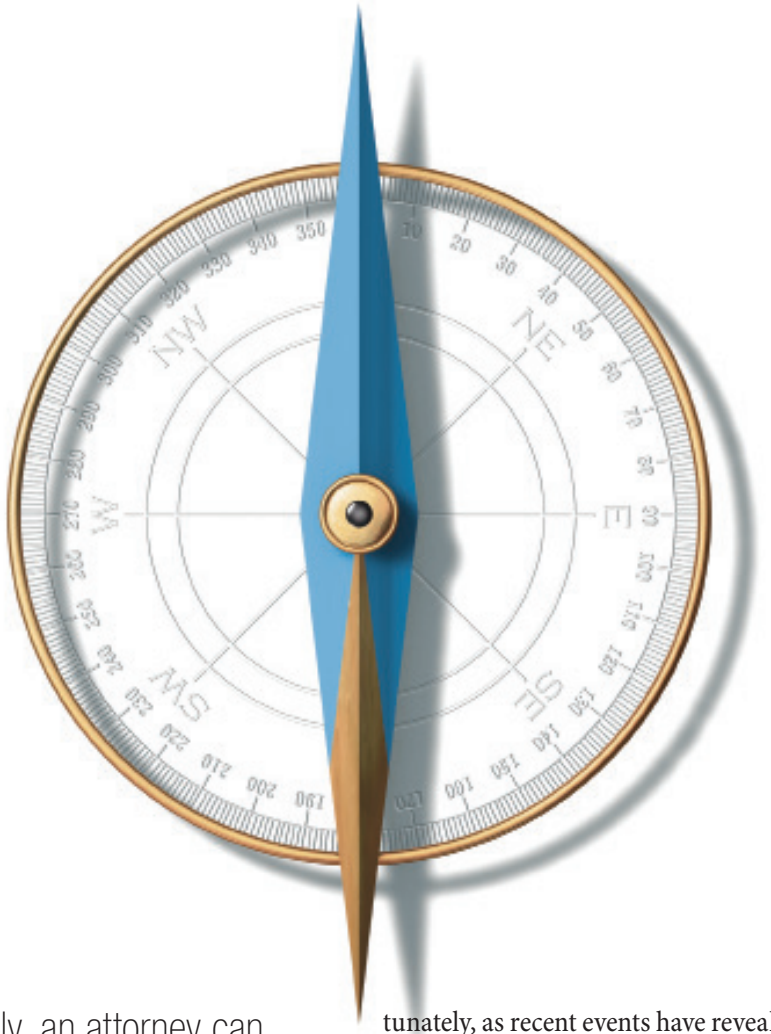
Lessons Learned from Penn State and Rutgers

By William A. Muñoz

General Counsel Internal Investigations



Generally, an attorney can avoid civil liability for exercising judgment calls in representing a client. However, the same does not hold true for general counsel involved in high-profile internal investigations for their corporate or institutional clients in the court of public opinion. Unfortunately, as recent events have revealed, an attorney's ethical obligation to look out for the best interests of his or her institutional client has taken a back seat to personal relationships and self-preservation. With Sarbanes-Oxley, Dodd-Frank, and other regulatory enactments, those conflicting interests are sharply scrutinized not only by regulators, but the public at large. With the scandals produced by the Penn State football program a few years ago involving Jerry Sandusky, and more recently, the Rutgers men's basketball head coach Mike Rice, general counsel's internal investigations into employee misconduct have come under significant scrutiny. In the cases of Penn State and Rutgers, both general counsel resigned under pressure from their respective administrations and the intense public outrage. In both instances, the internal investigations were inadequate, and more importantly, they lack of reasoned judgment for the actions taken produced catastrophic results.

Internal investigations require well thought out plans as to how to address the issues raised efficiently and effectively, regardless of whether it involves high profile claims like those asserted against Penn State and Rutgers, or a simple complaint that an employee is being treated differently, to protect and insulate (or minimize) the institutional client from liability or adverse publicity. Regardless of the nature of the investigation, the key for general counsel, whether handled internally or sent to outside counsel, is to get it right the first time—recognizing that one's ethical obligations should trump any personal ramifications that may arise from an unpopular, yet correct decision or recommendation.

This article will take a look at the role of general counsel generally, analyze how the investigations like those in the Penn State and Rutgers cases went awry, and suggest how general counsel can avoid significant consequences in the future.

The Role of General Counsel

Traditionally, the role of general counsel has been one of providing risk assessment to the company and ensuring compliance with the law in all aspects of the company's business. In this regard, general counsel has been viewed as a "business expense" as opposed to a profit center for the company. This antiquated view is changing to reflect that general counsel's role is not simply

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limited to the legal aspects. Rather, general counsel's role has expanded to include input on the business side of the company's business because an effective general counsel should have a solid understanding of the company's business.

This new dimension goes hand in hand with the traditional role of general counsel because "a better understanding of the company's business [will lead] to a better understanding of the risks that the company faces." *Assessing the Role of General Counsel Today: New Responsibilities or Some Very Old Ones in New Packing*, The Metropolitan Corporate Counsel p. 48 (June 2007). Consequently, general counsel is brought into the mix sooner to address an issue that arises effectively before it erupts. In this day and age of social media, where information is immediately obtained via Twitter, YouTube, blogs, etc., the ability to address potentially volatile issues immediately is crucial.

Along the same lines, the relationship that general counsel develops with his or her client in the institutional setting is critical. Model Rule of Professional Conduct, Rule 1.13 states, "a lawyer retained by an organization represents the organization acting through its duly authorized constituents." ABA Model Rules of Professional Conduct, rule 1.13(a). Thus, developing a working relationship grounded in trust and confidence should permit general counsel to investigate an issue effectively, reach a conclusion—good or bad for the client—and to make reasoned recommendations regarding the same without fear of backlash or retribution from a chief executive officer, president, or board of trustees, whatever the case may be. In doing so, general counsel will not be seen as a scapegoat, but a proactive member of management, looking out for the best interests of the institution.

Internal Investigations: Attorney-Client Privilege and Work Product Concerns

With this backdrop, depending on the size of the company, general counsel may be intimately involved in an internal investigation, or this function could be delegated to outside counsel or a human resources department. Smaller companies do not have this luxury and general counsel is more hands on. Where general counsel is directing the investigation and intimately involved, the issue of attorney-client privilege and work product often permeate the discussion insofar as disclosure of the findings of any investigation are concerned.

However, the fact that in-house counsel conducts the investigation does not diminish or eviscerate the attorney-client privilege, provided the purpose and confidentiality of the communications to and from general counsel are to obtain legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981) (attorney-client privilege applied to internal investigation conducted by in-house general counsel and outside counsel); *see also Schlicksup v. Caterpillar, Inc.*, 2011 WL 2731323 *3 (C.D. Ill. Jul.13, 2011) (outside counsel's investigation and report to client regarding plaintiff's internal complaints about alleged recordings of company meetings protected by work product and attorney-client privilege).

> In determining the objective of the investigation, and to ensure that it is unbiased, counsel must keep in mind his or her ethical obligations to the institution.

Conversely, investigations undertaken in the ordinary course of business with results reported to general counsel are not necessarily afforded protection by the attorney-client privilege or work product doctrine. For instance, in *Guzzino v. Felterman*, 174 F.R.D 59 (W.D. La. 1997), a fraud action against Dean Witter and one of its account executives, plaintiffs sought production of documents regarding Dean Witter's internal investigation of the account executive. Dean Witter resisted the document requests on the grounds of attorney-client privilege and work product, contending that the Audit Department conducted the investigation in connection with general counsel in anticipation of potential investigation by the SEC and NASD. *Id.* at 60. The court rejected Dean Witter's arguments finding an internal investigation and communications to general counsel regarding the same were not protected by attorney-client privilege because the documents were prepared in the ordinary course of business and not at the direction or guidance of counsel. *Id.* at 61–62. Additionally, the court held the work product doctrine did not apply to documents prepared in anticipation of a potential regulatory investigation. *Id.* at 62–63.

This begs the question: What investigations occur in the ordinary course of business that would otherwise not qualify for work product protection? According to one court, "if the [investigation] would have [occurred] without regard to whether litigation was expected to ensue, it was done in the ordinary course of business and not in anticipation of litigation." *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 477 (N.D. Tex. 2004).

In *Navigant*, the plaintiff company brought a claim for misappropriation of trade secrets and other torts after an investigation by its outside general counsel discovered defendants were copying proprietary company software and client databases in contemplation of leaving for a competitor. During the course of the investigation, defendants resigned. After the plaintiff filed suit, the defendants sought a number of documents from the plaintiff, including documents relating to the investigation, which the plaintiff objected to on attorney-client privilege and work product grounds.

Regarding the claim of attorney-client privilege, the court found that virtually all of the documents claimed to be privileged did not fall within the scope of the privilege because the communications between general counsel and outside counsel were for a business purpose as opposed to a legal purpose. *Navigant*, *supra*, 220 F.R.D. at 476. In so finding, the court rejected general counsel's declaration suggesting that all documents relating to the investigation were privileged because they were made by or sent to in-house counsel. *Id.* at 474. The court noted, "[u]nless the documents contain confidential communications made

for the purpose of facilitating the rendition of legal advice, there is no privilege." *Id.* at 476.

Similarly, regarding the work product claim, the court found that the documents claimed to fall within the work product doctrine were not protected because the primary motivation in preparing the documents was to protect the plaintiff's confidential information and not anticipated litigation. *Id.* at 477.

The manner in which an investigation is undertaken, and thus the ultimate quality of the results derived therefrom, depends on the objective or goal of the investigation. Bearing in mind the potential privilege and work product issues involved, the motivating purpose of the investigation should be to obtain legal advice from counsel regarding strategy to address the issues raised by an investigation in order to preserve the privilege. *See Fisher v. United States*, 425 U.S. 391, 403 (1976).

Internal Investigations: Quality Control

Privilege and work product issues aside, several other key issues arise with respect to internal investigations, which have been under careful scrutiny in light of recent public events such as Penn State and Rutgers. One is the quality of the investigation. Another issue is the recommendation or conclusions derived from the investigation. Lastly, the issue of what came of the investigation after it was all said and done. Each issue presents a number of questions: Was the investigation unbiased and objective? Was it thorough? Was it timely? What were the conclusions or recommendations? Were they followed?

Furthermore, in determining the objective of the investigation, and to ensure that it is unbiased, counsel must keep in mind his or her ethical obligations to the institution. First, counsel must reiterate to management that he or she represents the institution, not the individual directors, officers, trustees, or shareholders. ABA Rules of Professional Conduct, rule 1.13(f); *Innis v. Howell Corp.*, 76 F.3d 702, 712 (6th. Cir. 1996). This is particularly true when the subject of an investigation is general counsel's direct report or someone else in a management role. *Restatement (Third) of Law Governing* Lawyers §131, com. e (2000).

Second, and perhaps most important, is that counsel must recognize when the objectives of an investigation, as elicited by the "duly authorized constituent," conflict with the best interests of the institution. ABA Rules of Professional Conduct, rule 1.13(b); *see also* Keller, Josh, *When the Boss Is in a Tricky Spot, What's a General Counsel to Do?*, The Chronicle of Higher Education (June 27, 2011). It is the latter that appears to have caused the problems encountered by general counsel for Penn State and other institutions that have been in the spotlight recently.

> An open and honest assessment, based upon a thorough investigation, will be in the client's best interests in the long run even if there is some initial backlash.

Penn State—Missed Opportunities

The Jerry Sandusky debacle and who knew what and when was a public relations nightmare for Penn State from top to bottom. Once Sandusky was charged with over 40 counts of deviate sexual behavior, the board of trustees retained Louis Freeh to conduct a special investigation into the Sandusky matter that ultimately resulted in the 267-page "Freeh Report." *See* http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf.

According to the timeline of events in the Freeh Report, there were several missed opportunities to investigate Sandusky's conduct. Of importance for purposes of this article was the shower incident witnessed by assistant coach Mike McQueary in 2001 when outside counsel had been contacted by Senior Vice President of Finance and Business Gary Schultz regarding their obligation to report suspected child abuse. Freeh Report, p. 23. The extent of outside counsel's involvement was 2.9 hours consisting of two telephone calls and some research with no further investigation undertaken by outside counsel. *Id.* at 68. Counsel did not advise the board of trustees of this incident. *Id.* at 78–79.

The Freeh Report was more critical of Penn State's general counsel, Cynthia Baldwin, who was hired in January 2010. The report noted that once Baldwin caught wind of the Sandusky grand jury investigation, she downplayed its significance and delayed informing the board of trustees regarding the same. Freeh Report, p. 27. In fact, Baldwin and Penn State's president were opposed to having an independent investigation undertaken to look into Sandusky, stating "[i]f we do this, we will never get rid of this [outside investigative] group in some shape or form. The Board will then think that they should have such a group." *Id.* at 80. Baldwin's reasons for opposing such an effort clearly conflicted with her ethical obligations under Model Rule 1.13 because she put her own interests in not having this outside group overseeing her every step or that of the Athletic Department and football program above those of the institution as a whole.

Not only did Baldwin not conduct any type of investigation into Sandusky, she further compromised the school's position when she appeared at the grand jury hearing testimony of former Athletic Director Tim Curley and V.P. of Finance Gary Schultz. During the hearing, Schultz and Curley both testified Baldwin was their counsel, to which Baldwin did not object, which, absent consent from the school, violated Model Rules 1.7 and 1.13(g).

Baldwin stepped down as general counsel on June 30, 2012, indicating her decision had nothing to do with the Sandusky situation.

Rutgers Basketball—Process over Judgment

Recently, the media had a feeding frenzy regarding videotape excerpts of former Rutgers basketball coach, Mike Rice, verbally and physically assaulting his players during practices. It was only a matter of time before Rutgers' failed investigation regarding Rice's conduct came to light. Shortly after the video was released, the

university president fired Rice, the athletic director resigned, and the general counsel resigned amid the public's outcry to the video.

According to reports, the general counsel was intimately involved in an investigation of coach Rice earlier in the season, shortly after the athletic director saw the video in November 2012, which was provided by a disgruntled former assistant coach. General counsel recommended that Rice be suspended, but not fired. At least one theory behind not firing Rice at that time was the fact Rutgers was in the process of moving to the Big Ten Conference and a scandal such as this could have severely hampered, if not, torpedoed the move. Lippe, Paul, *Was Rutgers GC Blamed for Properly Managing A Process to the Wrong Outcome?*, ABA Journal (Apr. 11, 2013).

If the speculation is true that Rutgers did not fire Rice following the original investigation because it did not want to rock the boat regarding its move to the Big Ten Conference, then as the one responsible for handling the investigation, the general counsel failed to look out for the best interests of his client. Certainly, a move to the Big Ten may mean more revenue for the school, more potential talent for the basketball program, and prestige for the school. However, sweeping the investigation under the rug, or going through the motions of an investigation just to say an investigation had been undertaken with a recommendation that is tantamount to a slap on the wrist and telling the coach not to do it again, demonstrates a lack of integrity by putting money over the well-being of the athletes.

Unfortunately, we do not know the entire story or extent of the investigation that Rutgers' general counsel undertook that led him to recommend suspending coach Rice, as opposed to termination. Apparently, he had an outside investigator assist him in this investigation. Aside from the potential implications with the Big Ten, one report suggested that there may have been some concern about firing him for cause that could have prompted litigation. It suggests, however, that the recommendation or outcome of the investigation was predetermined to minimize the conduct and the reason for going through the process was to say that it was undertaken in the event the decision was questioned down the road.

Like Penn State, Rutgers has hired special counsel to investigate the handling of the Rice matter. Heyboer, K. and Sherman, T., *Rutgers Lawyer John Wolf Who Ok'd Keeping Mike Rice as Coach, Resigns*, Star-Ledger (Apr. 11, 2013). Only time will tell what this investigation will reveal, but if the Freeh Report regarding the Penn State scandal is any indication, Rutgers former general counsel and athletic director will be the focus.

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How to Avoid or Minimize Adverse Consequences of Internal Investigations

The Penn State and Rutgers scandals demonstrate how not to conduct an investigation if you are general counsel. Trying to save face with your report or telling people what they want to hear so there is no bad press for the Athletic Department, sports program, or other money-making component of the larger institutional client is bad business, particularly in today's society where social media can transmit information instantaneously.

The first step in being able to conduct unbiased, objective investigations is to have the trust and confidence of the client. In this regard, counsel must be able to have the relationship with the client to be able to tell the authorized representative confidently, whether it is the president or chair of the board, the good and the bad without fear of retribution. An open and honest assessment, based upon a thorough investigation, will be in the client's best interests in the long run, even if there is some initial backlash.

In the Penn State situation, Cynthia Baldwin may not have developed this type of relationship when the Sandusky matter arose such that she did not have the comfort level of being straightforward with the president or the board in terms of immediately addressing such a volatile and sensitive issue. She made a bad situation worse because her direct reports were aware of prior conduct and essentially did nothing about it.

Conversely, John Wolf had been Rutgers general counsel for 28 years. It is inconceivable that he would not have fostered such a relationship with the president to be able to recommend Rice's termination once the original investigation concluded. He and the athletic director sat on the video for several months. How they could have believed that the video would not get out is simply incredible. The video evidence is compelling and a recommendation of anything short of immediate termination is beyond comprehension.

Second, the investigation has to be thorough. Particularly in high profile cases, general counsel has to recognize, and perhaps should assume, that information uncovered in any investigation will get leaked. The old adage of leaving no stone uncovered should be the mantra of anyone involved in the investigation so that the party under investigation, the media, or possibly worse, other lawyers, cannot question it.

Third, the investigation must be conducted immediately. Any delay in conducting an investigation will suggest that the client is willing to turn a blind eye or something more sinister as a cover-up, neither of which are in the best interests of the client. In the case of Penn State, the lack of investigation demonstrated a cover up to protect Joe Paterno and the revered Penn State football program, whereas the Rutgers situation suggested the school just went through the motions hoping the situation would go away ostensibly so there would be no issue with the move to the Big Ten Conference.

Fourth, protect the attorney-client privilege and work product. Along the same lines, make certain that those in management, as well as lower level institutional employees, understand your role as general counsel is the attorney for the institution, not their personal counsel. Ensuring that

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the privilege is maintained will minimize disclosure of the "bad" facts for the client that may come out in the investigation should litigation ensue or the media expose the investigation.

Finally, and perhaps most important, is to make a reasoned recommendation to your client about the course of action that should be taken immediately based upon the findings of the investigation that is free from any outside influence. For example, as in the case of Rutgers, while the findings may initially have had some impact on moving to the Big Ten, the recommended course of action should not have taken this fact into consideration because it suggests that counsel placed the best interests of the men's basketball program over the best interests of his client (the institution as a whole).

Had Rutgers' general counsel recommended termination once the investigation was completed, and the president accepted his recommendation, he would still be general counsel for Rutgers today. If the president disagreed and refused to terminate Rice, the general counsel was well within his ethical obligation under Model Rule 1.13(b) to go to the board with his recommendation to protect his client, and would most likely still be general counsel under this scenario as well.

Conclusion

Internal investigations place general counsel in a difficult spot, particularly where it involves high profile issues, as often lawyers can be the scapegoat for the client's misdeeds. Cases like Penn State and Rutgers are examples of what general counsel should not do. To be the best advocate for the client, general counsel should be part of the solution, not the problem, regardless of whether the solution may bring some embarrassment or bad press to the client. While the embarrassment may be temporary, the impact of a thorough investigation and reasoned recommendation will be lasting.