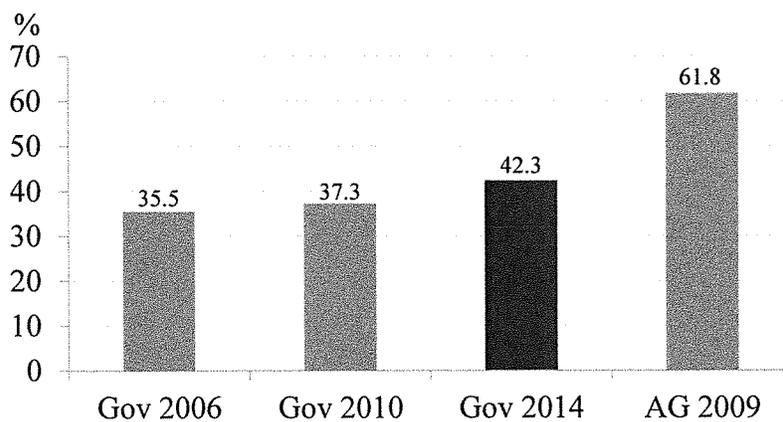


Whistleblowing: Rights and Duties

2015 Ethics Officer Conference
Loyola University College of Law
March 6, 2015

Employees who report wrongdoing are not retaliated against



WB in the Ethics Act

- Prohibits **retaliatory action** against a State employee because the employee engaged in **protected activity**:
 - Discloses or threatens to disclose activity, policy or practice of a State officer, employee or agency
 - he or she reasonably believes is in violation of law, rule or regulation
 - to a supervisor or public body (not the media)
- OR: provides information to or testifies before any public body conducting an investigation, hearing or inquiry into any violation of a law, rule or regulation by any State officer, employee or agency (5 ILCS 430/15)

Retaliatory Action

- Retaliatory Action:
 - reprimand,
 - discharge,
 - suspension,
 - demotion,
 - denial of promotion or transfer, or
 - change in the conditions of employment

Burden of Proof

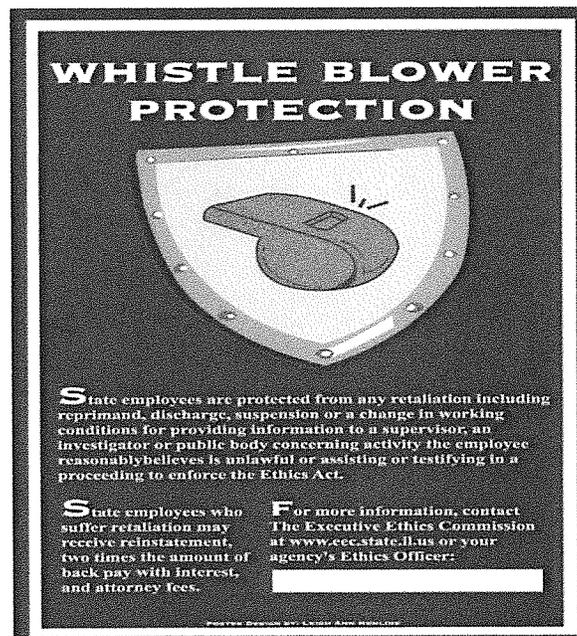
- State employee engaged in protected activity
- Protected activity was a contributing factor in the retaliatory action
- (But not if “clear and convincing” evidence is shown that the same unfavorable personnel action would have been taken in the absence of that conduct.)

Remedies

- Jurisdiction given to the circuit courts.
- Reinstatement of employee,
- 2x the amount of back pay,
- interest on the back pay,
- reinstatement of full fringe benefits and seniority rights, and
- reasonable costs and attorney fees.

Posting Notices of Protection

- State agencies must display notices of State employee protection “conspicuously”
- Get posters from the EEC or download from EEC web site.
- Has been subject of audits



Real Life Example

- Cook County jury awarded CSU senior legal counsel James Crowley over \$3 million after he was fired for reporting alleged misconduct by the CSU president and other top officials
- First and only Ethics Act whistleblowing complaint that resulted in an award to a State employee

Real Life Example (cont'd)

- Protected Activity
 - Refused to withhold FOIA'd documents related to CSU President's employment
 - Reported questionable contracts to AG
- PA was a contributing factor in termination
- Defense
 - Misused CSU resources: reserved parking spaces
 - Gave preferential treatment to student employee
 - Paid for conference travel to Hawaii (canceled)

Real Life Example (cont'd)

- Jury out less than an hour
- Award of back wages: \$480k
- Doubled to \$960k
- \$60k in interest on back pay
- Reinstated to job
- Punitive damages of \$2 million
- Attorney fees?
- On appeal?

State Employees' Duty to Report

- Administrative Order #6 (2003)
 - Employees subject to AO must notify the OEIG immediately of alleged misconduct by employees of agencies that are directly responsible to the Governor or contracting entities.
 - requires employees to cooperate with the OEIG.
- Commission adopted rules governing OEIG's request for docs and conduct of interviews.

Attorneys' Duty to Report

- No duty to report every violation
- RPC 8.3: "A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or 8.4(c) shall inform the appropriate professional authority."
- "Knows" = actual knowledge
- "Appropriate professional authority" = ARDC
- Disclosure of atty/client privilege not required

Rules 8.4(b) and (c)

- RPC 8.4(b)—another lawyer has committed a criminal act reflecting adversely on the lawyer's honesty or trustworthiness.
- RPC 8.4(c)—another lawyer engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

RPC Rule 1.13

- Lawyers employed or retained by organization
- Knows officer, employee, associate
- Acts, intends to act, or refuses to act that violates legal obligation to organization
- Likely to cause organization substantial injury
- Must report conduct up the chain
- Comment #9—applies to government lawyers

Handling a Whistleblower

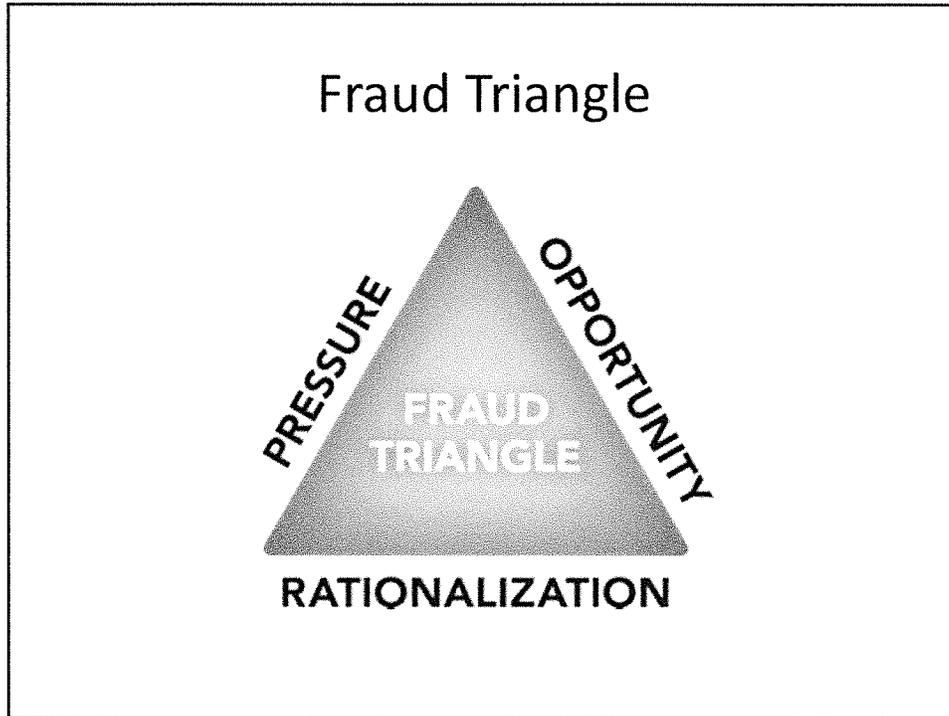
- Not the whistleblower's lawyer
- Confidentiality?
- Psychology of the whistleblower
- Unrealistic expectations

Why do people do bad things?

- 10-40-40-10 Rule
- Ignorance
- Theories of Crime:
 - Genetic
 - Social Science
 - Criminological
 - Economic

Economic Theory of Crime

- People consciously or subconsciously conduct a cost/benefit analysis before deciding whether to commit a criminal act.
- Bank Teller
 - + regular paycheck & benefits,
 - wear a tie, boring work
- Bank Robber
 - + quick, easy money
 - getting caught, shot



The Fraud Triangle

- Pressure
 - Real or perceived, internal or external
- Opportunity
 - Which employees have opportunity?
 - What opportunities do they have?
- Ability to justify internally
 - Justify stealing office supplies

Administrative Order 6 (2003)

December 11, 2003

Procedures for Investigating and Reporting Misconduct and Incidents at State Facilities

State Official Employees Ethics Act established, among other things, the Office of Executive Inspector General ("OIG") to investigate misconduct in agencies, boards and commissions directly responsible to the Governor. Title 20, ILCS Section 2605/2605-50 established the Illinois State Police, Division of Internal investigation ("ISP/DII") to (i) initiate internal State Police investigations and, (ii) investigate allegations of official misconduct by State office holders and employees directly responsible to the Governor, as directed by the Governor. To clarify the duties and responsibilities of the OIG and the ISP/DII, I hereby establish the following procedures for investigating and reporting allegations of misconduct by state office holders and employees, vendors of the State, and incidents at State facilities.

Except as outlined in Section III of this Order, the OIG must be notified immediately of all alleged acts of misconduct by any employee in, or any entity that has a contract with, an agency, board or commission directly responsible to the Governor. The OIG will determine whether to investigate the allegations, refer the allegations to the ISP/DII for investigation, or request that the reporting agency conduct an internal investigation. The ISP/DII shall be the primary agency responsible for the investigation of criminal conduct by state employees or criminal incidents at State facilities, as further described in Section III.

I. Preliminary Information

A. Definitions

"Agency" as used in this Order shall include all departments, agencies, boards, and commissions directly responsible to the Governor.

"Director" as used in this Order shall include all directors, secretaries, chairmen or heads of any Agency directly responsible to the Governor.

"Misconduct" as used in this Order includes fraud, waste, abuse, mismanagement, misconduct, nonfeasance, misfeasance, malfeasance, and violations of rules and/or regulations, including violations of the State and/or Federal Criminal Code.

"Reports or Notification to the OIG" may be made through the Inspector General, any Deputy Inspector General, or the Director of Investigations for the Office of Executive Inspector General.

"Reports or Notification to Illinois State Police, Division of Internal

Investigation" may be made to personnel of ISP/DII.

B. Responsibilities of Agencies, Directors and Employees

1. Reporting of Information

Every state officer or employee in an Agency shall report promptly to the Inspector General any information concerning waste, corruption, fraud, conflicts of interest or abuse by another state officer, employee or vendor relating to his or her employment. The knowing failure of any officer or employee to so report shall be cause for discipline, up to and including discharge. The knowing provision of false information to the Inspector General by any officer or employee shall be cause for discipline, up to and including discharge. Any officer or employee who in good faith acts pursuant to this paragraph by reporting to the Inspector General improper governmental action shall not be subject to dismissal, discipline or other adverse personnel action.

2. Duty to Cooperate

- a. Each Agency and every officer and employee, shall cooperate with, and provide assistance to, the Inspector General and her or his staff in the performance of any investigation. In particular, each Agency shall make its premises, equipment, personnel, books, records, and papers readily available to the Inspector General. The Inspector General or his/her staff may enter upon the premises of any Agency at any time, without prior announcement, if necessary to the successful completion of an investigation. In the course of an investigation, the Inspector General may question any officer or employee serving in, and any other person transacting business with, the Agency, and may inspect and copy any books, records, or papers in the possession of the Agency, including those made confidential by law, taking care to preserve the confidentiality of information contained in responses to questions or books, records, or papers that is made confidential by law.
- b. The Inspector General may compel any employee in an Agency to truthfully answer questions concerning any matter related to the performance of his or her official duties. If so compelled, no statement or other evidence derived therefrom may be used against such employee in any subsequent criminal prosecution other than for perjury or contempt arising from such testimony.

The refusal of any employee to answer questions if compelled to do so shall be cause for discipline, up to and including discharge.

3. Protection from Retaliation

No officer, employee or appointee in any Agency shall retaliate against, punish, or penalize any person for complaining to, cooperating with, or assisting the Inspector General in the performance of her or his duties. Any officer, employee or appointee who violates this provision shall be subject to disciplinary action, up to and including discharge.

II. General Procedures

A. Designation of OIG Liaison

Within thirty days after issuance of this administrative order, each Director shall notify all personnel in the Director's Agency of the OIG's investigative authority. The Director shall direct that allegations of any misconduct on the part of personnel or within the Director's Agency or vendors doing business with the Director's agency be immediately reported to the OIG.

All Directors shall designate a liaison to act as the Agency's Ethics Officer and for contact with the OIG and shall further establish procedures for referral of matters to the OIG. To the extent that the Agency has a person primarily responsible for internal agency investigations, that person's name shall also be forwarded to the OIG. Any referral and its contents shall be considered CONFIDENTIAL and only disseminated within the Agency as required for the efficient operation of the Agency. Any questions related to confidentiality should be referred to the OIG.

Each Director shall submit in writing or by e-mail to the Inspector General the name and telephone number of the designated liaison, and, where applicable, the name of the person responsible for internal agency investigations.

B. Notification to OIG

Each Agency liaison must promptly notify the OIG of any allegations of misconduct no later than five (5) business days after receipt of information related to the allegations. The notification should include all information known about the allegations. After referral, the agency is prohibited from taking any further investigative or disciplinary action until it has consulted

with, and received approval from, the OIG.

C. Internal Agency Investigations

Except as otherwise determined by law or detailed below, the OIG will conduct all internal Agency investigations, unless the Agency has been granted a general delegation of authority by the Inspector General that internal investigations may be conducted by personnel within the Agency.

In the absence of a general delegation by the OIG to an Agency, the OIG may request that any Agency conduct its own internal investigation. In such cases, the Director shall immediately refer the allegations to a designated person or unit within the Agency to investigate. The OIG may require periodic updates on the status of the investigation. If the agency's internal inquiry develops information suggesting that the conduct alleged is more serious, widespread or in any way different than originally reported, the Agency must re-initiate contact with the OIG before continuing the investigation.

D. Internal Inspectors General

In Agencies where the position of inspector general is governed by statute, the inspectors general shall, by this Order, report to the OIG. These Agency inspectors general shall otherwise continue to operate and function as set forth in relevant sections of the Illinois Compiled Statutes and the Illinois Administrative Code.

III. Exceptions for Certain Criminal Conduct – Emergency Situations

A. Types of Crimes to be Reported to ISP/DII

In the event of an emergency situation requiring an immediate police response, the Illinois State Police, county, or municipal police agency that can provide the fastest response should be contacted. The following are examples of such emergency situations:

1. Illegal Use or Unlawful Possession of a Weapon,
2. Bodily Injury or Immediate Threat of Bodily Injury,
3. Narcotics related activity,
4. Criminal Sexual Assault, or
5. Death.

B. Manner of Reporting to ISP/DII

If another police agency was contacted in one of the above emergency situations in Section A, the ISP/DII must also be contacted.

1. Preservation of Evidence

In the event of criminal conduct described above, the Agency shall ensure the preservation of the scene of the incident, the security of the evidence, the maintenance of accurate records relating to the condition of the victim, and other relevant information. Each facility shall adopt and maintain procedures that guarantee the preservation of evidence. Facility staff shall be advised not to disturb the scene until law enforcement personnel arrive.

2. Investigation

Facility personnel shall not take or initiate any investigation or action unless directed to do so by law enforcement officers. If any law enforcement official asks the staff of a facility to take action, the staff shall promptly document investigative activity and retain any physical evidence gathered as a result of the inquiry.

3. Reports and Records

The facility shall maintain all relevant documents and attachments related to the incident. Any written record shall be confined to a concise summary of the facts, and shall not contain conclusions or opinions. The facility shall maintain related records for a period of five years after the close of the incident investigation.

C. Special Procedures for Certain Types of Incidents

1. Physical Abuse By State Employees

All suspected patient/resident/inmate abuse, criminal sexual abuse or other incidents involving physical abuse for which state employees are allegedly responsible, or in which employee negligence could have been a factor, shall be reported immediately to the respective Agency's Director and designated administrative personnel. Any initial action taken should be limited to assessing whether the conduct described has occurred. If an incident has, or appears to have occurred the matter should be treated as set forth below.

2. Patient/Resident/Inmate Abuse or Neglect

Upon receiving notification of alleged abuse to a patient/resident/inmate by state employees, the facility administrator

shall immediately:

- a. Have a physician examine and treat the patient/resident/inmate and document his/her physical condition.
- b. Conduct a preliminary inquiry to establish that an incident of abuse has or appears to have occurred, and preserve all evidence and the integrity of the scene of the incident.
- c. Notify the Illinois State Police or other law enforcement agency if the need for immediate response by law enforcement is necessary. If the ISP was not notified in the first instance, the ISP/DII shall be notified.
- d. Conduct further inquiry into the incident if requested to do so.
- e. Report any incident of patient/resident/inmate abuse involving a person under the age of 18 years old in accordance with the Abused and Neglected Child Reporting Act to the Department of Children and Family Services within 24 hours after learning of such incident.

3. Criminal Sexual Abuse

If an alleged incident involves the criminal sexual abuse of a patient/resident/inmate, the facility administrator shall ensure that a physician examines the victim, utilizing a Rape Kit, as soon as possible after the alleged criminal sexual abuse. Such examination will be conducted to check the physical well-being of the victim, confirm injuries to the victim and document/obtain any physical evidence of any crime. All evidence should be obtained and preserved and clinical documentation completed. The facility administrator or his/her designee shall promptly notify the ISP/DII.

4. Death

In accordance with the Counties Code (55 ILCS 5/3-3013), any death occurring in a state facility shall be reported to the coroner of the county in which the facility is located. In addition, notice of death of a patient/resident (a change of status report) shall be given to the Clerk of the Circuit Court which committed the patient/resident in accordance with the Mental Health and Disabilities Code (405 ILCS 5/5-100); other notifications and reports required by law, rules or policies of the caretaker agency shall be made. All deaths other than

by natural causes must be immediately reported to the ISP/DII.

5. Attempted Bribery

Illinois law requires state employees to report attempted bribery.

- a. In general, bribery is an offer or solicitation of property (including money) or personal advantage with the intent to improperly influence a public employee in the performance of any act relating to her/his employment (720 ILCS 5/33-1).
- b. By law, State employees must report all offers of bribes to the Illinois State Police (720 ILCS 5/33-2).
- c. Any employee who has reasonable grounds to believe that an attempt to bribe has been made or suggested shall:
 - i. Avoid any statement or implication indicating acceptance or non-acceptance of the bribe; and
 - ii. Immediately report the matter, by telephone or in person, to supervisory personnel.

A supervisor must promptly report all incidents of attempted bribery to the ISP/DII. Employees shall cooperate fully and completely in all bribery investigations and any matters relating to the investigation. The ISP/DII shall immediately notify the local State's Attorney and the OIG, and initiate an investigation.

Any questions concerning the implementation of this order shall be directed to the Office of Executive Inspector General. The Toll Free Hotline for the OIG is 1-866-814-1113 and the general number is 1-312-814-5600.