

Vantage Viewpoints

Inside and Outside Counsel Answer Readers' Questions

By Michael Lacek and Neil Lang

In this issue's Vantage Viewpoints, Michael Lacek, in-house counsel at MetLife, and Neil Lang, partner in Sutherland's Litigation Practice Group, answer questions about internal investigations. Send your questions for the Vantage Viewpoints section to partneringperspectives@sutherland.com.



Why do I need outside counsel for internal investigations?

The short answer to the question is you don't. As nice as it would be to suggest that outside counsel is an essential part of any internal investigation, the simple fact is that in many, if not most situations, inside counsel can effectively conduct or direct internal inquiries. Indeed, internal investigations that do not involve senior management are often performed better and more economically by in-house personnel.

Many larger companies have well established and highly competent internal audit and compliance examiners who can effectively and efficiently investigate a wide range of issues relating to operations, regulatory matters and certain types of financial issues among others. Other significant advantages of internal investigations conducted by internal counsel are the knowledge and familiarity that company employees have with the business, the persons being interviewed, the recordkeeping system, the institution's culture, access to management, and how these aspects may have impacted any potential issues. Last, but not least, it is generally easier to control out of pocket costs when inquiries are conducted internally.

How does outside counsel add value?

Although in-house counsel may be more cost effective, the exclusive use of company personnel can create disadvantages for a company, particularly if a government investigation or shareholder litigation is involved. Because of their position in the company, in-house attorneys frequently perform both legal and business functions. In-house attorneys may also have been consulted as to the legality of the conduct at issue. And, even if in-house attorneys were not directly involved in the alleged activities at issue, they report to and their performance is evaluated by the executive team whose conduct may be implicated.

Although the out of pocket costs of having outside counsel undertake an investigation will be greater initially, if allegations or government investigations involve senior management or serious misconduct, the benefits of retaining outside counsel will usually outweigh the costs.

Internally directed investigations may also require internal auditors to investigate conduct that may have been under their jurisdiction. These potential conflicts are likely to draw skepticism from government agencies and private parties as to the credibility of the investigation's findings.

In addition, there may be practical obstacles to conducting internal investigations in-house. Investigations may involve colleagues and acquaintances within the company and are time consuming and labor intensive. It may also be difficult for inside counsel and auditors to effectively balance their ongoing ordinary responsibilities with the demands of a significant internal inquiry. Furthermore, communications between a special committee and internal auditors likely will not be considered privileged,¹ and the dual responsibilities of in-house counsel can weaken claims of attorney-client privilege for communications between management, a special or other board committee, and in-house counsel.²

In contrast, outside counsel hired to conduct an inquiry will not share in-house counsel's potential conflicts of interest, will most likely have greater experience with internal investigations, and be adept at responding to shareholder claims or agency investigations relating to the subject of the inquiry. Communications with outside counsel also generally receive greater protection as to privilege, particularly when outside counsel is retained in the context of the corporation seeking legal advice.³ Thus, although the out of pocket costs of having outside counsel undertake an investigation will be greater initially, if allegations or government investigations involve senior management or serious misconduct, the benefits of retaining outside counsel will usually outweigh the costs of retaining outside counsel.

Choosing outside counsel to conduct the investigation, however, does not completely foreclose the involvement of in-house counsel. Because of their experience with the company, in-house lawyers can and ordinarily should play an important role in the investigation. In-house counsel can ensure, for example, that outside counsel has ready access to the documents, personnel, technology, and other resources critical to the completion of the inquiry. In-house counsel can also be invaluable in addressing issues relating to company culture and organizational structure, as well as in saving time and resources by procuring the buy-in from important business and management personnel.

Endnotes

1. The self-evaluative privilege is not widely recognized. States that recognize the privilege via statute generally limit its application to specific situations, such as medical peer reviews.
2. See *Penn. Transp. Auth. v. CaremarkPCS Health, L.P.*, 254 F.R.D. 253, 258 (E.D. Pa. 2008). "The 'primary purpose' of the communication at issue must be 'to gain or provide legal assistance' for the privilege to apply due to the fact that 'in-house counsel may play a dual role of legal advisor and business advisor.'" Citation omitted.
3. See, e.g., *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1073. "Communications between a client and its outside counsel are presumed to be made for the purpose of obtaining legal advice." Citation omitted.



"Things have been going much more smoothly since we started riding with representation."

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