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The Three Pillars of Corporate Internal Investigations

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There are three pillars to successfully conducting corporate internal investigations: evaluating triggers, navigating ethical issues, and witness preparation. This article provides a broad overview of important points that every white collar attorney should keep in mind as he or she coordinates an internal investigation.

Conducting Corporate Internal Investigations–Evaluating Triggers

Companies are under constant pressure to investigate and self-report corporate misconduct as government agencies more aggressively investigate allegations of corporate fraud and abuse. This in turn has caused companies to sometimes become "trigger-happy" and has led to an increase in the number of internal

investigations. But is an internal investigation always necessary? This first part provides guidance on the initial decision of whether to conduct an internal investigation and the importance of ensuring an independent investigation.

Business disruption, PR problems, criminal charges, and fines are legitimate concerns for a company to consider in deciding whether and how to conduct an internal investigation.

Numerous factors go into the calculus of determining whether a company should conduct an internal investigation: a company's management style, its corporate culture, whether the circumstances are already under investigation by the government, and the nature of the suspected wrongdoing. At the same time, companies want to minimize business disruption, avert potential public relations problems, and avoid being charged with a crime or assessed a catastrophic civil penalty. Companies are right to consider these legitimate goals in deciding whether and how to conduct an internal investigation. With these goals in mind, any internal investigation should consider the possibility of a potential government investigation, if one is not already underway. Although a company may not believe it is a target, it should approach any credible allegation of misconduct as if it will have to answer to the government. It may be that precautionary steps taken in the beginning will pay off in avoiding a government enforcement action altogether, or at least minimizing penalties in the event of an enforcement action.

Maintaining independence in the internal investigative process is crucial. All of these considerations should be tempered by the rule of reason. If a company has limited resources and the risk of liability is remote, it may not be prudent to undertake an expensive internal investigation. However, in some circumstances,

failing to investigate could have severe consequences. This balance can be a difficult one to strike. With these considerations in mind, the most important question the company must address is whether to initiate an investigation.

Generally, the decision to investigate may be triggered by:

(1) a routine internal audit;

(2) a private or public complaint by a consumer, employee, or competitor;

(3) a manager or board member who learns of suspected impropriety or anomaly in a business practice;

(4) an anonymous tip; or

(5) a government or law enforcement inquiry.

Assuming it is not a law enforcement inquiry (which typically will necessitate some kind of internal review), a company must first evaluate the credibility of the complaint or allegation that might trigger an internal investigation. The company should have a compliance plan in place designating a person or committee with knowledge of the company's key players and departments. That person or team should be notified of all triggers and be responsible for conducting an initial assessment of the complaint or allegation as well as logging all triggering events in a centralized location to enable the company to monitor complaints for trends. This serves a dual purpose, as logging and monitoring triggering events help show that the company has an effective compliance plan and that it does not turn a blind eye to complaints and misconduct allegations, but addresses them by taking them seriously and investigates them.

Companies must also ensure that the persons charged with initially evaluating complaints are free from perceived bias or taint. This is vital as an "insider" may taint the effort to maintain the perception of independence. Companies should have a protocol in place that mandates that a person who is tasked with investigating a complaint or allegation and who is also implicated in that complaint or allegation must recuse himself or herself. The company should also have a designated alternative.

While there is no exact formula to determining whether an internal investigation should be conducted, the following chart lists some of the most important questions underlying the decision process.

Evaluating Triggers
When No Government Involvement Is Anticipated

- ❒ Is there a legal duty to investigate the complaint or allegation?
- ❒ Who must be notified and included in the evaluation process?
- ❒ Is the designated person or team independent and objective?
- ❒ Is the source of the complaint or allegation credible?
- ❒ Is the source an employee subject to protections, and does the law provide such source an incentive to proceed against the company?
- ❒ Have there been prior similar complaints or allegations?

Navigating Ethical Issues

Corporate internal investigations can implicate a number of ethical issues for white collar attorneys. Ethical issues come in all shapes and sizes and can arise at any point in the internal investigation, or even before the investigation has begun! For example, an attorney has a duty to ensure that he or she is not being compensated with tainted assets (such as stolen money, ill-gotten gains, etc.). Nonetheless, most ethical issues tend to arise at the beginning of the representation. Conflicts of interest leading to the potential disqualification of counsel can arise where corporate counsel fails to clearly define the identity of the client (for example, the company or the company's board of directors) or fails to define the purpose and scope of the internal investigation.

Once a company decides to investigate potential wrongdoing, it must define the scope and extent of the internal investigation. A company must balance competing interests. On the one hand, business as usual must go on, because most companies cannot afford to spend precious resources investigating frivolous and incredible allegations of misconduct. On the other hand, credible allegations of

misconduct must be investigated and the results documented in a way that will withstand subsequent scrutiny. One critical factor in defining the scope of the internal investigation is how quickly the company needs the information. The scope of the investigation can depend, in part, on whether the company wants to complete its investigation before the government becomes aware of the issue; whether the government is willing to defer its own investigation to the completion of the company's internal investigation; the timeline for making any mandated self-disclosures to the government; and the need to establish affirmative defenses for the company. The scope of an internal investigation also can be defined by inquiries from government investigators (whether informal or by subpoena), lawsuits or pre-lawsuit demands, and internal compliance reports from employees or customers. Whatever the scope of the internal investigation, it must be clearly defined.

After defining the scope of the internal investigation, the company should prepare and formally approve a written document "chartering" the investigation. The charter can take the form of a resolution from the board of directors or the board audit committee, an engagement letter, or a memorandum issued by senior management or the general counsel. The charter should be a "living document" because companies may need to re-evaluate the scope of the investigation based on new information and allow the action plan to develop and evolve as documents are reviewed and witnesses are interviewed.

Charters for internal investigations should include a number of the following basic elements:

- Specify, where appropriate, that the investigation is being conducted in anticipation of litigation and for the purpose of obtaining legal advice.
- Clearly identify the client—the company, the board of directors, or a board committee.
- Describe the scope of the internal investigation.
- Identify who is responsible for searching for documents, including electronically stored information (ESI).
- Identify who will be interviewed, at least initially.
- Describe how witness interviews will be conducted.
- Explain how third-party witnesses will be handled.
- Describe who the investigators will report to (the entire board, liaison, etc.).

In order to preserve the company's attorney-client privilege during an internal investigation conducted on behalf of a company, an attorney for the company should give some kind of *Upjohn* warning to a company employee before beginning an interview. There are several parts to an *Upjohn* warning. The interviewer, preferably counsel, should state to the employee/interviewee that:

- counsel represents the company and not the employee personally;
- the purpose of the interview is to learn about facts that will enable counsel to give legal advice to their client, the company;
- the conversation is privileged;
- the privilege belongs *solely* to the company because it is the client;
- it is entirely up to the company whether to waive that privilege; and
- the conversation should be kept confidential in order to preserve the attorney-client privilege.

The importance of providing an *Upjohn* warning is illustrated in *United States v. Ruehle*,[1] in which outside counsel conducted an internal investigation on behalf of a company and interviewed company employee William J. Ruehle. During the interview, Ruehle made statements that exposed him to criminal liability. Ruehle was charged, and at his criminal trial, the prosecution sought to admit Ruehle's statements, while Ruehle sought to suppress them.

Ruehle argued that the statements were privileged, because outside counsel had represented him and other individual officers in shareholder suits, and that outside counsel failed to advise him that his statements could be disclosed to third parties. The court found no record that outside counsel ever gave Ruehle an *Upjohn* warning, which would have put Ruehle on notice that outside counsel did not represent him. In so finding, the court gave weight to the fact that the interviewing attorney's notes did not state that an *Upjohn* warning had been given.[2]

Furthermore, even if the attorney gave an *Upjohn* warning, the court found that it was inadequate, because the attorney failed to inform Ruehle that counsel were not representing him and that his statements could be shared with third parties, including the government, for the purpose of a criminal investigation.[3] Although the decision was reversed on the grounds that Ruehle knew his statements would be disclosed, the case illustrates the harsh consequence of failing to give an adequate *Upjohn* warning.

Thus, an attorney conducting an internal investigation should provide some kind of an *Upjohn* warning to his client's employees to ensure that his client is the holder of the privilege. This seems simple enough, but may cause tension, especially if an attorney is tasked with interviewing C-Suite executives. Another ethical issue that an attorney should consider is whether it would be appropriate to offer separate, un-conflicted counsel to employees who are going to be interviewed.

Witness Preparation

Following an internal investigation, company counsel may be tasked with preparing company witnesses for law enforcement interviews, depositions, or even court testimony. It is often a challenge to convince a corporate manager that he or she needs extensive preparation before testifying in a legal proceeding, particularly if that corporate manager is "just a witness." Clients, especially those who have pursued higher education, are often insulted at the notion that they need an attorney to prepare them to testify. They believe that they are going to simply answer questions—something they have done hundreds of times. It is your job as their attorney to dispel them of this myth.

Testifying in a legal proceeding is never simple, even if your client is "just a witness." Witnesses may be eager to complete their testimony and end up providing more information than a question calls for. An experienced attorney can tell you that this has the opposite effect: it does not shorten the process; it makes it longer. This is because the questioner now has more information than was sought, and any good questioner will probe around these additional areas of testimony in hopes of finding information related to his or her original question.

Witness preparation should never be an afterthought.

Clients may also be eager assist the process and in their attempts to be helpful will end up guessing and speculating. This only confuses the record and is detrimental to the fact-finding process because the witness is speaking about things that he or she has no personal knowledge about. An attorney should ensure that his or her client knows the difference between guessing and speculating, on the one hand, and estimating, on the other hand.

Lastly, an attorney should advise the client to listen to the question and answer *only* the question before them. This is best exemplified by the question "Do you know what time it is?" The right answer is the difference between a conversation and testimony. In testimony, the right answer is "yes" and nothing else. Testimony should be succinct and to the point. Testimony is not a conversation. It does not "flow" or entertain. It has its own language and its own rhythm.

Witness preparation should never be an afterthought. It is an attorney's job to ensure that his or her client does not go into a legal proceeding without being prepared, even if the client is "just a witness." At the very least, an attorney should present the client with the following "Ten Rules to Testifying."

Ten Rules to Testifying

1. Take Your Time – A witness should not rush to answer a question.
2. Testimony Is Forever – A witness cannot simply take back what he or she said while testifying. A witness should choose words carefully.
3. Tell the Truth – A witness will be under oath in a legal proceeding.
4. Be Polite – A witness should not get defensive or argumentative.
5. Understand the Question – A witness should never answer a question he or she doesn't understand.
6. "I Don't Remember" Is an Acceptable Answer – If a witness does not remember, he or she should simply say so.
7. Do Not Guess or Speculate – This only confuses the record. "I don't know" is also an acceptable answer.
8. Do Not Volunteer – A witness should answer *only* the question before him or her.
9. Carefully Read Documents – A witness should thoroughly read all documents placed before him or her.
10. Listen to Counsel – A witness hired an attorney for a reason: his or her expertise.

Witness preparation is no easy feat, and every witness needs a different amount of preparation, while most witnesses will likely feel that no preparation is needed. Remember, it is your job as an attorney to ensure that at the very least your client knows the "Ten Rules to Testifying."

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NOTES

1. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).
2. United States v. Nicholas, 606 F. Supp. 2d 1109, 1111 (C.D. Cal.), *rev'd sub nom*. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).
3. *Id*. at 1117.