

## Ethical Dilemmas

The following are some ethical and professional scenarios that arise in the context of possible improper payments to foreign officials. The scenarios could be amended slightly to apply to other contexts. The discussion questions and facilitators guides are only guides and not intended to be exhaustive of topics that might get raised in the discussion or to represent definitive “answers” to the questions. Many of the questions are intended to provide a forum for discussion of how an issue might be handled within each lawyers’ organization and to help lawyers develop strategies to discuss a situation within the organization.

The scenarios were developed for in-house counsel but could easily be adapted to external counsel or a mixed group of lawyers.

**Program Format:** Facilitated discussion. Recommend having one or two people lead the facilitation. They would be provided with the discussion content below. Participants would simply be given the scenarios and the questions. Could have small group discussions on each scenario and then a larger group general take up of the discussion.

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### *Internal Investigations/ Whistle blowing in the context of Improper Payments to Foreign Officials*

You are Canadian counsel in a multi-national public company. The Canadian arm of the Company has been involved in expanding its operations in Asia.

1. You receive an anonymous note from an employee stating that he/she has documented proof that the company has been involved in improper payments to foreign officials in connection with its Asian expansion. The employee is willing to meet with the general counsel to demonstrate proof but demands \$75,000 or he/she will turn over the material to regulators.

*Ethical and professional issues for discussion –*

- Is payment for the information proper?
  - RPC – 2.02 (5) lawyer shall not knowingly assist in or encourage any dishonesty, fraud or illegal conduct.
  - Employee is essentially blackmailing the company
  - Note – rule is really directed at when the client is going to do something dishonest. Employee is not the lawyer’s client. Is it improper to assist your client in complying with an illegal “request”? Does that make the company complicit in the illegal behaviour?
  - In the US – SEC under Dodd-Frank, has implemented a program to pay whistle blowers who provide information with tips that lead to successful enforcement actions.

- Facilitators to raise any substantive legal issues the situation raises
  - How should in-house counsel respond to the employee?
    - Can you threaten legal action against the employee or having them charged with blackmail if they go public with the information? RPC – 2.02(4) – can't threaten criminal proceedings to secure a civil advantage.
    - Without “threatening”, remind him of his obligations as an employee.
    - Facilitators – other ideas on how to respond?
  - What additional steps should in-house counsel take?
    - Discuss the need for an internal investigation with senior management
2. You are asked to conduct an internal investigation of these potential improper payments to foreign officials. You are about to interview an employee whom you don't believe to be directly involved in the payments and he/she asks if they need a lawyer. The employee also wants you to promise that nothing he/she tells you will be attributed back to them.

*Ethical and professional issues for discussion –*

- Is the employee an unrepresented person?
  - No definition under the RPC for “unrepresented person”
  - If you don't think they have done anything wrong do you need to treat them as an unrepresented person?
  - At what point do the employee become an unrepresented person? Likely when you first suspect they might have done something wrong.
- What are your obligations to an unrepresented person?
  - RPC 2.04 (14) Dealing with Unrepresented Persons – you must
    - Urge them to consult their own lawyer
    - Make sure they don't think you will be protecting their interests and they know you act for the interests of the company
  - But doing this will likely result in them not telling you anything
  - Professional obligation to your client – to conduct as thorough an investigation as possible [basic competency requirement]
- How do you balance your obligation to your client to conduct as thorough an investigation as possible against the duties you owe to the employee?
  - Likely each situation is different. Provide practical advice to the extent possible.

- Can the discussion with the employee be “off the record”? What is your obligation to report what the employee tells you?
  - Can’t be “off the record”.
  - Duty to be honest and candid with your client. Advice must be open and undisguised. [RPC 2.02(1)]; duty of competency [RPC 2.01(1) commentary] includes duty to provide a client with the facts, assumptions, circumstances on which advice is based. Can’t do this if they keep critical information from the client.
  - But may depend on what the person has to say on whether you have to tell your client.
  - Does what the employee has to tell you significantly impact the matters being investigated? Does what he/she says raise any other issues or concerns for your client? If so, then have to report. If not then could you keep it quiet?
  - Provide other ways you have seen employee interviews conducted and issues that might arise. E.g. some interviews might be recorded verbatim. Company might retain accountants or external counsel to conduct the interviews. When should you consider retaining outside counsel? Any concern about potential loss of privilege when conducted by non-lawyers.
- What should you tell the employee before you start the interview?
  - Explain you are acting for the company and have to protect its interests. You won’t necessarily be able to keep anything they tell you as confidential.
  - But try to do it in a way that doesn’t scare them off.
  - Perhaps refer to their obligations as an employee to come forward with any information they have. If the company has any kind of Code of conduct or ethics policy refer to it to encourage compliance and cooperation.

3. You discuss your findings from the investigation with the GC of the Canadian operations to whom you directly report. You feel that the findings of the investigation must be disclosed to the public and you are drafting a memo to the Board on this issue. The GC does not yet feel there is enough evidence to mandate disclosure at this time. He has instructed you to draft the memo indicating disclosure is not yet necessary.

*Ethical and professional issues for discussion –*

- How do you handle a difference of legal views within the legal group?
  - What is the culture of the organization? Is it collaborative? No answer in the RPC other than requirement for lawyers to be courteous, civil and act in good faith with other members of the profession. Which should include your “partners”. [RPC 6.03(1)]

- Talk through the difference of opinion. Consider seeking input from a 3<sup>rd</sup> party, e.g. another member of the legal group. Or if significant, outside counsel.
  - What if the GC really insists on the memo being “clean”? Can you suggest the GC should write the memo? Or have it come from the GC rather than you?
  - What is the duty to the Company
    - Duty to be honest and candid with your client. Advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results. [RPC 2.02(1)]
    - RPC 2.01(1) definition of a competent lawyer, in commentary - A lawyer should be wary of bold and confident assurances to the client, particularly if your employment may be dependent on advising in a particular way.
    - If there is real disagreement then this should be somehow reflected in the memo by using typical words to signal there is no clear answer (e.g. “the better view is”, “though the matter is not free from doubt ...”).
4. You are almost through your internal investigation and the evidence you have found seems to indicate that the President of the Canadian operations is involved in the misconduct. The President has asked you for a copy of the report before it is sent to “head office”.

*Ethical and professional issues for discussion –*

- Who is your “client”?
  - The President is putting pressure on you to change your legal position. Does the President represent your client?
  - RPC 2020(1.1) organization is the client, even though you take instructions from officers of the organization.
  - Must act in the interests of the organization not the individual to necessarily take instructions from.
- Should you disclose your findings to the President prior to sending them to “head office”?
  - No clear answer. Does it matter whether he gave the initial instructions to conduct the investigation?
  - Discuss possible approaches on how to handle the President.
- What obligations do you have to report misconduct? Discuss up-the-ladder reporting obligations.

- RPC 2.02(5.2) sets out what to do when you know an organization has acted dishonestly.
- Tell the person you report to. But in this case the person you report to is the one you think has been engaging in the dishonest activities. Rules require you to go successively up the ladder. Advise progressively the next highest person or group in the organization, up to the Board.
- Facilitators – can you provide practice advice on how to have a conversation with someone higher up in the organization on some improper activity. How do you convince them to cease if there is a real difference of view on whether the activity is illegal? Focus on risks if the activity continues.
- If you report the misconduct and the Company doesn't take any action to fix the situation what are your obligations? Do you have to resign if the company chooses to ignore your legal advice?
  - Commentary to RPC 2.02(5.2) If the organization, despite the lawyer's advice, continues with the wrongful conduct, then the lawyer shall withdraw from acting in the particular matter.
  - In some but not all cases, withdrawal would mean resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.
  - Can in-house counsel "resign" from a matter? Perhaps a particular instance but if it is something on-going then would have to "refuse" to do that work on an on-going basis. Is this realistic?