

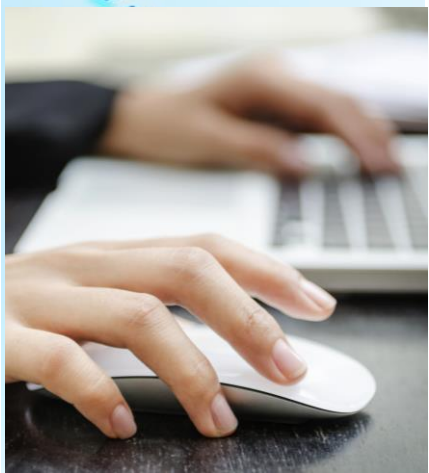
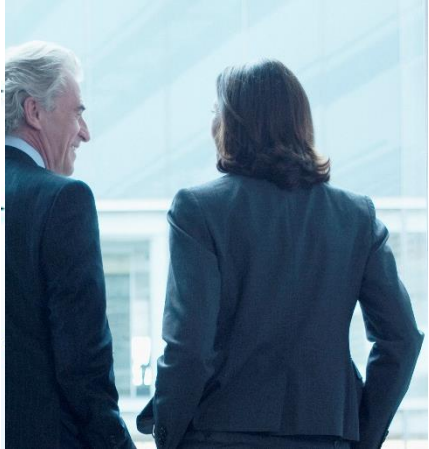
# Ethics: Responding to Governmental and Internal Investigations

---



## **Hector Diaz, Partner**

- White Collar Crime and Internal Investigations
- Litigation & Dispute Resolution
- Higher Education



# Internal Investigations, Government Investigations, and Corporate Victim Representation

---

**Presented by:** Hector Diaz

# An Overview

---

1. Internal Investigations
2. Government Investigations
3. Corporate Victim Representation

# Internal Investigations

---

An entity's internal review and analysis regarding allegations of wrongdoing or misconduct

# Internal Investigations

---

## Preliminary Safeguards

- Segregating Confidential Documents
- Offsite/Cloud Back-Up for Electronic Records
- Records Destruction Policy

# Internal Investigations

---

## Protecting Documents

- Privileged Documents
- Preserving Documents

# Internal Investigations

---

When Should a Corporate Entity Initiate an Internal Investigation?

# Internal Investigations

---

## Counsel's Involvement in Internal Investigations



# Internal Investigations

---

In-House Counsel *or* Outside Counsel

# Internal Investigations

---

## In-House Counsel

- Advantages of Using In House Counsel?
- Disadvantages of Using In House Counsel?

# Internal Investigations

---

## Outside Counsel

- Advantages of Using Outside Counsel?
- Disadvantages of Using Outside Counsel?

# Internal Investigations

---

## Attorney-Client Privilege

### When does the Privilege Apply?

- Communication between Employee and Counsel
- Communication with the Employee Whose Conduct Gives Rise to Potential Corporate Liability

# Internal Investigations

---

## Work Product Privilege

- Employee Interviews
- Memos/Notes Regarding Investigation

# Internal Investigations

---

Corporate Entities Should Be Aware that a Civil Investigation Can Lead to Criminal Charges

# Government Investigation

---

- Interviews/Informal Requests by Government Investigators/Law Enforcement
- Search Warrants
- Subpoenas
- Civil Investigative Demands
- Forfeiture

**Interviews/  
Informal Requests by Law  
Enforcement**



# Employee Interviews: Hypothetical #1

---

Agent appears at front desk and asks to interview an employee regarding a client of the Company.

**What Do You Do?**

**Does the Employee Have  
to Talk to the Agent?**

# Employee Interviews

---

- If an interview is requested, the employee should contact his or her supervisor.
- Company should have a “game plan” for how employees and corporate executives should handle this situation.

# Employee Interviews

---

## Employees Have Three Options:

1. Refuse Interview
2. Speak with Agent
3. Speak with Agent only if Counsel is present

# Employee Interviews

---

## Employees Have the Right to:

- Schedule the date and time of the interview
- Be represented by their own counsel during the interview
- Request that corporate counsel/outside counsel be present during the interview

# Employee Interviews

---

## Be Aware:

- Anything you say to law enforcement can be used against you in a criminal prosecution or in a civil enforcement proceeding.
- This is true regardless of whether the officers give you any so-called *Miranda warnings*.

# Employee Interviews

---

## The Company should:

- Assess the benefit of having outside counsel vs. corporate counsel present during employee interview
- Be cognizant of attorney-client privilege issues

# Employee Interviews

---

- Does outside counsel represent individual employees?
- *Upjohn* advisory
- Confidentiality of information provided

# Employee Interviews

---

## Company CANNOT:

- Dissuade employees from speaking with agents
- Attempt to influence employees' statements to agents



# Informal Request by Law Enforcement: Hypothetical #2

---

A federal agent appears at the office and shows you his badge. He says that he is conducting a criminal investigation and asks to see certain company emails.

**What do you do?**

# Informal Request by Law Enforcement

---

- Take down the agent's name and number.
- Explain to the agent that someone will get back to him regarding his request.
- Do not provide any documents without first talking to your supervisor or corporate counsel.

# **Search Warrants**

# Search Warrants

---

A court order issued by a magistrate or judge that allows a law enforcement officer to conduct a search of a person, location, or property and confiscate any evidence found.

- A.R.S. §§ 13-3911-3925
- 18 U.S.C. §§ 3101-3118
- Federal Rule of Criminal Procedure 41(b)

# Search Warrants: Hypothetical #3

---

- Federal authorities are investigating allegations of fraud associated with a business transaction.
- Agents believe that evidence of this alleged misconduct can be located in files at your office.
- Agents obtain a search warrant and arrive at your office.

**What do you do?**

# Goals in Responding to a Search Warrant

---

Review and comply with the search warrant.

- Be cognizant not to obstruct justice

Minimize the harm to caused by the search warrant.

- Disruption of business activities

# Search Warrants: Don't Be Caught Off Guard!

---

- Obtain a copy of the warrant
- Identify the agents/prosecutors and ask to see identification
- Ask agents to delay search so you can contact counsel
- Note the time of arrival and departure of agents

# Search Warrants: Don't Be Caught Off Guard!

---

- Limit the search to place or location described in the warrant
- Do not consent to a broader search without consulting counsel
- Videotape the search?
- Prepare a complete list of all documents/items seized



# During the Search...

---

- Counsel should be present to monitor investigators and supervise employees.
- Supervisors should be instructed to gather their employees promptly.
- Employees should be instructed not to interfere with the search.
- Customers (if any) should be escorted from the search area.

# Scope of the Search Warrant

---

- The search warrant itself defines the permissible scope of the search.
- Make sure law enforcement does not exceed scope of warrant.
- Can you block agents from coming in until counsel arrives?

# During the Search...

---

- Counsel should ensure investigators only review materials specified in warrant
- Counsel should advise investigators/law enforcement about privileged materials
- Contact prosecutor/agent if there are questions surrounding scope of search

# During the Search...

---

Appoint Employees to Monitor the Actions of Investigators/Agents During the Search

- Obstruction of justice issues

Take Detailed Notes of the Places Searched, Files Searched, and Items Seized.

# During the Search...

---

- Request copies of all materials seized
- Don't be afraid to ask probing questions of investigators/agents
- Obtain written inventory of items seized

# Subpoenas

# Subpoenas:

---

A written order requiring an individual or corporation to appear in Court and/or provide evidence.

- Arizona Rule of Civil Procedure 45
- Arizona Rule of Criminal Procedure 34
- Federal Rule of Civil Procedure 45
- Federal Rule of Criminal Procedure 17

# Subpoenas: Hypothetical #4

---

- Company receives a subpoena *duces tecum* from the state attorney general's office.
- Based upon the accompanying letter, it is evident subpoena is related to a government investigation regarding consumer fraud.

**How should the company respond?**



# Subpoenas

---

Response to a Subpoena Should Be Overseen by  
In-House or Outside Counsel

# Subpoenas

---

## Counsel SHOULD:

- Assert all relevant objections
- Contact prosecutor or government agent
- Direct the collection of responsive documents
  - Attorney-client privilege /work-product
- Ensure responsive documents are not overlooked or destroyed / document retention policy

# **CORPORATE VICTIM RIGHTS**

# Under Arizona law, who is a Victim?

---

A Victim means a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.

# Corporate Entity as a Victim

---

- A corporation, partnership, association or other legal entity which, except for its status as an artificial entity, is included in the definition of victim in section 13-4401.
- A.R.S. §13-4404

# Arizona Crime Victim's Bill of Rights

---

- Article II, § 2.1 of the Arizona Constitution II, §2.1 of the Arizona Constitution
- A.R.S. § 13-4401, et. seq., et. seq.

# Rights of Crime Victims in Arizona

---

- To be informed of rights at various stages of the process
- To receive notice of proceedings
- To receive notice of offender's release
- To attend proceedings
- To be heard at proceedings
- To confer with the prosecutor
- To obtain copy of the Plea Agreement and provide input
- To a speedy trial and disposition
- To refuse an interview with the Defendant or defense attorney
- To prompt restitution

# Limited Rights of Corporate Crime Victims

---

- Right to appear and be heard at any restitution or sentencing proceeding.
- Right to submit to the court a written statement containing information and opinions on restitution and sentencing in its case.
- Right to be advised of the date, time and place of any proceeding relating to restitution or sentencing of the person convicted of committing the criminal offense against the legal entity.
- Right to designate a lawful representative to act on behalf of the corporate entity.

A.R.S. § 13-4404(1-4)



# Federal Crime Victim's Rights

---

- Crime Victim's Rights Act  
18 U.S.C. §3771
- Mandatory Victim Restitution Act  
18 U.S.C. §3663A

# Who is a Victim under federal law?

---

A victim is a person directly and proximately harmed as a result of the commission of a federal criminal offense, or an offense in the District of Columbia.

18 U.S.C. §3771(e)

A person is defined as “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”

1 U.S.C. §1

# Rights of Crime Victims Under Federal Law

---

- Right to be reasonably protected from the accused
- Right to reasonable, accurate, and timely notice of any court proceeding
- The right NOT to be excluded from any public court proceeding
- The right to be heard at any public proceeding in the district court involving release, plea, sentencing, or parole
- Reasonable right to confer with the AUSA
- Right to proceedings free from unreasonable delay
- Right to be treated with fairness and respect

# Victim's Right to Restitution

---

At Sentencing, the Court Shall Order a Defendant Convicted of the Following Offenses to Pay Restitution to the Victim:

- Violent crimes
- Crimes against property (including any offense committed by fraud or deceit)
- Offenses relating to theft of medical products
- Offenses relating to tampering with consumer products
- In all cases where the victim has suffered a physical injury or pecuniary loss

# Why Victims Should Call Law Enforcement?

---

- Protect the company's brand/reputation
- The government has many investigative tools
- The government can do your investigation for you
- Government will work to “make you whole”
- Criminal conviction = civil judgment

# Why Victims Are Hesitant to Call Law Enforcement?

---

- Fearful of the government
- Afraid of exposure
- Government may “take over”
- Government may not share evidence
- Lack of confidentiality
- Corporation may want to pay for defense counsel

# Convincing the Government to Investigate

---

- Don't call general law enforcement phone numbers
- Can you meet the elements of a criminal offense?
- Explain to the government why they should care about this case:
  - Victims?
  - Witnesses?
  - Financial loss?
  - Evidence?
  - High priority crime?
  - Is the perpetrator easy to catch?

# Convincing the Government to Investigate

---

**Utilize Counsel to Package Up the Case**





# Questions?

---



Hector Diaz  
Phoenix Office  
(602) 229-5274  
[hector.diaz@quarles.com](mailto:hector.diaz@quarles.com)