

## Session 201:

# Reinventing the Internal Investigation: Practical Strategies for Ensuring a Yates-Informed Process

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## Presentation Overview

- Yates Memorandum and DOJ policy text-corporations get credit (and deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs)) only when cooperating against individuals.
- Cooperation expectations
- Legal, ethics, and policy issues in Yates cooperation
- Rodstein/Sessions follow-up:
  - 22 corporate DPAs and NPAs in 2017 (down from 122 in 2015)
  - “First, any changes will reflect our resolve to hold individuals accountable for corporate wrongdoing.
  - Second, they will affirm that the government should not use criminal authority unfairly to extract civil payments.” Rodstein 10/17

## Yates Investigation Considerations

- Who is represented? Who has common counsel?
- Joint defense agreement?
- What records to make of investigation (e.g., written report)?
- Full(!) cooperation
- Employee discipline/resolution
- Evidence of compliance, remediation

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## The Yates Memo-2015

- For a corporation to be eligible for cooperation credit, corporation must provide to DOJ, “all relevant facts” . . . “about individuals involved in corporate misconduct.”
- Prosecutors are directed to pursue senior individuals criminally and civilly even after criminal resolution for corporation.
- Set forth in U.S. Attorneys Manual 9-28.000 (Principles of Federal Prosecution of Business Organizations)

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## Yates Memorandum DOJ Process – 9-28.700

In order for a company to receive **any** consideration for cooperation under this section, the **company must identify all individuals involved in or responsible for the misconduct at issue**, regardless of their position, status or seniority, **and provide to the Department all facts relating to that misconduct**. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved, its cooperation will not be considered a mitigating factor.

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## Yates Memorandum DOJ Process

- If an investigation of individual misconduct has not concluded:
  - The corporate prosecution authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done; and, when warranted, an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period.
- If a decision is made at the conclusion of the investigation to pursue charges or some other resolution with the corporation, but not to bring criminal or civil charges against the individuals who committed the misconduct, the reasons for that determination **must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation**.

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## Investigation Challenges Posed by Attorney Ethical Rules

Question 1: How should lawyer for corporation (or compliance department) advise/inform employees of the risk/likelihood that company must identify all individuals involved in or responsible for the misconduct at issue, and provide all facts relating to that misconduct to be eligible for cooperation credit?

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## Attorney Ethical Duties Under Rules of Professional Conduct

- Key professional conduct rules implicated by investigations:
  - Corporate Miranda and Reporting Up (1.13)
  - Confidentiality of Information (1.6)
  - Conflict of Interest (1.8(b))
  - Dealing with Unrepresented Person (4.3)

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## RULE 1.13: Corporate Miranda

- Corporation is the client:
  - "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
- Lawyer "shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to "directors, officers, employees, etc. with whom the lawyer is dealing."
- Compliance Officer expected to preserve "the anonymity of reporting employees, if such employees request anonymity."

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## RULE 1.13(b): Corporate Reporting Up

"If a lawyer for an organization **knows** that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or **a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization**, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization."

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## Lawyer Ethics and HCCA Compliance Officer Ethics Compared

**R1.4:** If, in the course of their work, HCCPs become aware of any decision by their employing organization which, if implemented, would constitute misconduct, adversely affect the health of patients, residents, or clients, or defraud the system, the professional shall: (a) refuse to consent to the decision; (b) escalate to the highest governing authority, as appropriate; (c) if serious issues remain unresolved after exercising “a” and “b,” consider resignation; and (d) report the decision to public officials when required by law.

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### RULE 1.6: Confidentiality of Information

- “A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client . . .”
- Not limited to attorney-client or work product

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## Lawyer Ethics and HCCA Compliance Officer Ethics Compared

- **R2.6:** HCCPs shall not reveal confidential information obtained in the course of their professional activities, recognizing that under certain circumstances confidentiality must yield to other values or concerns (e.g., to stop an act which creates appreciable risk to health and safety, or to reveal a confidence when necessary to comply with a subpoena or other legal process).

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## Can the Stars Align? Protecting the Corporation and Its Constituent

- Question 2: In Yates world, may the corporation ever enter into a joint defense investigation with employees?

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## Yates Memorandum DOJ Process – 9-28.730 – Obstructing the Investigation

The corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired.

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## RULES 1.8(b) and 4.3: Conflict of Interest; Unrepresented Persons

- "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent."
- Attorney must explain:
  - Potential inherent conflict of interest in representing the corporation and an individual (Yates world); and
  - That the attorney may divulge the communications between that person and the attorney because they do not represent the individual.

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**RULE 1.8(b):  
Conflict of Interest-Yates Mistake**

- *COMMONWEALTH of Pennsylvania v. Graham B. SPANIER*, 132 A.3d 481 (2016)
  - (Penn State counsel) Ms. Baldwin also communicated with Spanier and expressed her belief that no conflict existed between her joint representation of Schultz, Curley and him.

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**Rubber Hits the Road: Ethical Rules and  
Yates Meet the Internal Investigation**

Question 3: How can counsel for the corporation provide all relevant facts about the individuals who were involved in the misconduct if it obtained the relevant facts as the result of attorney-client communications within the corporation or the attorney work product of investigation?

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## Yates Memorandum DOJ Process – 9-28.720

The company may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all relevant facts about the individuals who were involved in the misconduct. But if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.

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## Yates Memorandum DOJ Process – 9-28.710

Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: Has the party timely disclosed the relevant facts about the putative misconduct?

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## Yates Memorandum DOJ Process – 9-28.720

- To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the interviews conducted by counsel for the corporation.
- To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews.

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## Yates Memorandum DOJ Process – 9-28.710

“While a corporation remains free to convey non-factual or 'core' attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.”

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## Untangling the Web of Privileged Information Regarding Conduct and Non-Privileged Factual Information

- Question 4: VP of Finance states that diagnosis data submitted to managed care entities and Medicare was probably not accurate—the consulting firm told him they only looked for chart information that would result in an upcode, and was paid on a contingency basis for successful upcodes.
  - What is the “factual” information in this admission?
  - How should the attorney provide this information?

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## Corporate Response to Yates Investigation

Question 5: How should the corporation appropriately discipline wrongdoers during the course of the investigation? And, can the corporation consider employee cooperation in deciding on appropriate discipline?

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## Yates Memorandum – Corporate Response & Remediation – 9-28.1000

- “Among the factors prosecutors should consider and weigh (in deciding whether to prosecute the corporation) are whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct.”
- “Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. Prosecutors should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.”
- “. . .(a) corporation's quick recognition of the flaws in the (compliance) program and its efforts to improve the program are also factors to consider as to the appropriate disposition of a case.”

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### Key Process Considerations: Documenting the Investigation

- Ensure documentation created and maintained in manner consistent with status of investigation (privileged versus non-privileged).
  - May be hybrid (e.g., compliance performs factual inquiry, legal performs analysis of exposure, and obligations created by facts).
- Contemporaneously identify rationale for not pursuing certain issues/avenues of inquiry based on available.
  - Not just what you did– why you did not do what you did not do.

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## Yates Memorandum – Deferred Prosecutions

“Where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other.”

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## What Has Happened in Yates Prosecutions?

- *Acclarent, Inc.*, medical device company, \$18 million False Claims Act civil settlement
  - CEO William Facteau, VP Sales Patrick Fabian, acquitted of all felony charges, convicted of non-intent misdemeanors relating to unlawful distribution of medical devices

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## What Has Happened in Yates Prosecutions? (cont.)

- *Warner Chilcott*, specialty drug manufacturer, guilty plea, \$22 million criminal fine, and \$102 million settlement for kickbacks to physicians
  - Carl Reichel, President, acquitted of single count of conspiracy
  - District Managers entered guilty pleas
  - Physician charged with accepting kickbacks (\$23,500 in meals and speaker fees) (case pending)

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## What Has Happened in Yates Prosecutions? (cont.)

- *Volkswagen*, deferred prosecution of corporation
  - Indictment of 6 individuals (most German nationals who cannot be extradited to USA)
  - Attorney who allegedly suggested document destruction not charged
  - Former General Manager of Volkswagen's U.S. Environment and Engineering Office, sentenced to 84 months in prison for his role in Volkswagen's scheme to sell "clean diesel" vehicles containing software designed to cheat U.S. emissions tests (December 2017)

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## VW Deferred Prosecution (cont.)

- Volkswagen guilty plea (see handout)
  - Recites cooperation
  - Recites remedial measures and payments
  - “[T]he defendant has continued to enhance its compliance program and internal controls”
  - Independent monitor
  - Continuing cooperation in investigation of officers, directors, employees
  - Probation

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## Last Obama Yates Case

- *Western Union*, \$586 million forfeiture and deferred prosecution agreement — Western Union processed hundreds of thousands of transactions for Western Union agents and others involved in an international consumer fraud scheme. The perpetrators of fraud schemes contacted victims in the United States and falsely posed as family members in need or promised prizes or job opportunities. Victims were then directed to send money through Western Union to purportedly help their relative or claim their prize. (1/19/2017)

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## Other Examples of Yates Prosecutions

- *Wells Fargo* — investigation of retail banking sales
  - Shearman and Sterling investigation, 110-page report (April 2017)
  - Carrie Tolstadt, former head of Community Banking, terminated for cause, “resisted and impeded scrutiny or oversight” by Board
  - John Stumpf, former Chairman and CEO, was “too slow to investigate or critically challenge,” permitted to retire (“deer” “with a “tin ear” - Yale prof)
  - Clawback of \$180 million in executive compensation from multiple executives
  - Federal Reserve Board's consent cease and desist order (2/18) with Wells Fargo requires the firm to improve its governance and risk management processes, including strengthening the effectiveness of oversight by its Board of Directors. Until the firm makes sufficient improvements, it will be restricted from growing any larger than its total asset size as of the end of 2017.
  - No criminal prosecution
  - \$185 million in civil fines to Consumer Financial Protection Bureau

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## Other Examples of Yates Prosecutions

- *Rabobank*, guilty plea (February 2018), felony conspiracy charge for impairing, impeding and obstructing its primary regulator, the Department of the Treasury's Office of the Comptroller of the Currency (the OCC) by concealing deficiencies in its anti-money laundering (AML) program, forfeited \$360 million
- George Martin, Vice President, received deferred prosecution agreement

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## Other Examples of Yates Prosecutions

- *HSBC Holdings plc (HSBC)*, entered into a deferred prosecution agreement, agreed to pay a \$63.1 million criminal penalty and \$38.4 million in disgorgement and restitution (January 2018), “HSBC received substantial cooperation credit because, although. . . the bank’s initial cooperation with the government’s investigation was deficient in certain respects, after being notified of the Department’s concerns, HSBC changed course and its cooperation improved substantially” (DOJ Press Release)
  - HSBC cooperated in prosecution of Mark Johnson, HSBC employee
- *Barclay’s*, similar case as HSBC - same month
  - Criminal prosecution of exchange trader, Robert Bogucki

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## Other Examples of Yates Prosecutions

- *Och-Ziff Capital Management Group LLC (Och-Ziff)*, New York-based hedge fund, Och-Ziff will pay a \$413 million fine as part of a deferred prosecution agreement to settle both the criminal and civil charges (2016)
  - Michael Leslie Cohen, a former Executive Managing Director, indicted for his alleged participation in a scheme to defraud one of the hedge fund’s clients, a large charitable foundation (January 2018)

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## Och-Ziff Deferred Prosecution Agreement (2016)

Received sentencing credit for “cooperation with the Offices’ investigation, including its Audit Committee’s very thorough and comprehensive internal investigation through counsel which included regular reports to the Offices, Company counsel’s collection and production of voluminous evidence located in foreign countries, and efforts to make current and former employees available for interviews.”

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## Och-Ziff Deferred Prosecution Agreement (2016)

The Company did not receive additional credit because of issues that resulted in a delay to the early stages of the investigation, including failures to produce important, responsive documents on a timely basis, and in some instances, producing documents only after the Offices flagged for the Company that the documents existed and should be produced, and **providing documents to other defense counsel prior to their production to the government.**

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## Questions?



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