

## WHO Should Handle Serious Internal Investigation

In the most recent issue of the Compliance and Ethics Professional Magazine, Issue 08/2011, is an article entitled “*Foxes and henhouses: The importance of independent counsel*”, in which author Dan Dunne discussed what he termed a “critical element” in any whistleblower response, which is a “fair and objective evaluation.” Dunne wrote that a key component of this fair and objective evaluation is the WHO question; that is, who should supervise the investigation and who should handle the investigation? Dunne’s clear conclusion is that independent counsel should handle any serious investigation.

Dunne list three factors which he believes should cause a company to retain independent counsel for internal investigations of serious whistleblower complaints. First, for any corporate ethics policy to be effective, it must be perceived to be fair. André Agassi was right, *perception is reality*. If your employees do not believe that the investigation is fair and impartial, then it is not fair and impartial. Further, those involved must have confidence that any internal investigation is treated seriously and objectively.

Secondly, if regular outside counsel investigates their own prior legal work or legal advice, Dunne believes that “a plethora of loyalty and privilege issues” can come up in the internal investigation. It is a rare legal investigation, where the lawyer or law firm which provided the legal advice and then investigates anything having to do with said legal advice, finds anything wrong with its legal advice. Dunne also notes that if the law firm which performs the internal investigation has to waive attorney client privilege, it may also have to do the same for all its legal work for the company.

The third point Dunne raises is the relationship of the regular outside counsel or law firm with regulatory authorities. If a company’s regular outside counsel performs the internal investigation and the results turn out favorably for the company, the regulators may ask if the investigation was a “whitewash”. If a regulatory authority, such as the Securities and Exchange Commission (SEC) or Department of Justice (DOJ) cannot rely on a company’s own internal investigation, it may perform the investigation all over again with its own personnel. Further, these regulators may believe that the company, and its law firm, has engaged in a cover-up. This is certainly not the way to buy credibility.

Jim McGrath, writing in his Internal Investigations Blog, noted that despite the fact that using specialized investigation counsel is a best practice that is worth the money, one of the more difficult things is convincing decision-makers of the this advantage. This is particularly so when speaking with mid- or small-sized companies that are part of larger supply chains. While general counsels and compliance officers may be up to speed on outsourcing critical inquiries, managers in business segments often are not and frequently reply that they’ve “got someone” in the company who “takes care of that stuff.” However, it is clear that such an approach will be more

costly to a company in the long run. McGrath emphasizes the need for independent counsel for serious corporate investigations.

I would add a couple more reasons to those listed by Dunne and McGrath. If there are serious allegations made concerning your company's employees engaging in criminal conduct, a serious response is required. Your company needs to hire some seriously good lawyers to handle any internal investigation. These lawyers need to have independence from the company so do not call your regular corporate counsel. Hire some seriously good investigative lawyers.

I believe that there is another reason to hire outside counsel. It is also important because, no matter what the outcome of your investigation, you will most probably have to deal with the government. If the investigation does reveal actionable conduct, your company will need legal counsel who is most probably an ex-DOJ prosecutor or ex-AUSA to get your company through that process. Even if there is a finding of no criminal activity, you will need very competent and very credible counsel to explain the investigation protocol and its results to the government.

One need only look at *L'Affair Renault* to see the hazards of not following the WHO approach of Dunne, McGrath or myself.

*This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at [tfox@tfoxlaw.com](mailto:tfox@tfoxlaw.com).*

© Thomas R. Fox, 2011