

Organizational Integrity *Shorts*



Edition 2.1

Don't Just Let the Dominoes Fall; Understand The Paths They Might Take

By: Jonathan Aronie, Sheppard Mullin* on March 2024

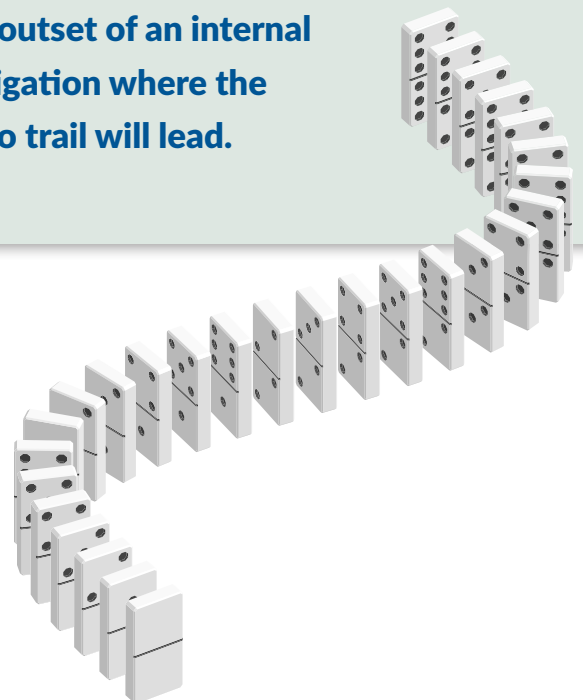
Let's say you're a publicly traded manufacturer of a popular medical device, which you sell commercially as well as to a number of VA hospitals. You receive an anonymous internal hotline complaint alleging that certain unauthorized, reverse-engineered components were used in the manufacturing process and that certain quality tests were skipped in the interest of "efficiency." You triage the complaint, do your preliminary diligence, determine the complaint isn't frivolous, and launch a privileged internal investigation.

You know you have a legal obligation to investigate (remember, our device manufacturer is a publicly traded federal contractor), but you're obviously apprehensive about what you might find. You're also apprehensive about where those findings may take you. You can see the dominoes falling one by one in your mind's eye.







The truth is, one never knows at the outset of an internal investigation where the domino trail will lead. But with some advance planning, we at least can understand the *possible* paths ahead of us –and, as importantly, the many possible branches (and decision-points) off those paths. Taking the time early on in an investigation to map out the multitude of potential scenarios – the good ones and the bad ones – can be tremendously helpful in guiding the investigation, making future decisions, allocating resources, and setting expectations.

In her excellent book, *Thinking In Bets*, professional poker player Annie Duke talks about the importance of "scenario planning." Duke is a thoughtful and seasoned cheerleader for a disciplined approach to visualizing future outcomes, good and bad; making informed judgments regarding the probabilities of each; and using those judgments to inform decision making. It's a process most of us in the legal and compliance world undertake, to some extent, as a matter of course. Duke advocates for doing it more intentionally, deliberately, and robustly. So do we.

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Let's return to our medical device manufacturer. Depending on the findings of the internal investigation, the company is going to have a number of decisions to make, each one creating its own paths, opportunities, and risks. For example:

-  • Must the company (and should the company) notify customers and/or public health regulators? If it does, what impact will that have on the company's ability to mount later defenses, be true to its stated ideals and values (e.g., promoting public health), and manage future government enforcement actions?
-  • Might there have been a crime committed? Must the company bring that possibility to the attention of federal law enforcement? What new opportunities and risks (and future decision-points) are created if that path is followed?
-  • Must the company notify the VA Office of the Inspector General (and/or other enforcement officials)? If it does, how does that decision inform the company's strategy vis-à-vis the reverse engineered components?
-  • Must the company notify the cognizant Suspension/Debarment Official? If it does, how will the admission and contrition the SDO expects from self-reporters align with the somewhat more defensive disclosures often made to the OIG? And how will the inevitable SDO admissions impact the company's defense against the forthcoming infringement claim from the company whose products were reverse engineered?
-  • Must the company report the matter to its external auditors, to the SEC, and/or in its public reports? If it does, what impact will those disclosures have on potential future investigations and litigation?
-  • Must the company report the matter to the company whose component it reverse engineered? If it does, what new paths and branches will present themselves in terms of litigation risk and settlement opportunities?

The list could go on, but even these few illustrations make the point. Thinking through scenarios at an early stage can be extremely helpful down the path.

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In the 1998 romcom *Sliding Doors*, Helen Quigley, played by Gwyneth Paltrow, rushes to catch a departing subway car and is relieved that she just makes it in before the doors close. The scene then rewinds and Helen again is seen rushing for the same train, but this time the doors close as she approaches and she frustratedly watches the train pull away without her. From there, the movie splits in two, taking two quite different paths as we watch the dominos that fall from catching the train as well as the different dominos that fall from missing the train. It's an entertaining illustration of how quickly and materially expected paths can diverge based on changes that seem small at the time.

Helen had no reason to map out the various paths her life might take as she swiped her card and headed into the subway. But we investigators and litigators do. While we can't – and probably shouldn't even try to – plan for every possible eventuality, thinking through at an early stage the multitude of possible paths the dominos may take, as well as the many possible branches and consequences of those paths, is time well spent.

** Jonathan is a partner in the Washington office of Sheppard Mullin LLP. He leads the firm's Governmental Practice and is the co-founder of the firm's Organizational Integrity Group. In 2013, Jonathan and his colleague (and OIG-co-founder) David Douglass were appointed by the U.S. District Court to serve as the Federal Monitors over the New Orleans Police Department Consent Decree. Jonathan can be reached at jaronie@sheppardmullin.com.*



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