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ORGANIZING A SUCCESSFUL CORPORATE INTERNAL INVESTIGATION

By

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It is a sign of the times that we see an ever-increasing utilization of independent investigations to scrutinize allegations of wrongdoing or questionable conduct within corporate enterprises. Moreover, companies in trouble have come to realize that nothing less than full disclosure as a result of such investigations will suffice. Limited disclosure not only doesn't work — it can make things worse. This LEGAL BACKGROUNDER provides counsel with insights on how to initially plan for an internal investigation when it becomes apparent one will be needed; reviews process issues that counsel will recurrently face; discusses the essential elements of an investigative work plan; and concludes with some general observations that counsel must keep in mind throughout the process.

Approaching an Internal Investigation

Investigators involved in these types of undertakings must, of course, be totally independent of the organizations engaging them and, as a result, often have little or no background in or knowledge of the matters given to their charge in the investigation. Naturally, any engagement must be preceded by a careful check of any potential conflicts of interest that might be encountered.

It is important also to note that an internal investigation can only be effective if the lawyers conducting it realize that they are not advocating a particular position and need to give consideration to both sides of any disputes over the characterization of particular conduct. The goal must be to develop all the facts and report upon them in an unbiased and balanced manner.

Of initial importance in undertaking an investigation is defining in an *engagement letter* the mandate under which counsel is to operate. (Of course, in a judicially-authorized investigation, such would be encompassed in the order appointing counsel). Otherwise, counsel should:

- Define who the client is and isn't (the corporation, its board of directors or a board committee and particular individuals). Appropriate notice of this status should be given to all persons interviewed.
- Define the scope of the investigation in as precise terms as possible, recognizing that you may not know the full scope of the problems at the outset.

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- Designate a primary contact person or persons within the client organization with whom you can communicate on all matters that arise in the course of your inquiry.
- Commit the client to make available all employees and contractors for interviews and provide for the scheduling, facilities, and logistics for such interviews.
- Commit the client to provide for the retention and production of all books, records, documents and files, especially internal documents such as phone logs and records, e-mails and personal notes, and memoranda, as well as providing for secure storage of these items.
- Come to a clear understanding as to whether counsel is to be provided to and/or paid for those employees involved in the investigation.
- Ensure that the basis for the investigator's fees and expenses is on an hourly and cost-reimbursement basis with no incentives or disincentives dependent on outcome.
- Commit to consult on issues of attorney-client or work product privilege and relations with government investigators.
- State whether a written report of findings, conclusions, and/or recommendations is expected.

Recurrent Process Issues

Careful attention should be given to putting together a team of lawyers and other necessary experts such as forensic accountants, with the requisite skills to carry out the inquiry. In particular, make sure that you have available to you a capable information technology team to assist in the electronic transfer of documents and in searching files for relevant material.

Recognize that you may not be sure of direction at the outset, nor of the extent of the work involved, e.g.:

- The WorldCom investigation, originally thought to focus on \$11 billion in accounting irregularities, eventually concentrated on a massive breakdown in corporate governance and included suspected wrongdoing by investment bankers and tax advisers.
- In the CBS investigation, what began as an inquiry into the authentication of documents turned into a wide-ranging examination of the proper application of journalistic standards.

In putting your team together, you will find that while civil litigators can be useful, they don't necessarily make the best investigators as they sometimes tend to be predisposed to seek a given result. Former prosecutors' investigative instincts are perhaps preferable so long as they don't act too much like prosecutors. The real answer: Get the best talent available.

Recognize that you will generally be calling upon colleagues with full agendas, so time commitments must be discussed candidly.

A team leader should be appointed to coordinate and supervise the investigation and to serve as the overall editor of any written report.

Get the team working as quickly and efficiently as possible. Set up separate issue teams. Monitor the process closely and expand or limit assignments as appropriate. Be sure that all are aware of and held to deadlines for task completion.

Remember to communicate frequently and extensively among the team. Many issues and facts will have significance for more than one part of the team or line of inquiry. This kind of exchange will also help to coordinate issues to be covered in examining a particular witness.

Developing a Work Plan

Next, an appropriate *work plan* must be prepared. It will be vital to work out means to coordinate with any government authorities, the board of directors, or any special committees created to focus on the problem. With WorldCom, my team was involved with the SEC, various U.S. attorneys' offices, a special board committee represented by outside counsel, the bankruptcy creditors committee, and a special court-appointed corporate monitor.

If parallel government investigations are ongoing, address the sensitivities of all involved, particularly in criminal cases where you may, understandably, be denied access to some individuals who may be targets, suspects, or witnesses. Limit the number or persons who are authorized to interact with government officials to ensure consistency and avoid misunderstanding.

Initial interviews should be set up as soon as possible, even if all relevant documents have not been gathered. It is important to get a witness's story as soon as practicable in order to obtain the freshest and most unvarnished recollection. For significant witnesses, it is likely that they will need to be re-interviewed on more than one occasion. Always ask for documents in a number of different ways and more than once. You'll be surprised what shows up. Maintain the absolute confidentiality of your work. Gossip or press coverage through "leaks" can not only compromise the integrity of your effort, but may tip off potential witnesses before you have a chance to interview them. Instruct those whom you interview accordingly. Try to minimize disruption of the ongoing enterprise consistent with its obligation to cooperate.

Some debate exists over the manner in which to record testimony from those interviewed in the course of these investigations. While a transcript or transcribed, taped account may maximize accuracy, my preference is to approach the task in a more conversational format with one or two note takers present. Thereafter, notes of the interviews can be reviewed and cross checked so that an accurate account of the interview can be forthcoming.

While there may be numerous people engaged in the project, be sure that work product is funneled to no more than one or two persons in the finalizing of the effort to minimize the chances of important components being overlooked, as well as to provide for consistent treatment in the editing process of any written report(s).

Counsel will already have decided whether a written or oral report on your work is to be produced. If written, make sure it is expressed in plain and understandable English. Decipher complicated issues and concepts so that they are understandable, particularly if accounting and tax issues are implicated. It is also a good idea to have each section of the report reviewed by team members or others not involved in that particular aspect for "reader friendliness."

Imperative Steps to Investigative Success

- **Be fair.** Remember that you are neither prosecutors nor defense counsel. Recognize the significance of your work and its potential impact. People, including those in executive positions, can lose their jobs as a result of your inquiry.
- **Be thorough.** Issues will inevitably come to your attention from virtually every imaginable source and they all must be carefully evaluated. Separate the issues of significance through a careful triage process.
- **Be correct** ("get it right"). Some issues will be easy to handle. Others will involve difficult judgment calls. If doubt exists on particular points, don't hesitate to recall individuals for additional interviews. Invite the client (and others as appropriate) to review your final work product for accuracy so as to avoid factual errors. Consider having a separate footnoted version of any final written report which provides support from the investigative record for every statement or fact in the body of the report.

General Observations

- It is important to acknowledge that nearly everyone you interview has his or her own agenda or set of objectives (shifting blame, promoting their own interests, shading the facts in a favorable way, etc.). In most instances, it is not hard to see what they are trying to accomplish, and appropriate discounts can be applied. In other cases, a process of triangulation will be necessary so as to tighten down on the true factual picture.
- Maximum cooperation should be sought from all those interviewed. Full voluntary cooperation will be erratic, to be sure, but the key is to elicit as complete a picture as possible, including suggestions of other persons with whom to talk.
- E-mails are among the most productive, if not invaluable, sources of information, second only to testimony itself and a good check on the accuracy of that testimony through refreshing recollections or correcting memory lapses.
- Occasionally, parties will proffer written summaries or “white papers” on particular points and these should be encouraged. They can provide important information and a useful “testing ground” for assertions that might otherwise appear to be either convincing or dubious at first glance. For important witnesses, the providing of such additional information should be encouraged.
- If witnesses are represented by counsel, don’t let them take over or disrupt interviews. Instead, give them a full opportunity at the end of the interview to “state their case.”
- If a written final report is to be made public, be sure that an appropriate media strategy is agreed upon with the client which conforms with any ground rules established at the outset of the investigation and responsibilities undertaken to other participants.

Conclusion

To be sure, we are likely to see more of this investigating phenomenon in the immediate future. Internal investigations call for application of the highest standards of professionalism, as well as the consummate skills of the practicing lawyer. They are designed to permit clients to respond in a proactive manner to suspicions or allegations of wrongdoing and to monitor the efficacy of their ongoing compliance initiatives. In this day and age, these have to be among the highest priorities in the field of corporate governance. Moreover, written investigative reports can be effective tools for arguing against culpability under DOJ’s Thompson Memorandum, the SEC’s model guidelines for “cooperation” and, if worse comes to worse, under federal or state sentencing guidelines.