(s) from the act itself
 - Detective control that should have detected the act
 - Effects of the act (if any)



The Devil's in the Data

- When fraud or corruption is involved, concealment leaves a digital trail:
 - Deleting electronic records
 - Altering electronic records
 - Adding electronic records
- Don't overlook "the curious incident of the dog in the night-time"
 - Sometimes the lack of a record is important



Data Analytics to Assess Extent of Noncompliance

- When one noncompliance has been identified, data analytics can be useful in finding others
- Build a profile of anomalies present in the known noncompliant transaction/activity
 - What characteristics differed for the known noncompliant transaction in comparison with a valid one
- Apply this profile to remaining population
- Consider multi-factor scoring



Preparing for Interviews

- Perform data analytics
- Review of documents
- Order of interviews
 - Start with informational and least likely to be involved
 - Interview subject last
- Establish goals for the interview
- Outline planned order of questioning
- Anticipate barriers to communication
- Plan room setup to facilitate discussion
- Consider the effects of implicit biases



In-house lawyers' output

Check whether an in-house lawyer has the benefit of privilege at all (i.e. not in European Commission investigations)

There are further restrictions on in-house lawyers' privilege too:

- Business advice with no legal context
- Upwards reporting - legal advice within board meetings and minutes.
- Risk reporting and post mortems: what caused an incident to happen?
- Policies, written guidance, procedures, compliance – published and explained
- Transcripts/notes of meetings with third parties where litigation is not contemplated



Legal privilege is limited

Three Rivers 5 - Privilege only applied to communications between the lawyers and a small group of the client's employees who were actually charged with instructing the client's lawyers

- Three Rivers 6
 - The purpose must be seeking or giving legal advice;
 - Legal advice covers what should prudently and sensibly be done in a relevant legal context (including the presentation of a case to an inquiry by someone whose conduct might be criticised by it);
 - There must be a legal context to the lawyer's retainer.



Lawyers' working papers

Balabel v Air India - If legal advice privilege exists, the lawyer's notes, working papers and documents are likely to be privileged.

OTHERWISE

Privilege exists in very limited circumstances, if:

- the selection of documents reveals the "trend of advice"; or
- the notes/annotations reveal the trend of advice.

The following examples will not attract privilege

- verbatim transcripts;
 - documents revealing the lawyers "train of enquiry", interests and perceptions;
 - notes containing a precis or distillation or selection.
- The RBS Rights Issue Litigation (Dec 2016)



Checklist #1

Terms of reference

- Are the terms of reference neutrally expressed and fair?
- Is the legal hold appropriate?
- If the scope of the investigation expands, how will that be managed?
- How do we ensure our record keeping about the investigation is accurate and fair?
- What privilege might exist?
- Who has authority to instruct lawyers?
- How is legal advice reported and acted on?
- How will advice be restricted to the client group?



Checklist #2

Progress, internal reporting and updates

- Is it clear when legal advice is sought about the investigation?
- How will this advice be managed internally?
- How to handle meeting minutes, board meetings and documents in which legal advice and the investigation are discussed?
- How will advice be restricted to the client group?
- How to manage communications about the investigation and its participants more generally?



Checklist #3

Interviews

- Planning – plan structure of interview and consider the note taking
- Consider recording the interview, rather than relying on notes (tendency to make partial notes).
- How will you deal with a surprise in the interview?
- Does the interviewee need separate legal advice?
- Is privilege available and, if so, how can it be preserved?



QUESTIONS ??

Anna Cook
Partner
Bristows LLP
anna.cook@bristows.com

Gerry Zack
Incoming CEO
SCCE & HCCA
gerry.zack@corporatecompliance.org



THANK YOU !

Anna Cook
Partner
Bristows LLP
anna.cook@bristows.com

Gerry Zack
Incoming CEO
SCCE & HCCA
gerry.zack@corporatecompliance.org


