Conducting Internal Investigations

In-House Counsel's Guide

March 17, 2021

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The authors also would like to thank Dylan Schweers, litigation associate at Goodwin Procter LLP, for his assistance in preparing this publication.

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Introduction

Whether you are a director, or a member of an in-house legal, human resources, or internal audit team, there are sensitive scenarios that occur daily in companies and charitable organizations across industries that trigger the need for an internal investigation. It is critical that, as soon as allegations come to light, decisions are made about whether to investigate, who should direct and conduct the investigation, the goals and scope of an investigation, and whether a report, written or oral, will be issued. This guide sets forth a framework of best practices and key considerations for effective internal investigations, including special subject matter and industry-specific considerations; preserving the attorney-client privilege and attorney work product protection; the need for disclosure to and coordination with auditors, regulators, and others; and conducting investigations remotely.

This document does not constitute legal advice; it sets forth practical, guiding principles for conducting effective and efficient internal investigations. These guiding principles are not bright line rules, and each internal investigation must be tailored to its particular facts, circumstances and issues. Any internal investigation process also should be iterative, and the practices and issues highlighted in this document should be considered at the outset of any investigation, and continually re-evaluated through the course of the review. The investigative work plan likewise should be revisited and revised as appropriate to ensure that it is continuing to meet its goals.

Overview of the Internal Investigation Process

Step One: Decide Whether to Investigate

Common Triggers of Investigations

The following events, among others, may trigger the need to conduct an internal investigation:

- Search warrants, receipt of subpoenas, or other regulatory requests for information;
- Government interviews of current or former employees;
- Shareholder demand or civil lawsuit (or threat of a lawsuit);
- News media or other reports of industry sweep;
- Whistleblower complaints or anonymous hotline reports;
- Red flag in acquisition due diligence;
- Internal audit findings;
- Employee complaints;
- Third-party complaints (customer, potential employee, supplier, etc.); and / or
- Suspected data breach or other security incident involving customer, employee, or clinical trial data.

Whether to Conduct An Investigation

The threshold issue to be considered upon learning of an allegation of potential wrongdoing is whether to initiate an internal investigation. On balance, some level of internal review generally is prudent in response to almost every report or complaint of wrongdoing. At a minimum, enough preliminary review should be conducted so that the company or organization can make an informed decision regarding whether further fact-finding is warranted. In addition, regardless of how allegations arise and whether an internal investigation is ultimately conducted, the company should adequately document the intake and disposition of every report, even where the decision is made to cease the inquiry after initial review.

As a general matter, there are a few key considerations when determining whether to conduct an internal investigation:

- Source and credibility of the information;
- Nature of the alleged misconduct, including
  - The severity of the alleged misconduct;
  - Whether there are potential criminal, regulatory, or other legal implications;
  - Whether the allegations involve senior management; and
  - Whether the allegations are a one-time incident or alleged systemic or recurring issue.
- Benefits of investigating versus potential consequences of not investigating.

Potential Benefits of Investigating

Under the right circumstances, conducting an effective internal investigation protected by the attorney-client privilege can benefit the company in a number of ways:

- Developing a comprehensive understanding of the facts necessary to allow management and the board to make informed decisions;

- Assessing the organization's potential criminal and civil exposure;
- Remedying the conduct to prevent further violations;
- Memorializing the organization's good faith response to the facts as they become known;
- Insulating senior management and / or the board of directors against allegations of complicity or breaches of fiduciary duties;
- Helping defend against shareholder or customer claims; and
- Promoting a culture of transparency and compliance.

U.S. regulators increasingly expect that companies will monitor their own conduct and report potential wrongdoing to the appropriate enforcement agencies. If it appears that the government has already initiated an investigation into the alleged conduct or that one is probable, then the case for initiating an internal investigation is significantly stronger. By promptly developing the facts, counsel is best equipped to control the factual narrative, argue against prosecution, and respond to government requests. An internal investigation also reduces surprises that may arise during a government investigation, allowing the company's legal advisors to stay ahead of the outside investigators.

Likewise, private plaintiffs are filing more cases with significant allegations that attempt to call corporations' conduct into question. In the case of pre-suit shareholder demand, a special committee of independent directors empowered by the board to conduct an internal review and determine whether the prosecution of derivative claims is in the best interest of the company can be a powerful aspect of a board's management authority. In the case of alleged sexual harassment and other serious misconduct by senior management, a prompt internal investigation also is the first step of an appropriate "zero tolerance" corporate response.

The prompt results of an internal investigation also can help the company determine whether to consider self-reporting to government regulators *prior* to the initiation of the government's own investigation, which is necessary to attempt to obtain "cooperation credit." Moreover, the result of an internal investigation also can help the company determine how to proceed in its discussions with the government during a government investigation once it has been commenced. Among other things, it will help a company decide whether it should seek to settle the government investigation or persuade the government to agree to a favorable settlement. In the event that a government investigation is threatened but has not yet been initiated, disclosing the results of an internal investigation may assist the company in persuading the government that no government investigation is necessary, or that the government investigation need not be as far-reaching as it might otherwise be.

A careful internal investigation also allows the corporation to discuss the subject matter of the investigation with employees. It may also provide an opportunity to help lock in the testimony of witnesses at an early stage, and potentially mitigate unnecessarily harmful testimony down the road. An internal investigation is also particularly prudent if private litigation has been commenced or is probable. Among other things, a prompt and effective internal investigation and appropriate remediation of certain allegations of misconduct may assist a company in mounting a successful affirmative defense in private litigation.

Finally, an internal investigation can provide opportunities for the assessment of and enhancements to internal controls, training, and / or policies. It is particularly important to ensure good corporate hygiene is being followed during the current work from home environment and to develop an appropriate system of remedial measures to address any deficiencies.

Potential Disadvantages of Investigating

Whether to initiate an internal investigation may be a more difficult decision when the government has not yet initiated an investigation or is unlikely to do so. Despite its many benefits, an internal investigation does have certain costs. They generally do not override the need for an internal investigation, but the potential costs of such a review must nevertheless be addressed. For instance, if the investigation is not privileged, it could create a roadmap for government officials and private (perhaps class action) litigants. Even if counsel has faithfully cloaked an investigation with layers of privilege, the company may be forced (or, at least, strongly encouraged) to waive that privilege and share all aspects of its internal investigation with the government. There also could be reputational concerns if the investigation becomes known to the public, and potential privilege waiver implications for publicizing an internal investigation report. Finally, an internal investigation can be disruptive and costly in terms of fees and lost business opportunities. Document collection, e-mail review, and difficult questions in interviews may be distracting and impact employee morale.

But despite the potential costs, it is almost always preferable to get to the bottom of the matter. For one thing, a company's willingness and capacity to conduct an effective internal investigation is an important component of an effective compliance program. And senior management has an obligation to take appropriate steps when confronted with indications of potential wrongdoing. Conducting an internal review *now* also can avoid exposing the company and board to risk of regulatory action or private litigation later — if, for instance, the problem goes undetected or is not remediated and, ultimately, recurs.

Immediate Steps to Prevent Real or Perceived Risks

From the outset and throughout the internal investigation, it is important to consider the need to address potential imminent safety, environmental, financial statement, or other concerns. Assuming the allegations are true, does the alleged conduct need to be stopped immediately? It may also be necessary to address potentially volatile circumstances, such as employee safety concerns, or temporary reassignments or leave.

If the allegations involve health care, pharmaceuticals, or other areas that implicate patient safety, it will be necessary to consider whether there are practices that should be suspended pending the investigation. Likewise, if patient personal health information ("PHI") is implicated in the investigation, this information is subject to privacy and securities laws and regulations and notification obligations in each relevant jurisdiction. If the allegations involve an alleged data or confidentiality breach, investigators should consider taking immediate steps to ensure that the company's and other confidential information is secure.[1] Finally, to the extent the allegations involve potentially false statements in connection with state or federal grants or applications, investigators should consider whether and / or when suspension of draw-downs on those grants is appropriate, as well as potential self-reporting to relevant agencies.

[1] The company or organization also should consider any applicable federal, state, and international data breach notification requirements.

Step Two: Decide Who Should Conduct and Direct the Investigation

Despite the potential costs, in most instances an internal investigation is necessary. The next decision is who should conduct and direct the investigation. The answer generally depends on who is being investigated, the nature and seriousness of the alleged wrongdoing at issue, the need to keep the internal investigation and results privileged, and the resources needed to manage the investigation effectively.

Counsel, auditors, or human resources

Allowing internal auditors, compliance personnel, or human resources staff to conduct the investigation (as opposed to in-house or outside counsel) may be less disruptive and could decrease the employees' level of concern over the seriousness of the situation. Such internal reviewers may also be the most economical solution. In-house or retained counsel, however, may be more experienced at conducting an investigation, and may also have greater objectivity and independence in assessing the progress and results of the investigation. Further, attorneys are often asked to provide legal services based on the results of the investigation. Most important, having legal counsel involved in and directing the investigation will provide the strongest chances of cloaking the investigation with the attorney-client and work product privileges.

In-house counsel or outside counsel

If counsel is selected to lead the internal investigation, the next question is whether the company should use in-house or outside counsel. The following general factors should be considered in determining whether the investigation is sufficiently serious to warrant the retention of outside counsel:

- The seniority and prominence of the individuals who will likely be the subject of the investigation;
- The potential financial exposure to the company;
- The extent to which the subject matter of the review is likely to result in law enforcement activity; and
- The need for actual or perceived "independent" review.

Outside counsel present a number of benefits. For instance, in most cases, outside counsel will be more objective and, perhaps more important, will *appear* more objective to outsiders, including the government. Such independence may be important to prosecutors who may seek to rely on reports or presentations provided by counsel conducting the investigation. If the subject matter of the investigation implicates senior management or the legal department, the independence of the outside law firm might provide the board of directors additional comfort in relying on the results of the investigation.

Outside counsel also frequently have greater resources and more experience in conducting internal investigations. In-house corporate counsel are busy running a business or managing disparate litigations. Outside counsel, on the other hand, are in the business of conducting investigations.

Outside counsel also may provide a greater degree of privilege protection. While the attorney-client privilege and attorney work product doctrine can apply to the work of in-house attorneys, courts have applied stricter standards to in-house counsel in determining whether these privileges apply. The work of in-house counsel is more likely to be viewed as "business" in nature, whereas courts are less likely to find that a business purpose was the primary purpose of an internal investigation if that investigation is conducted by outside counsel.

On the other hand, in-house counsel generally have a greater familiarity with their own organization and will not have to spend time getting up to speed. The presence of outside counsel also may increase the level of concern among employees. Depending on the circumstances, it may make the most sense to implement a staged approach, with in-house counsel handling the investigation during its early stages, consulting with

outside counsel as needed, and ultimately turning the investigation over if it escalates. For one thing, the expense of outside counsel cannot be undertaken every time a company needs to conduct an inquiry into potential wrongdoing. In addition, especially at the early stages, it may make the most sense to leverage in-house counsel's superior knowledge of the company's business, procedures, and personnel.

In the event the decision is made that outside counsel should lead the investigation, additional consideration should be given to whether the company's existing outside counsel or an unaffiliated law firm should conduct the investigation. This decision turns in large part on the need for a truly "independent" review. For instance, if the allegations implicate members of the Board of Directors, the Board should generally consider forming a committee of independent, non-implicated directors, who should retain an unaffiliated law firm to assist in conducting the investigation. If the allegations implicate high-level executive officers, the investigation most likely should be overseen by the Audit Committee or other independent member of the Board of Directors, who typically will choose an unaffiliated law firm to assist. When an internal investigation is being directed by a committee of the Board of Directors, the Board will need to pass a resolution nominating specific directors to the committee and authorizing the powers being delegated to the committee. If the allegations involved non-executive managers or other employees, in-house counsel or other regular outside counsel generally should oversee the investigation.

E-discovery resources

In addition to retaining outside counsel to conduct the investigation, internal investigators often require the assistance of specialized e-discovery counsel and vendors to advise on a data preservation, collection, and review protocol. The data collection, preservation, and review protocol must be most defensible and well-documented in the event that the scope or propriety of the investigation is ever challenged. Likewise, remote internal investigations require additional planning to achieve the most efficient execution, and investigators should ensure that their e-discovery resources possess the necessary experience in these circumstances.

Other outside consultants or forensic investigators

Internal investigations often require the assistance of private investigators, forensic accountants, technology experts, and other specialized consultants who can be helpful in fact-finding and analysis of data. One of the decisions that must be made early in an investigation is whether to rely on in-house expertise or outside experts for that expertise. Although personnel who are already familiar with the matters at issue may be most efficient in many cases, this may put these personnel at risk of having to testify regarding the factual analysis performed in connection with the investigation.[2]

Steps also must be taken when using non-attorney consultants or investigators to protect the privileged nature of the work. Among other things, counsel, preferably outside counsel, should retain the consultant. Retainer letters should state that the consultant is retained by and at the direction of counsel to assist counsel in providing legal advice and in anticipation of litigation, and that this subjects all consulting work to the attorney-client privilege and work product doctrine. Written reports, if any, should be created only upon request of counsel, and, if created, such reports should state at the outset that they were created at the direction of counsel. All documents should be addressed and sent to counsel with the usual and appropriate "Privileged and Confidential; Attorney Work Product" label.

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[2] *See, e.g.*, *In re Six Grand Jury Witnesses*, 979 F.2d 939 (2d Cir. 1992).

Cross-Border Issues

Investigators should pay special consideration to issues that may arise if the internal review involves operations, subsidiaries, employees and / or interviewees located in another country, as the laws of the non-U.S. jurisdictions may impact how the investigation proceeds. For example, various non-U.S. jurisdictions have data privacy laws that are more protective of employee emails and personal data than the laws in the U.S. These laws can impact the ability to collect, the ability to review, the location where review can occur, and how the data can be stored. In many countries, written employee consent is required to access employee company email accounts and personnel data. Similarly, Chinese authorities take a broad view of information deemed to be state secrets. It may be important for investigators to seek advice from local counsel regarding the extent to which the PRC's state secrets regime will limit the ability of a multi-national parent company to transfer company-owned information from China to an offshore jurisdiction for review and analysis.

Privacy concerns also arise in the context of witness interviews. For example, you may determine that you want to record a particular witness interview. You must first determine where the interviewer and interviewee will be located, what the relevant law is of those jurisdictions, and which jurisdiction's law applies. Recording an individual without his or her informed consent may give rise to a civil or criminal offense that can carry substantial penalties.

In addition, depending on the laws of a particular jurisdiction, there may be mandatory disclosure requirements if the investigation uncovers evidence of particular misconduct or a crime in that jurisdiction. Issues may also arise if the company chooses to discipline or terminate employees in a non-US jurisdiction. Decisions such as those involving severance to a discharged employee or concerns about discrimination can implicate local employment laws.

In order to prepare for and respond to these types of issues, the company should consider engaging local counsel and local forensic resources to assist with the internal review. While U.S. companies will likely want to retain an experienced, U.S. based law firm to oversee the investigation to ensure compliance with U.S. law, the U.S. firm may not have any expertise in the laws of the relevant jurisdiction. As such, depending on the nature of the allegations at issue, it may be prudent to engage a qualified local counsel at the outset of the investigation. That way, the investigative team in the U.S. will know in advance what issues may arise during the investigation and what legal factors must be considered. Local counsel can also be on hand to assist with witness interviews, potential employment actions, or other remedial measures. Local counsel advice can provide a company with comfort that it is making an informed decision based on the interests of the client and the likely legal consequences with the assistance of experienced local counsel.

Step Three: Define Goals and Parameters of the Investigation

Once decisions are made to investigate and regarding who will handle the investigation, the company must set the goals and parameters of its work. A typical internal investigation can accomplish a number of goals, including: (i) developing the facts and evidence; (ii) determining the extent of potential civil and criminal liability; (iii) formulating a strategy for future compliance; and (iv) remedying past misconduct.

Once the goals are established, the team should determine the appropriate scope of the review. Internal investigations of every size require balancing efficiency with quality, thoroughness, and completeness. One of the biggest challenges in any investigation is designing the scope of the review so that it is sufficiently thorough, while not overly broad. This effort can have critical implications on the credibility of the investigation, as well as the costs.

Approaching an investigation in phases and staying focused on specific issues or allegations can help manage costs and avoid "mission creep." Likewise, it is generally sensible to start with a set of preliminary investigative steps to identify supporting evidence that would help the company determine the need to probe further. While a broad investigation will likely produce more information and will put the company in a better position to assess its overall exposure, a broader investigation leads to greater internal disruption, will take longer, and will be more expensive.

Another initial consideration for public companies is when and to what extent to inform a company's outside auditors of the allegations and internal investigation. As a general matter, it is advisable to keep outside auditors timely informed of such allegations and to establish a mechanism for regular updates and input on the investigative procedures.

A related point to consider at the outset is the timing of the investigation. Depending on the nature of the investigation, this could be dictated by outside factors, including upcoming public filings or disclosures, anticipated employment actions, news or media reports, or the government. The length of the investigation is, of course, also contingent on its scope: how much information needs to be gathered and reviewed. But an extended investigation risks information leaks and further disrupts business.

The investigative team should identify key documents, employees, and other information to be evaluated during the investigation at the outset. Finally, the team should consider its options as to how the results of the investigation will ultimately be reported. Beginning with the end in mind will save time and help the investigation stay more organized as it moves ahead.

Step Four: Conduct the Internal Investigation

To ensure the effectiveness of the investigation, a control group should be established and be involved in developing a strategy for the investigation. Among other things, this group will determine who needs to be informed about the investigation. Although confidentiality must be considered and carefully preserved, certain supervisors and managers will need to know what is happening in order to facilitate the collection of documents and the scheduling of employee interviews.

Clear direction also must be provided to employees and managers as to the confidentiality of the investigation. Employees should be instructed as to how they should respond to inquiries from the government, media, or other outside parties. Cooperation of employees should be expected and received, but employees, of course, have competing concerns: if an employee is a subject or target of a criminal investigation, the employee may choose to invoke the Fifth Amendment and refuse to cooperate, regardless of the employment ramifications.

Consider the need for a public relations strategy

Corporate misconduct can damage a company's reputation. Controlling the timing and content of the information disseminated to the public is important. Companies, in conjunction with counsel, should designate a spokesperson to whom all outside inquiries should be directed. In-house or outside counsel may be adept at handling these inquiries.

Another option is hiring a public relations firm. Companies should be aware that disclosure of investigation reports to the public may waive attorney-client privilege merely by referencing protected information. Mandatory disclosures made in the normal course of business — including, for example, quarterly reports — should conform to the public relations strategy. The goal is to control the message to the greatest extent possible. But at no point should the public relations message trump the litigation strategy. And, indeed, public relations mistakes can adversely impact the investigation itself. Early public denials, pronouncements of innocence, or, worse yet, statements of questionable veracity may provoke the government into a more vigorous investigation than it would otherwise undertake. Above all, the goal of an investigation is to resolve the alleged misconduct in the way that best suits the company's interests. Public relations should not be ignored, but it also should not distract from that goal.

Document Collection and Review

Document collection and review is a critical component of any internal investigation. Among other things, documents can provide the most objective evidence and assist counsel in obtaining information from witnesses. That being said, the most expensive aspect of an internal investigation is usually the review of documents and associated technology costs. While this is often an unavoidable reality of an investigation, care should be taken by the investigative team to scope document review reasonably, and not overly broad unless the initial findings warrant a deeper dive.

As soon as the company becomes aware of allegations or evidence of misconduct, it should suspend normal document retention procedures and preserve all documents relevant to the subject matter of the investigation, including e-mails. If the company has become a target or subject of an investigation, potentially responsive documents cannot be destroyed, regardless of general document retention policies. A diligent search should be conducted to locate and secure documents and electronic devices (laptops, thumb drives, cell phones, etc.) that relate to, or contain data relating to, the subject transaction or incident. While companies are in remote work environments, it is critical to collect relevant hard copy documents and electronic devices from employees, regardless of whether they are kept in the company's offices or at its employee's homes.

It is important to review and become familiar with all documents potentially relevant to the investigation, even those that are not responsive to any pending document requests or subpoenas, including:

- Policies, procedures, and manuals;
- All emails and other electronic data, including, if economically feasible, archived emails;
- Personnel files;
- Minutes from Board of Directors meetings and related Board materials; and
- Privileged documents that are not subject to production.

If the government has opened its own investigation, it may request that the company produce documents on certain topics. A thorough document review gives investigators a preliminary understanding of the factual landscape so that they may position the company in the best light while remaining forthcoming to the government. It also provides context for witness interviews, and helps the investigators develop the facts and questions for each interview.

Although most forms of electronic documents can be collected remotely, it may be more difficult to collect and review hard copy documents. In these instances, it may be possible to wait to perform certain hard copy collections, particularly if the matter is less time-sensitive and does not pose a risk of spoliation. Alternatively, investigators may ask local legal or compliance personnel to conduct the hard copy document collection pursuant to a clear document collection protocol, and then transfer the documents to investigators via a secure file transfer site.

Witness Interviews

Witness interviews are a key part of the investigative process and, along with documents, are generally the primary source of factual information that will be gathered during the investigation. While interviews have great potential to provide useful information, they come with significant challenges. Thoughtful planning and execution are critical to maximize the former and minimize the latter. Careful consideration should be given to who should conduct the interviews and whether anyone from the company should be present.

It generally is best if attorneys conduct the interviews. For one thing, having an attorney conduct interviews strengthens the argument that what is said during the interviews is covered by the attorney-client privilege (in the case of employee interviews) and that notes or memoranda documenting the interview are similarly protected as privileged, as well as attorney work product.[3] Further, counsel generally have more training and experience in synthesizing relevant facts and questioning witnesses.

Other logistical factors also play a significant role in conducting effective interviews. The timing and location of the interviews should be convenient for the employee, and the interviewer should make the employee feel comfortable. If the employee is "on guard," it is less likely that he or she will be candid during the interview.

Interviews should be conducted of all company personnel likely to have knowledge regarding the relevant transaction or the alleged violation. Before interviewing personnel, counsel should review the relevant documents and interviews, prepare an outline of topics to be covered with the witness, and select the documents that should be shown to the witness during the interview. The interviews should be prioritized,

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[3] *Upjohn Co. v. United States*, 449 U.S. 383, 394-399 (1981) (attorney-client privilege protects attorney notes taken during interviews with employees during internal investigation).

as the order in which they are conducted makes a difference. The investigative team also should be alert to sensitivities in interviewing directors and senior management, and consider whether senior management really needs to be interviewed. On the other hand, it is important to ensure that all necessary interviews are conducted and that there is no perception of favoritism shown to senior management.

When considering whom to interview, the investigative team should also look beyond current employees. Former employees may have knowledge of the alleged wrongdoing. If that is the case, assess whether they are willing to cooperate. An employee's willingness may be influenced by the circumstances under which she or he left the company. If the employee left on unfavorable terms, she or he may be less likely to assist the company. And if particularly disgruntled, the employee may pose a risk of disclosing unfavorable information to the government or the media. By diligently researching these matters, investigators increase the likelihood of gaining useful information and simultaneously reinforce another benefit of internal investigations: reducing surprises.

An important consideration is whether to conduct the interview in-person or remotely. Factors to consider are: the severity of the allegations in the investigation, the rank of the interviewee, the involvement of the interviewee in the subject matter being investigated, and the import of being able to adequately assess the interviewee's credibility. For instance, interviewing an employee about the company's general policies and procedures relevant to a particular subject may easily be conducted remotely, while interviewing an employee about allegations that have been made against him may be best suited for an in-person setting where you can ore easily control the tone of the interview, confront the witness with documents, and assess the witness' credibility.

Where interviews must be conducted remotely, it is important to be mindful that the potential presence of undisclosed or unauthorized third parties during an investigative interview may risk privilege waiver. Investigators should explain this risk to employees and emphasize that no one other than the witness (or his / her counsel, if applicable) should be physically present or within earshot during the interview.

Regardless of how you conduct the interview, it is important to lay out a strategy for sharing documents with witnesses. Documents may be provided (either by e-mail or mail) to the interviewee beforehand, or you may use screen sharing technology to show documents to witnesses without giving them the benefit of a preview of the document beforehand.

Conducting the Interview

Suffice to say, it is critical to preserve the attorney-client privilege and the work product doctrine at each stage of an internal investigation. Employee interviews are subject to the attorney-client privilege. Recordings of interviews, however, may be considered purely factual communications that, as verbatim transcriptions, are not subject to the attorney work product doctrine.[4] Accordingly, it is best not to record interviews and instead have the interviewer (or, preferably, another attorney in the room) take written notes which include his or her thoughts and mental impressions. Because opinion work product receives greater protection than fact work product, it is more likely that written notes including an attorney's thoughts and impressions will be protected.[5]

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[4] The Federal Rules of Criminal Procedure also require production of contemporaneously recorded statements after the witness has testified on direct examination at trial. Fed. R. Crim. P. 26.2.

[5] However, counsel should be aware that the fact that interview memoranda contain mental impressions can result in complexities later if the memoranda are disclosed to the government as part of a company's cooperation efforts.

Counsel also should give the employee an *Upjohn* warning. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court held that communications between company counsel and company employees are privileged, but the privilege belongs to the company, not to the employee. Providing the warning makes clear that counsel represents only the company. Anything the employee states in the interview is privileged only between counsel and the company. The company may choose to waive the privilege in the future, and in that event, the employee's statements may be disclosed to the government. If clearly given, an *Upjohn* warning sets the boundaries of the interview and removes any doubt about whether counsel represents the employee.

Of course, if employees know that they will not control the fate of their own statements, they may be less likely to speak candidly with the interviewer. But given the ethical consequences posed by an ambiguous or altogether omitted *Upjohn* warning, some loss of candor is a necessary risk.

After giving the *Upjohn* warning, counsel should clarify his or her role. Inform the employee about the scope of counsel's representation and the general purpose of the investigation. But stick to generalities. It is best not to discuss strategies and theories of the case with people who do not need to know them. In the same vein, consider whether anyone from the company should be present during the interviews. Sometimes this may be preferable, but usually it is best to minimize the presence of observers in the room. Think twice about disclosing sensitive information during the interviews. The employee may repeat the information the interviewer discloses to the government or become otherwise unfavorable to the company's case. These tips are small parts of a bigger objective: carefully controlling what information is disclosed, and to whom.

Separate Counsel, Joint Defense Agreements, and Indemnification[6]

In some circumstances, it may be appropriate to recommend that a current or former employee hire separate counsel. This may be advisable if, for example, the employee's interests may become adverse to the company's interests at some time in the future. Separate representation may also be important if the government is likely to interview the employee down the road. So, too, if counsel representing the company faces a conflict of interest. Even if there is no current conflict, counsel may potentially be forced to withdraw if a conflict becomes evident at a later date.

If an employee does obtain separate counsel, company counsel should explore the possibility of a joint defense agreement ("JDA") between the company and the employee. The joint defense privilege, sometimes a "common interest privilege," was recognized by courts as early as 1964 as an exception to the normal rule that attorney-client privilege and attorney work product protections are waived when otherwise privileged communications or materials are disclosed to a third party.[7] Pursuant to this exception, privileged communications between a client and his attorney, and that attorney's work product, remained protected even if disclosed to certain third parties. In essence, pursuant to the joint defense privilege, information is permitted to be shared among defendants as if they were represented by joint counsel, but with each defendant having the benefit of individual counsel to fully protect and advocate for its own separate interests.

The privilege can be asserted defensively, to avoid having to disclose information to the government, and also offensively, to prevent another party to the joint defense group from disclosing joint defense information. The party seeking to establish the existence of a joint defense privilege and assert its protections must demonstrate

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6 This section is intended to provide general information regarding the use of JDAs, with a focus on federal law. Courts' recognition of the existence and scope of the joint defense privilege varies across federal and state jurisdictions; practitioners should research local law to confirm applicability to their particular circumstances.

7 *See Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964).

that (1) the communications were made in the course of a joint defense effort; (2) the communications were designed to further the joint defense effort; (3) the communications were intended to be kept confidential; and (4) the privilege has not otherwise been waived.[8] JDAs need not be written and can be formed by anything from simple oral undertakings to detailed written agreements.[9] Some attorneys choose not to reduce agreements to writing so that the agreements are not subject to production.[10] Others wish to avoid lengthy negotiations regarding nuanced waiver and limitations concerning issues that may or may not ever come into play.

At the same time, there are risks to JDAs. It is important for counsel to remember that, even though they are preparing a joint defense, they still owe an independent professional duty to their individual clients. Company counsel must do what is best for the company; the employee's counsel must do what is best for the employee. If counsel anticipate that their clients' interests may diverge in the future, they should structure the JDA accordingly. One solution is to restrict the JDA to a limited issue on which the parties have common interests. Furthermore, the common interest privilege only protects the confidentiality of information exchanged to further the joint defense.

Companies may also want to consider indemnifying their current and former employees and advancing their legal fees, if they have separate counsel. In some cases, company executives may be entitled to such indemnification under corporate by laws or by agreement with the corporation, while other employees may need to negotiate a form of undertaking. From the company's perspective, providing such indemnification may improve employee cooperation, save time, and improve the company's control over the litigation. The government, however, may view indemnification as inconsistent with cooperation or as an endorsement of misconduct. Companies should compare the perceived benefit from indemnification with the risk that the government will adopt this view, and the consequences if it does so.

Disciplinary Action

Not surprisingly, investigations often identify misconduct. In these instances, the company may consider taking disciplinary action against the responsible individuals. Whether or not this is advisable will depend on a variety of factors, including the seriousness of the employee's conduct and strength of evidence against him or her, the need to stop further misconduct, and the company's obligations under federal and state employment laws. For instance, while discipline may be helpful in that it stops or limits the actions of people who are damaging the company's interests, it may also be harmful by creating discontented, disloyal employees who become more willing to cooperate with the government *against* the company. However, sometimes the wrongdoers' actions are so egregious that there is no question discipline will be administered; it is just a matter of timing. If discipline is inevitable, the company may wish to put the matter behind it by addressing it early. The company also should consider what will happen if the company *does not* discipline the wrongdoers. If the company must discipline someone to prevent future harm from occurring, the case for preemptive action becomes stronger.

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8 *See*, *e.g.*, *Continental Oil Co.*, 330 F.2d at 350.

9 *Id.*

10 Some courts have held that JDAs are not privileged and are subject to production for at least *in camera* review. *See, e.g.*, *United States v. Stepney*, 246 F. Supp.2d 1069, 1074-75 (N.D. Cal. 2003).

The company needs to consider how the government will interpret discipline. Depending on the circumstances, the government could plausibly interpret it as a good faith effort to remedy the problem, or as an admission of wrongdoing. Finally, depending on the seniority of the personnel and the nature of the conduct warranting discipline, such employment actions could trigger some reporting requirement, which could cause the subject of the investigation to become known outside the company earlier than anticipated.

Step Five: Concluding the Investigation

The final considerations after the investigative team's workplan is complete are (1) how to report the investigative team's findings, and (2) how to proceed with the information that has been ascertained. While the company's next steps and decisions about possible disclosures will ultimately be dictated by the investigative team's substantive findings, options regarding the form of the investigative report that will ultimately be presented to senior management, the board, and / or the special board committee should be considered at the outset of the investigation.

Reports

At the conclusion of the investigation, counsel may wish to prepare a written report which summarizes the investigation procedures and fact-finding, and recommends remedial measures. There are many reasons why counsel may do this. A written report can be a useful tool to present the investigative team's findings to management or the company board. This is particularly the case if the factual evidence is voluminous or the issues are particularly complex. A report may be necessary to justify and document employee disciplinary actions that arise out of the investigation. It may also be used as the basis for an eventual oral or written submission to the government, if the company chooses to do so. The report can highlight the remedial measures the company takes to prevent similar misconduct in the future, and the report may be necessary proof of the thoroughness of the investigation. Whatever the reason, counsel should consider the benefits and risks of drafting a written report before beginning the task.

A report can demonstrate the thoroughness of the investigation, setting forth the company's goals in opening the investigation, as well as the steps it has taken to achieve those goals. A report also can provide further documentation of a board's prudent exercise of its duties as directors. The company should understand, however, that a report, if prepared, may have to be disclosed. If a written report is prepared, it may be inevitable that the government will request a copy once the investigation becomes known to them. And once privilege has been waived, the report can be obtained for use by private litigants. Thus, counsel and consultants should anticipate the risk of having to produce the report when they draft it.

As counsel consider the question whether to prepare a report at the end of an investigation, it is worthwhile to return to the beginning: the goals of the investigation. Will an oral report, rather than a written one, accomplish the goals and objectives of the investigation? If a written report will not further the goals, it may be better to avoid it. But if a report will meaningfully address the investigation's goals, it may be worth producing one.

Whether the report of the investigative findings is delivered orally or in written form, it usually includes: (1) identification of the evidence or allegations that prompted the investigation and a statement that the investigation was conducted in anticipation of litigation and for the purpose of providing legal advice; (2) a description of the work plan that was implemented; (3) a summary of the relevant background facts; (4) analysis of the key evidence; (5) an outline of the pertinent law; (6) an application of the law to the evidence; (7) a description of the remedial measures that should be considered (or have been taken) as a result of any issues identified during the investigation; and (8) a recommendation as to whether there should be a self-report or disclosure to the government.

Disclosure to the Government and Waiver Considerations

Depending on the circumstances, at the end of an investigation the company may be forced to decide whether to voluntarily disclose the contents of the investigation to the government. As with producing a report, voluntary disclosure may persuade the government that the company has greater transparency and integrity. This, in turn, may lead to a more favorable resolution of the issue. Of course, self-reporting will not necessarily prevent prosecution, but it may lead to better settlement terms by demonstrating cooperation and good faith. And, at a

minimum, voluntary disclosure provides the government with the company's version of the facts. The government may use these facts to structure its own investigation, allowing the company to shape the matter as it moves forward.

Disclosure also has significant risks that the company should consider before it proceeds. First, disclosure to the government may waive the attorney-client privilege and work product protection in all other contexts. By waiving privilege, the company may provide a roadmap for liability to private litigants, including class action litigants. Although the case law is not uniform, courts typically do not uphold non-waiver or selective waiver agreements. To reduce the possibility of waiver, the company should frame disclosures in terms of possible settlement negotiations with the government. Settlement discussions generally receive greater protection, but even these ultimately may not remain privileged. The company also should consider entering into a confidentiality agreement with the government, in which the government agrees not to disclose company information to third parties.

Second, disclosure can chill future discussions between company employees and attorneys and may thereby impair the corporation's ability to detect and prevent future wrongdoing. If employees believe that the company will report misconduct to the authorities, they are less likely to cooperate with the company's investigation. The company does not want to develop an "us vs. them" relationship with its own employees.

Third, the company should be careful about preemptively disclosing materials. It should time the disclosures so as not to interfere with the ongoing investigation (if indeed it is ongoing) and to ensure that unnecessary materials are not disclosed. To do so, it may seek to limit the disclosure to a limited issue or subject matter.

Sometimes, an internal investigation uncovers misconduct that is not yet on the government's radar screen. Should the company disclose this misconduct and initiate a government investigation? Here again, the government may view voluntary disclosure as forthcoming, but disclosure may not prevent prosecution. At the same time, if the government is already conducting its own investigation, and if it is likely to discover the misconduct anyway, self-reporting may be the preferred course.

Disclosure to the Public and Waiver Considerations

Depending on the facts and circumstances of the internal investigation, a company, institution, and / or its board of directors may decide that it would be in the best interests of the company to disclose the findings of its internal investigation to the general public. Most of the time, the public disclosure takes the form of a public report or executive summary drafted by the company's outside counsel.[11] Before deciding to release the findings of an internal investigation to the public, however, there are significant issues that should be considered and discussed with counsel leading the investigation. Prior to making any announcement to the public regarding an internal investigation, decisions should be made about the scope of the anticipated disclosure to the public, the timing of the disclosure, and whether there other individuals, board members,

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[11] *See, e.g.,* Goodwin Procter's MIT / Epstein Report, Ropes and Gray's Report of the Independent Investigation concerning Larry Nassar's Abuse of Athletes, The Freeh Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky by Freeh Sporkin & Sullivan, LLP, Pepper Hamilton's Report of Baylor University's Findings of Fact related to Title IX, The Report of Independent Investigation–Sexual Misconduct by Yale Professor D. Eugene Redmond by Finn Dixon & Herling LLP, and Perkins Coie's Report of the Independent Investigation–Sexual Abuse Committed by Dr. Richard Strauss at The Ohio State University.

faculty members, stakeholders, witnesses, and / or other entities or individuals that need to be informed prior to the report's public release.

It also is important to consider potential waiver of the attorney-client and work product privileges in relation to any public release of an internal investigation report. This will become particularly relevant in relation to any follow-on litigation or government investigation that may occur *after* the public release of an investigation report. While the case law on these issues is relatively limited, it appears that courts will construe the scope of these privileges relatively narrowly under these circumstances, and that, where an entity chooses to publicly release legal and factual conclusions contained in a report, claims of attorney-client privilege that existed with respect to the report itself could be waived.[12] Further, depending on the level of specific detail included in the report, and whether individual interview memoranda or source documents are quoted and / or otherwise included, it may also result in subject matter waiver of the attorney-client privilege covering the interview memoranda used to compile the report.

Another consideration relates to potential public records requests following the public release of an internal investigation report. To the extent the entity for whom the internal investigation was conducted is a state agency, municipality, or is otherwise publicly funded, there are arguments that could be made pursuant to state or federal public records laws to try to compel production of underlying investigative material. While, among other things, these public records laws generally include exceptions for documentation that is protected by the attorney client privilege, especially in those instances where the privilege has been waived, these are potential implications that should be carefully reviewed by and discussed with counsel.

Remedial Measures

Based on the information gathered during the investigation, the investigative team should recommend and the company should decide what remedial measures, if any, should be undertaken. Disciplining employees tends to demonstrate that the company takes wrongdoing seriously. There is a risk that employee discipline could be viewed as an admission of wrongdoing. And, if disciplined, employees could refuse to cooperate with the company and instead cooperate with the government. Unwarranted or overly severe discipline may also damage morale. If the company does decide to discipline an employee, it may have to create a memorandum or report to justify its action. That record, though, may be deemed part of the employee's personnel file and may need to be disclosed.

If the investigation revealed evidence of potential ongoing or recurring violations, the company also should consider taking procedures necessary to prevent any further violations. This might include instituting new procedures, instituting new training sessions, revising compliance materials or developing new internal audits or oversight committees to review compliance on a periodic basis. Policing internal misconduct through an investigation is, in many ways, no different than other business matters. It is best to be thorough in preparation and action, learn from mistakes, and make improvements when necessary.

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[12] *See, e.g., Banneker Ventures, LLC v. Graham et al.*, 253 F. Supp. 3d 64, 74 (D.D.C. 2017).

An internal investigation can be a critical tool when allegations or evidence of misconduct within a company, or within a company's industry, arise. Internal investigations of every size require balancing efficiency with quality, thoroughness, and completeness. And above all else, an effective internal review requires careful planning at the outset. While the best compliance program and training regime cannot completely prevent some types of misconduct — or, at the very least, allegations of misconduct — from occurring, practical preparedness and a carefully scoped internal review of the situation is the best defense.

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