KWM'S SPRINT TO THE FINISH

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YOU HAVE THE RIGHT TO REMAIN CALM: HOW TO MANAGE INVESTIGATIONS

The Mind Wanders by Anya Love

AGENDA

1 THE INITIAL RESPONSE

All cases are different

First steps

When to investigate?

Stages of an investigation

2 EARLY ENGAGEMENT

Engagement with the regulator

Key questions that arise

Privilege

3 CONDUCT OF INVESTIGATIONS

Multiple investigations

Implications of institutional misconduct

4 THE TAIL END

Successfully bringing the tail to an end

Managing secrecy vs reporting and disclosure obligations

ALL CASES ARE DIFFERENT

The need for an investigation can arise in many different ways:

- Bullying, discrimination and sexual harassment complaints
- General workplace misconduct complaints
- Whistleblower disclosures
- Accountability reviews for significant risk
- Response to regulatory compliance/breach concern
- Health, safety, environmental and security incidents

FIRST STEPS

Initial response to complaint, disclosure or incident

- Initiate emergency response/crisis management plan, as appropriate
- Ensure health and safety of personnel
- Minimise environmental and property damage
- Appoint key response personnel/team
- Gather threshold information and establish record keeping process
- Assess the nature and seriousness of the issue
- Make decisions about legal involvement (privilege), notifications to authorities, notification to other stakeholders
- Put in place internal and external communications strategy
- Cooperate with authorities but project rights
- Establish investigations

WHEN TO INVESTIGATE?

To identify

- What happened?
- When it happened?
- How it happened?
- Why it happened?

To obtain legal advice, or
In anticipation of litigation

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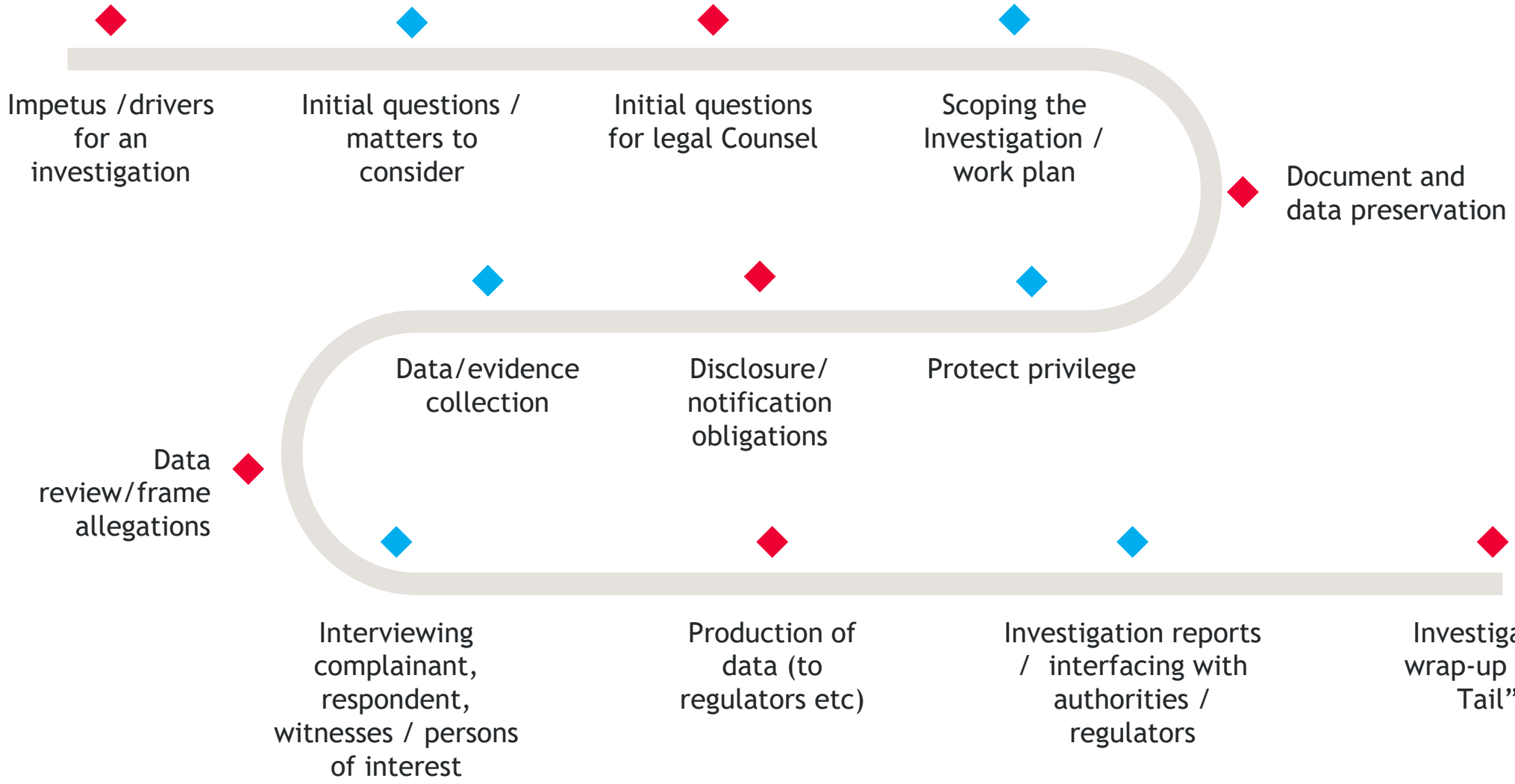
Legal Privilege

An investigation should

- Establish and document relevant facts
- Make findings based on the available evidence
- MAY also recommend suitable responses or actions

STAGES OF AN INVESTIGATION



THE SET UP

INVESTIGATIONS

External

- Infringement notice
- Dawn raid or warrant

Internal

- Whistleblower
- Audits / due diligence
- Allegations of wrongdoing
- Media interest

NONE OF THESE ARE MUTUALLY EXCLUSIVE

- Internal investigations often morph into external investigations
- Internal investigations often bring to light other potentially improper conduct
- Internal investigations often run in tandem with external ones
- Though there is no ‘one size fits all’ – engaging with the early stages of an investigation is key

THINK ABOUT: YOUR TEAM

- Lawyers (in-house and external)
- Third parties?
- Specialist firms?
- Any conflicts within the team?

THINK ABOUT: YOUR INVESTIGATION PLAN

- What is the scope of the investigation?
- If you are engaging a third party, what are their terms of reference going to be?
- May need to demonstrate investigation was adequate
- Communication protocol in place?

PREVENT DOCUMENT DESTRUCTION

- Take immediate steps to preserve and avoid the destruction and deletion of documents
- Suspend automatic deletion/ overwriting processes

THE REGULATOR

FIRST IMPRESSIONS

A. Building rapport

GET CLARITY EARLY

- Clarify any matters regarding the scope of the investigation (ie. notices, decisions regarding interviews).
- Can create efficiencies.

DOCUMENT ALL COMMUNICATIONS

- Keep an accurate, complete record of all interactions with the regulator.

ACT IN THE SPIRIT OF COOPERATION

- Provide updates on timing.
- Builds trust and credibility.
- Facilitates the investigations process.

B. Other considerations

FORMAL VS INFORMAL DISCUSSIONS

- Know the benefit and differences between the two.
- **Formal discussions**: can attract certain protections.
- **Informal discussions**: can give insight into the regulator's MO.

CUT TO THE CHASE

LENIENCY AND SELF-REPORTING

- Some regulators have cooperation policies.
- However, self-reporting some offences (e.g. foreign bribery) may be considered favourably.
- Self-reporting guidelines by the AFP and CDPP.

OBLIGATION TO REPORT?

- Depending on the conduct in question, there may be an obligation to self-report.
- Timeliness will be a factor.

PRIVILEGE: AVOIDING WAIVERS

Establish your strategy on privilege early

- Recently, privilege has been subject to extensive scrutiny by the courts
- Can be established and maintained throughout internal and external investigations but requires careful consideration

Ask yourself these questions:

- Could there be a benefit or risk to handing over certain material to the regulator and/or other third parties?
- Are you obliged to investigate under a statute or workplace policy – what do those say about confidentiality and privilege?

Watch out for:

- In-house lawyers acting in the investigation must not be involved in the 'commercial participation' of the business
- Waiver (e.g. implied waiver, which involves using a report or document prepared in investigation for ulterior purpose)

Practical tips for managing privilege

Third party reports

- **Dominant purpose** of the engagement must be to assist your investigation lawyers provide legal advice
- **Engagement letter needs to be precise** by clearly stating:
  - what the issue being investigated is
  - what questions they are being asked
  - why their advice is needed
  - their strict confidentiality obligations

Witness interviews

- **Be clear with the witness** that:
  - interview is conducted confidentially, and to allow your investigation lawyers (or third party) to give advice
  - Interviewer represents the company, not the interviewee/witness

Privilege protections in other jurisdictions

Communication protocol

YOU HAVE A NOTICE – NOW WHAT?

In power?

Tranches Timing??

Do you understand it? – Confirm interpretation

Will this address the regulator's concerns?

Limit databases?

Limit brands?

STEP 1: INITIAL TRIAGE

- Consider scope, **timing and burden** – and engage with the regulator early.
- Is the notice **valid**?
- Do you need to notify **insurers** or make other disclosures?
- **Litigation hold**?
- Who needs to be consulted?
- **Risk/consistency**: what have you already told the regulator?

STEP 2: WHAT IS THE BIGGER PICTURE?

- Parallel **internal investigations** - consider setting up **privilege** protections.
- **Risk assessment**: how much further could this go?
- Consider **immunity**.
- Is there a broader investigation – multinational, multi-regulator or multiple parties? Consider a **regular sync call.**

STEP 3: ZOOM INTO THE DETAILS…

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- **PRESERVE**: documents and data, litigation hold, sources
- **COLLECT**: consider timelines, workplan, collection techniques and sources, trackers, IT support, central repository/ database or more searches?
- **REVIEW**: internal or external, privilege and confidentiality claims, notice interpretation
- **PRODUCE**: work backwards from production day to allow time for final checks(privilege, confidentiality, consistency), redactions and signoff, caveats

DAWN RAIDS 101

1. CHECK WARRANT AND ID CARD	• Ensure the time and location are correct. • Ask the 'lead' investigator to confirm their identity matches that listed on the warrant by presenting their regulator-issued ID card. • Ask to take a copy/photo of the warrant
2. CALL LEGAL REPRESENTATIVES	• Ask the officers to not commence the search until after your legal representatives have arrived. • Call KWM– KWM will then alert the internal legal team. • If the officers do not agree, do not obstruct or otherwise resist the search from commencing. • If the officers agree to wait, set up a comfortable holding room (e.g. provide tea/coffee) and comply with any conditions.
3. PRIVILEGE	• If investigators seek access to documents that may be subject to legal professional privilege claim and/or a large number of documents, inform the investigators that these documents may be privileged and this privilege is not waived. • If possible, separate out physical and electronic documents/emails that may be subject to a legal professional privilege claim. • If legal representatives are present, they will put in place arrangements with the investigators for an initial review to be undertaken by the company's lawyers before access by the regulator.
4. OBSERVE THE SEARCH	• If legal representatives are not present, take notes about the conduct of the search, what is seized and copied, and questions asked by the investigators (including answers you have provided). Ask to take photos (or preferably videos) – and do so where you are concerned about non-compliance with terms of the warrant or privilege claims. • If legal representatives are present, do not take notes/photos/videos – just observe and relax. • You may be required to assist the officers in accessing materials (including computer files or document management systems) or answering questions in relation to the search. Be honest and cooperative but do not volunteer information. If you are unsure of an answer, say so. You cannot refuse to answer on the basis of self-incrimination.
5. AFTER THE SEARCH	• Do not delete or destroy any documents. • Do not discuss the search with anyone outside of the office. • Request a receipt of seized materials and a copy of any questioning.

HOW DO YOU SUCCESSFULLY BRING THE TAIL TO AN END?

- If fresh questions keep coming?
- If you're asked about things you've addressed before?
- If there has been a long break in correspondence?
- If you consider the scope is improper or the direction unsound?
- If you uncover something else along the way?
- If there are adjacent issues that need resolving?
- If remediation is needed?

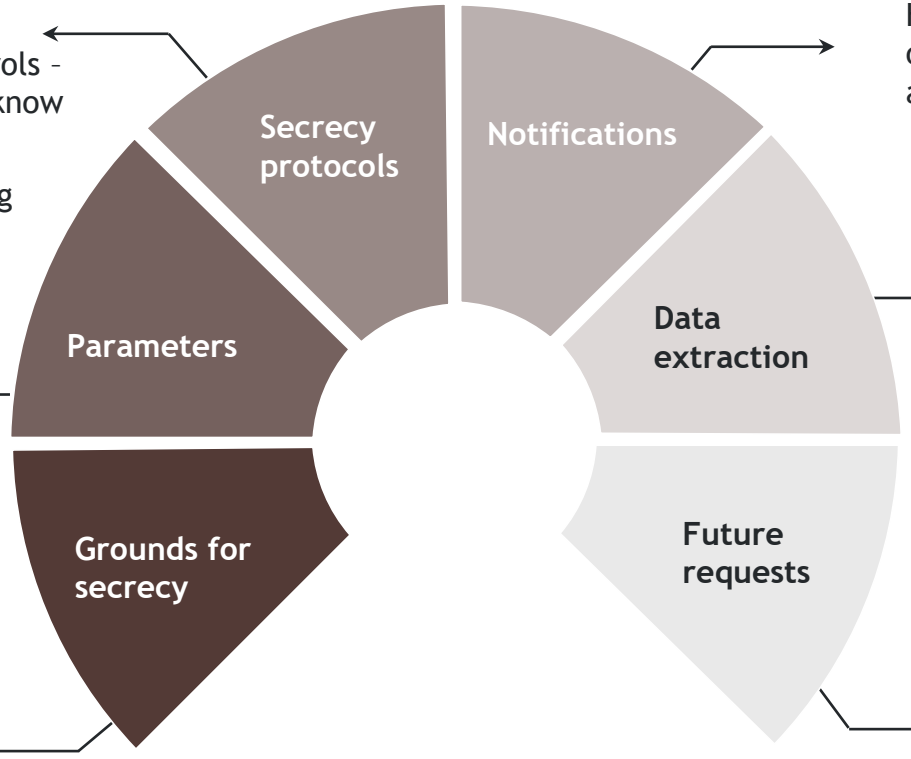
ONGOING SECRECY MANAGEMENT

How do you manage ongoing disclosure, reporting and ad hoc requirements?

- Clear rules and practices required
- Often dovetail into other project controls – eg project name, passwords, need-to-know working groups etc
- Consider group structures and reporting lines / MIS

- To whom do the restrictions apply?
- What is their scope?
- Are there any defences?
- How can exceptions be approved?

Statutory, contractual, general confidentiality principles or otherwise?



How can notifications be made to other regulators, financiers, acquirers and other stakeholders?

Is it possible to extract (and share) valuable information from materials without offending secrecy protocols?

How can these be managed lawfully without dodging the question or providing false or misleading information?

Examples:

- M&A diligence
- Licensing applications
- Cross-border cooperation requests

THANK YOU

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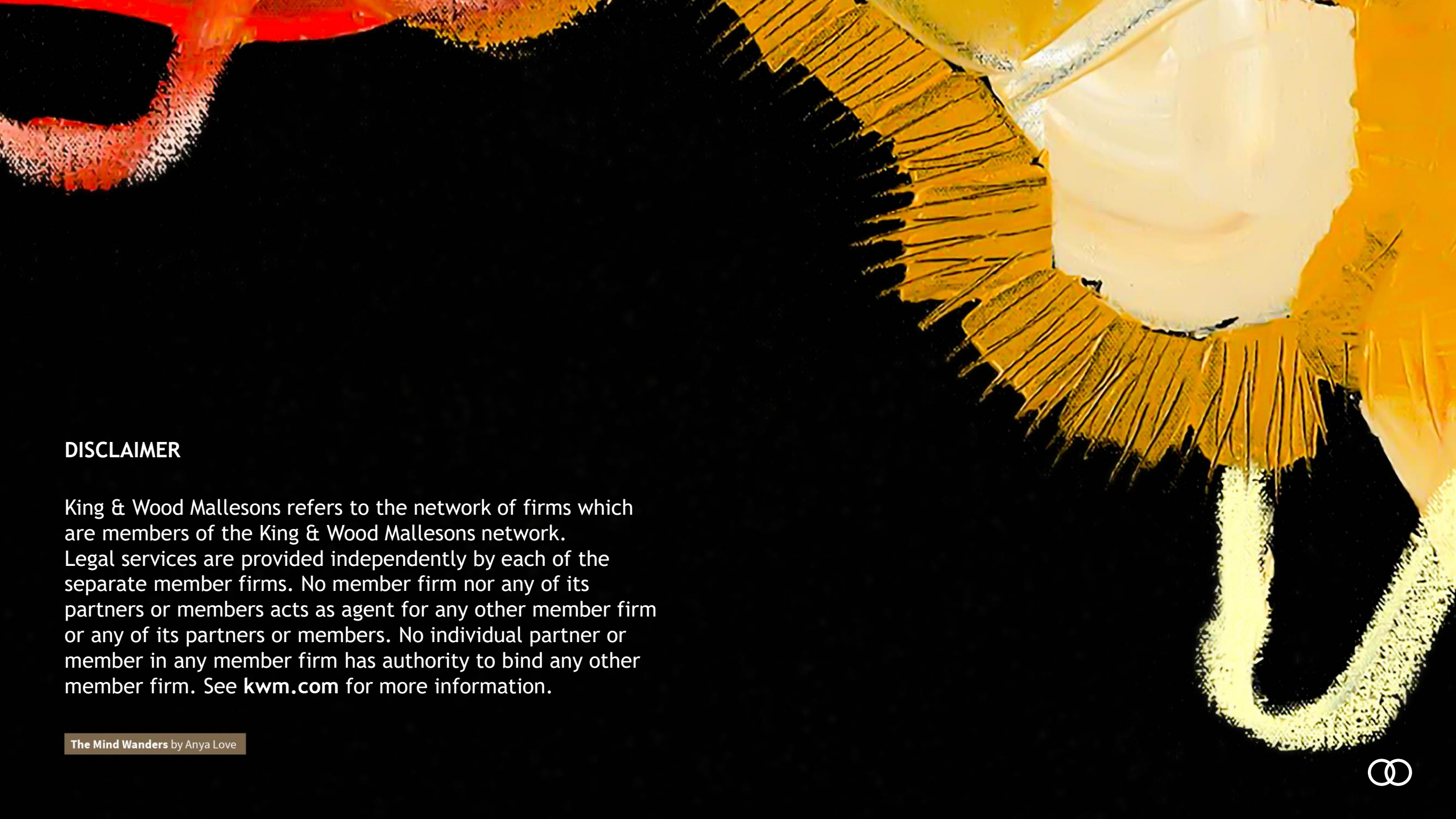

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