

36th Annual Workforce Management Briefing

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Managing Workforce Compliance in an Unpredictable World



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Compliance in an
Unpredictable World

Predictably Unpredictable:
Making Sure Ethical Curveballs
Don't Strike Out Employers and Their Lawyers

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Panelists



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Agenda



01

Scenario 1: Stepping Up to the Plate

- Some Important Ethics Rules and Considerations
- Nonalignment with CEO on Personnel—Opposition, Options, and Obligations

02

Scenario 2: Making Contact

- Some Important Privacy and Privilege Considerations
- Investigations—Documents, Difficulties, and Decisions

03

Scenario 3: Curveballs and Pick-Off Moves

- Some Important Real-World Concerns
- Be Careful What You Ask for—Twists, Turns, and Trouble

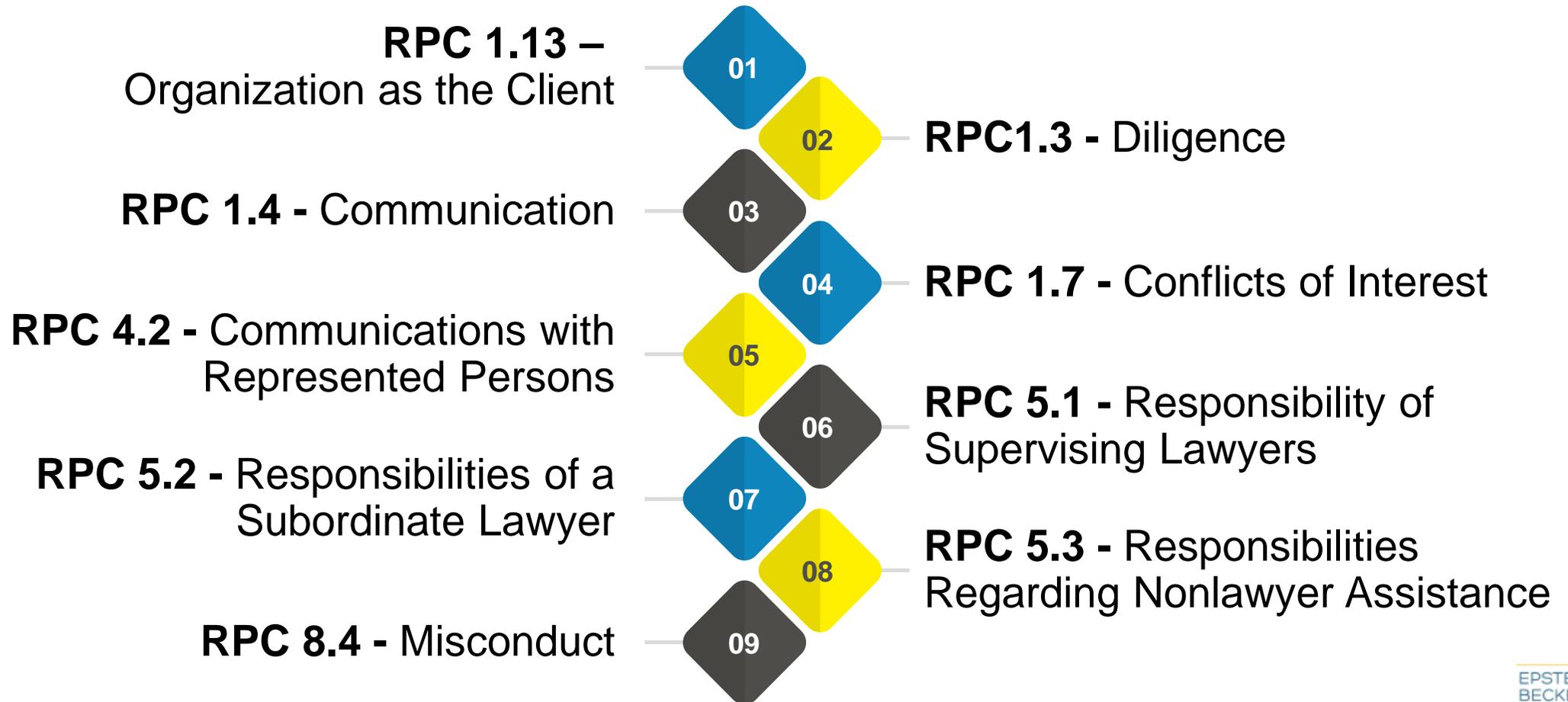
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Scenario 1:
Stepping Up to the Plate
(for Discussion)

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Some Important Ethics Rules and Considerations



Nonalignment with CEO on Personnel

Opposition, Options, and Obligations



What Should be Deputy General Counsel do?

The Deputy General Counsel gets a call from an outside auditor to discuss the CEO's expense reimbursements.

The CEO has submitted requests for reimbursement in excess of \$20,000 per month, many times, without appropriate or full backup documentation.

- The auditor states that the issue is not material with respect to the financial statements as a whole.
- But many of the requests are arguably personal - bar tabs, sports tickets, purchases of watches, and computer equipment are characterized as marketing gifts.
- The CEO recently transferred/demoted a member of the accounting staff after a dispute that may have involved expense reimbursement.

Nonalignment with CEO on Personnel

Opposition, Options, and Obligations



Assume the Deputy GC advises the GC that this matter should be disclosed to the Board, but the GC says, “Let me handle it.”

- What should the Deputy GC do then?
- What should the follow-up be, and when?



While waiting for someone to “handle it,” an ethics hotline call comes in anonymously saying, “CEO is not only romantically involved with a sales executive, but they are expensing their fling and steering docs into paid consultancies with no real duties.”

- Can the Deputy GC just wait for the GC to handle this matter?
- Whom should the Deputy GC tell?

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Scenario 2:
Making Contact
(for Discussion)

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Some Important Privacy and Privilege Considerations



Do involved employees have a reasonable expectation of privacy?

- Based on overarching law?
- Has expectation been qualified or dispelled by company policies?



Does mode/platform for communication impact the expectation of privacy?

- What if employer's equipment and email system are used?
- What if employer's equipment is used to access personal, password-protected email system?
- Does any of that matter based on what is or isn't said in a policy?

Some Important Privacy and Privilege Considerations

Cases to Consider

- **Expectation of Privacy Established:** *Stengart v. Loving Care*, 201 N.J. 300 (2009); *Rozell v. Ross-Holst*, 2007 U.S. Dist. LEXIS 46450 (S.D.N.Y. June 21, 2007); *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 587 F. Supp. 2d 548 (S.D.N.Y. 2008); *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961F. Supp. 2d 659 (D.N.J. 2013).
- **Expectation of Privacy Not Established:** *U.S. v. Hamilton*, 701 F.3d 404 (4th Cir. 2012); *In re Info. Mgmt. Servs., Inc. Derivative Litig.*, 81 A.3d 278 (Del. Ch. 2013); *Holmes v. Petrovich Development Co., LLC*, 191 Cal. App. 4th 1047 (Cal. 3rd App. Dist. 2011); *Aventa Learning, Inc. v. K12, INC.*, 830 F. Supp. 2d 1083 (W.D. Wash. 2011).



Investigations

Documents, Difficulties, and Decisions



- The Deputy GC begins an investigation and has HR interview the demoted accountant, the CEO, and the sales executive.
- The company gets a lawyer's letter from the demoted accountant. The CEO and sales executive each refuse to discuss their "private lives" and "relations between consenting adults."
- IT advises the Deputy GC that the demoted accountant has been using a work computer to access a personal Gmail account to communicate with her counsel, and also that the sales executive is using her work email account to communicate with her own lawyer.
 - **Can in-house counsel look at all the emails? More? Some?**
 - **Should in-house counsel look at them? Should outside counsel?**
 - **What is the downside for you and/or your outside counsel of looking at all, more, some?**

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Scenario 3:
Curveballs and Pick-Off Moves
(for Discussion)

Some Important Real-World Concerns



Sentencing Guidelines and Self-Reporting:

- “The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.” Intro. to Chapter 8 (Sentencing of Organizations), U.S. Sentencing Guidelines



“Yates Memo”

- Department of Justice (DOJ) “guidance” document stating that corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct to be eligible for any cooperation credit



Deferred Prosecution Agreements

- Voluntary alternative to adjudication in which a prosecutor agrees to grant amnesty in exchange for the defendant’s agreement to fulfill certain requirements

Be Careful What You Ask for—Twists, Turns, and Trouble



During the investigation by the Deputy GC, the Deputy GC convinces the CEO to cooperate and “come clean,” never suspecting what the CEO would say next.



Then the CEO tells the Deputy GC that the CEO and other senior members at the company have conspired to mislead investors about the quality of loans issued by the company over the last five years.



The improper activity could impact thousands of investors.

- Should the company self-report to the Securities and Exchange Commission?
- Should the CEO self-report?
- What are the risks and benefits?
- Whom can you advise? Whom should you advise?
- What is a deferred prosecution agreement?

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Questions and Wrap-Up

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Additional Materials & Resources

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Ethical Rules/Commentary

- **ABA Model Rules of Professional Conduct**—available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html
- **“Conflicts Of Interest After the Yates Memorandum,”** by Michael Volkov (July 6, 2016)—available at <https://blog.volkovlaw.com/2016/07/conflicts-interest-yates-memorandum/>
- **“DOJ Focuses on Individual Accountability: New Guidance for Corporate Investigations Places Pressure on Companies and Boards to Put Executives at Risk”**—available at <http://www.ebglaw.com/news/doj-focuses-on-individual-accountability-new-guidance-for-corporate-investigations-places-pressure-on-companies-and-boards-to-put-executives-at-risk/>
- **Yates Memo**—available at <http://www.justice.gov/dag/file/769036/download>

Cases of Interest Regarding Expectation of Privacy

- *Stengart v. Loving Care*, 201 N.J. 300 (2009) (holding that a policy that banned all personal computer use and provided that unambiguous notice that an employer could retrieve and read an employee's attorney-client communications if accessed on a personal, password-protected e-mail account using the company's computer system would not be enforceable).
- *Rozell v. Ross-Holst*, 2007 U.S. Dist. LEXIS 46450 (S.D.N.Y. June 21, 2007) (whether the employer pays for the email account is not dispositive, because an employer does not necessarily "own" e-mails merely because it pays for the account from which they were sent).
- *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 587 F. Supp. 2d 548 (S.D.N.Y. 2008) (finding a reasonable expectation of privacy in a personal, password-protected email stored on a third-party server, even though the employee accessed the server while at work).
- *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961F. Supp. 2d 659 (D.N.J. 2013) (finding that the federal Stored Communications Act covers an employee's Facebook wall posts that are configured by the employee to be private).

Cases of Interest Regarding Expectation of Privacy

- *U.S. v. Hamilton*, 701 F.3d 404 (4th Cir. 2012) (finding a “waiver of marital privilege by email usage” when an employee did not take any steps to protect the emails in question, even after being on notice of the employer’s policy permitting inspection of emails stored on the system at the employer’s discretion).
- *In re Info. Mgmt. Servs., Inc. Derivative Litig.*, 81 A.3d 278 (Del. Ch. 2013) (holding that the attorney-client privilege did not cover a corporate executive’s emails with his personal lawyer because he sent the emails through the company’s email account knowing that the company maintained a policy that it may monitor employee emails).
- *Holmes v. Petrovich Development Co., LLC*, 191 Cal. App. 4th 1047 (Cal. 3rd App. Dist. 2011) (holding that a government employee’s Fourth Amendment right to be free of government searches and seizures was not violated by his employer’s accessing his text messages on a government-issued device, despite statements by a supervisor that contradicted the stated employer policy).
- *Aventa Learning, Inc. v. K12, INC.*, 830 F. Supp. 2d 1083 (W.D. Wash. 2011) (ruling that, based on company policy, a terminated senior-level employee enjoyed no expectation of privacy for personal emails or other materials that the employee created or received on web-based systems stored on an employer-issued laptop).

General Counsel's Role and Interactions with Corporate Officers and Other Employees

Individual Accountability / The Yates Memo (Sept. 9, 2015)

01

To be eligible for **any** cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct.

02

Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

03

Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”
The Yates Memo (Sept. 9, 2015).

General Counsel's Role and Interactions with Corporate Officers and Other Employees

Individual Liability / The Yates Memo (Sept. 9, 2015)

05

Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for individuals.

06

Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized.

07

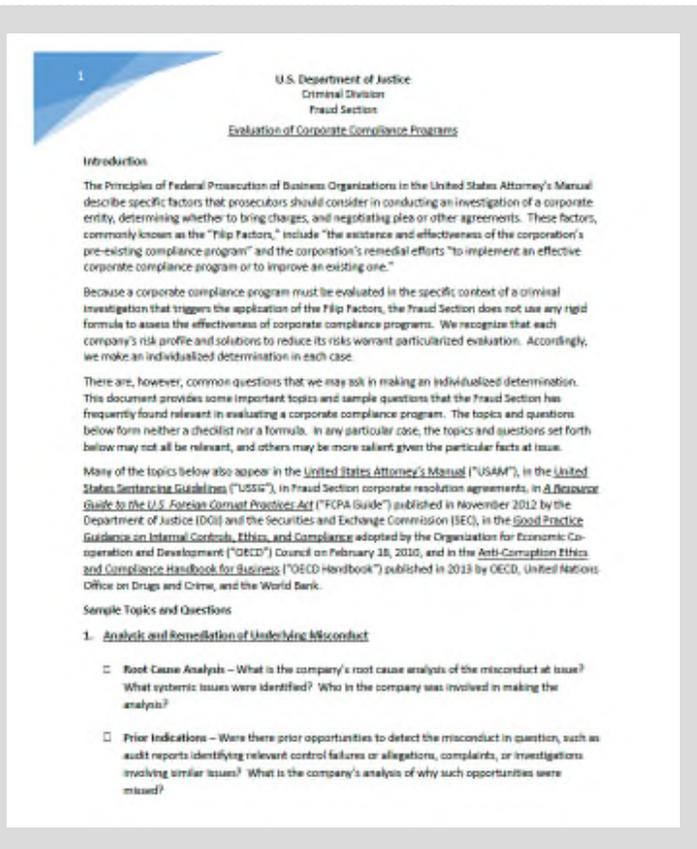
Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

“By focusing on building cases against individual wrongdoers . . . we maximize our ability to ferret out the full extent of corporate misconduct.”

The Yates Memo (Sept. 9, 2015).

DOJ, Criminal Division Fraud

Evaluation of Corporate Compliance Programs



“Response to Investigations”

- Has the company's investigation been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives?
- How high up in the company do investigative findings go?"

“Effective Compliance” Under Sentencing Guidelines

- “Effective Compliance”:
 - Oversight by high-level personnel
 - Due care in delegating substantial discretionary authority
 - Effective communication to all levels of employees
 - Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal
 - Consistent enforcement of compliance standards, including disciplinary mechanisms
 - Reasonable steps to respond to and prevent further similar offenses upon the detection of a violation