

BEFORE THE WHISTLE BLOWS

*Managing Ethical Concerns
and Creating a Compliance
Culture*



Presenters

- **Leslie S. Cohn**, Executive Vice President and General Counsel, Balfour Beatty Investments
- **Gabriel Holdsman**, General Counsel US, SVP Legal Operations, BTG International Inc.
- **Stephanie Benecchi**, Associate, White Collar & Gov't. Investigations Group, Montgomery McCracken
- **Janice Dubler**, Partner, Employment Counseling & Litigation Group, Montgomery McCracken
- **Paul Zoubek**, Partner, Co-Chair White Collar & Gov't. Investigations Group, Montgomery McCracken

Company Culture in the Headlines

United Grapples With PR Crisis Over Videos of Man Being Dragged Off Plane

How Lyft Is Capitalizing on Uber's Scandals

United CEO manages apology in third statement since man dragged screaming from overbooked plane

**Sexism at Uber from female management
#UberStory**

Culture Can Be Changed



by **Nick Statt**

April 30, 2014 10:30 AM PDT

@nickstatt

Zuckerberg: 'Move fast and break things' isn't how Facebook operates anymore

CEO Mark Zuckerberg distances Facebook from its early, hacker-gearred motto to a more mature one focused on stability.



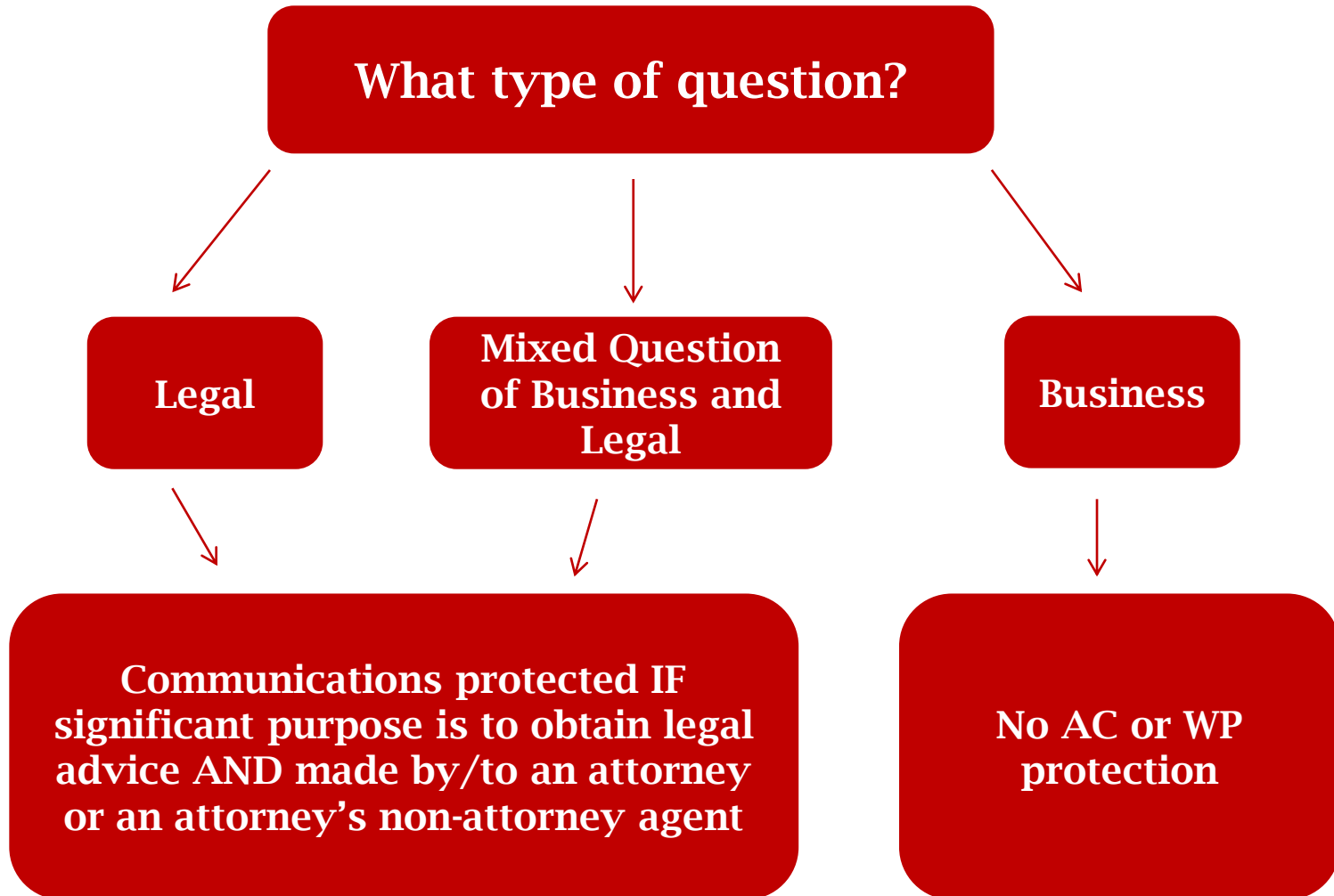
Hypothetical: StationsR'Us



- Bridget and Daniel work for StationsR'Us.
- Bridget reported that Daniel sexually harassed her to her manager Jessica.
- Jessica reported to HR.
- HR reported to dual-role GC/CCO.
- GC/CCO directs Jessica to interview Daniel.

General Counsel & Chief Compliance Officer Roles

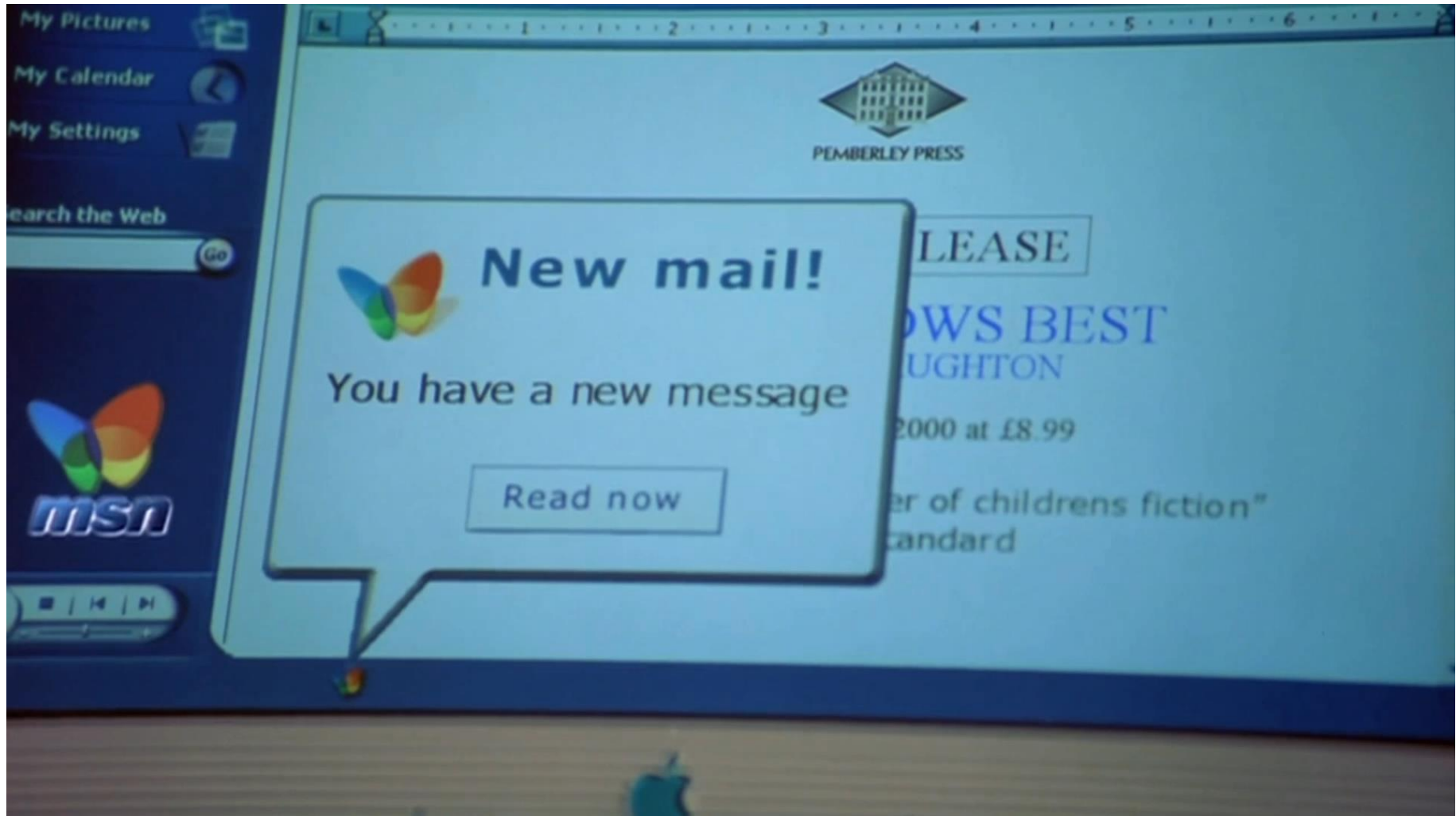
When one officer wears two hats at once, what protection applies?



Best Practices for Internal Investigations

- Mark all communications to which privilege might attach with the privilege(s) that apply
- Avoid discussing mixed questions in the same communication – where possible, segregate legal concerns from business concerns
- Any third parties or consultants should be hired by counsel and the engagement letter should clearly state the purpose is to assist with the provision of legal advice

The Initial Investigation





Employee Communications in the Digital Era

- Company policies regarding digital communications and device use are key
- Digital communications are more than corporate email: employees use personal email, text, and other social media
- Whether the employer provides or pays for the device used is a crucial factor in determining whether the communications are protected – and to whom the privilege belongs

Ethical Considerations for Social Media Use

The image shows a screenshot of a Facebook profile for Daniel Cleaver. The profile picture is a man in a suit. The name "Daniel Cleaver" is displayed prominently. Below the name are navigation tabs for "Timeline", "About", "Friends", "Photos", and "More".

On the left side of the profile, there are sections for "Intro", "Photos", and "Friends". The "Intro" section includes options to "Describe Who You Are", "Add Info About You", and "Want to Lincoln High School". There is a blue button labeled "Add Details" with the text "Add details about you to your profile." below it.

The main content area shows a post by Daniel Cleaver. The post text reads: "Women may be from Venus but CAN'T Build! Female owned ≠ female electricians, just affirmative action nonsense." |". Below the text is a "Post" button and a "Friends" dropdown menu.

The post includes a photograph of a white van with a metal rack on top. The van has a logo on the side that says "Elliot's Electrical" in orange text next to a yellow lightning bolt icon.

At the bottom of the post, there is a "Share" button.

When The Hotline Rings

StationsR'Us receives a call through its internal hotline, reporting that the electrical work on the station appears to be performed by Eliot's Electrical and not the DBE Venus Construction, as required under contract.

What should their next steps be?

Best Practices

How to ethically investigate hotline complaints and avoid costly missteps

- Failure to thoroughly investigate reported complaints – even if skeptical of the source – can lead to peril.

Even when dealing with a “repeat complainer” everything should be adequately investigated.

- Be forthcoming with employees about the steps undertaken in the investigation and the results.

An employee who feels heard by the company and trusts the company to do the right thing is less likely to become a *qui tam* Plaintiff.

Special Considerations for Government Contractors

The Mandatory Disclosure Rule (“MDR”) requires disclosure of “credible evidence” of fraud, conflict of interest, bribery, or gratuity violations in U.S.C. Title 18 or of the False Claims Act. FAR 52.203-13.

MDR “Contractor Code of Business Ethics and Conduct” requires:

- (1) a written code of business ethics and conduct,
- (2) due diligence to prevent and detect criminal conduct, and
- (3) timely disclosure to the OIG of “credible evidence” of violations.

Contractors must have both:

- (1) an ethics awareness and compliance program, including training
- (2) an internal control system, including anon. reporting mechanism.

Failure to comply can result in debarment and suspension, in addition to civil and criminal penalties.

Otherwise privileged investigation materials prepared as a result of investigations required under the Mandatory Disclosure program remain privileged.

BUT voluntary disclosure of privileged documents waives privilege.

Small Problems Ignored, Grow Into Large Problems

At each step, there is always an opportunity to prevent further damage. Even using the best practices, issues can arise that lead to a *qui tam* action or government investigation.

If the worst happens, remember

- Protect any applicable privilege – previously reviewed best practices
- Importance of *Upjohn* warnings
- Employee's right to counsel & ABA Model Rule 4.3

Good Policy and a Compliance-Oriented Culture are Two Sides of the Same Coin

- Company policies should support the desired Company culture – and appropriate effort should be devoted policy application and enforcement.
- Good policies support good culture and good culture enforces good policies.