

Practice and Pitfalls of Internal Investigations



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FEATURING....

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ROADMAP

- Internal Investigation Considerations & Process
- Constitutional Implications of Internal Investigations
- Communications Implications of Internal Investigations
- Hypothetical
- Questions



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Internal Investigation Considerations



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BACKGROUND

- Why do an internal investigation?
 - Successfully address misconduct
- Advantages
 - Determine liability/responsibility
 - Control or address the issue
 - Avoid government or regulatory action
 - Avoid litigation
 - Obtain favorable settlement
 - Improve or preserve company's public image
- Disadvantages
 - Cost
 - Disruption
 - Might find and need to address additional issues

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Reporting Resources

- Issues and complaints requiring an investigation come to the attention of the company through a variety of sources:
 - Hotline complaints
 - Complaints to internal employees such as managers or HR
 - Complaints from former or current employees
 - Consumer or competitor complaints
 - Internal audit findings
 - Notice of law enforcement action or subpoena
 - Demand letter, charge, or lawsuit
 - Media report
 - Report to the Board or senior leadership



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A Note on Hotlines

- Upcoming EU Whistleblower Protection Directive:
 - Compliance by 2021 (250+ employees) and by 2023 (50-249 employees).
 - Need to create effective reporting channels and supporting processes (including feedback and response) and communicate these throughout the company.
 - Understand what types of issues may be reported (better to frame as rule breach versus “crime” or “offense”).
 - Understand who will be protected.
 - Note that anonymous reporting may now be acceptable in most if not all jurisdictions.
- Be aware which jurisdictions require dedicated policies on whistleblower protection:
 - Australia
 - UK

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Timing of Investigation

- As soon as possible given the circumstances.
- Typically depends on the reporting method.
 - Internal complaints allow for more investigation time as compared to government or regulatory inquiries, or publicly-revealed complaints.



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Who Should Conduct the Investigation?

- Counsel
 - In-house counsel
 - Advantage - quick and efficient; knows the business and the people
 - Disadvantage - weakens privilege claims; lack of resources/experience
 - Regular outside counsel
 - Advantage - knows the business and sometimes the people
 - Disadvantage - higher costs; may lack special expertise/independence
 - Specially-retained outside counsel
 - Advantage - avoids conflicts; establishes credibility and independence
 - Disadvantage - high costs; less likely to know the business
- Internal resource such as HR or Employee Relations (independently or under the direction of counsel)



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To Whom Does The Investigator Report?

- Senior legal leadership and/or General Counsel for most issues
- The Board (usually the Audit Committee) if senior management is implicated or there is significant financial exposure or accounting issues



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Preserving Confidentiality

- Clearly identify whom counsel represents
- Avoid conflicts of interest
- Clearly designate materials as privileged and limit their dissemination, as well as dissemination of investigation-related information generally
- Separate opinion from fact work product



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Internal Investigation Process



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Follow Up with the Reporter

- Obtain all relevant information from the reporter and ensure they feel like they are being heard.
- Inform the reporter that the company takes the complaint seriously and it will be handled appropriately.
- Set the expectation that you may not be able to provide substantive updates on the investigation to the reporter.
- Ensure the reporter understands they will not be retaliated against (if not anonymous) and they should report any perceived retaliation.



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Prepare Investigation Plan

- Determine:
 - Investigation team (consider preparing RACI matrix)
 - Timing of investigation
 - Who will be interviewed and when
 - How will updates and information be provided to the investigation team
- Preserve evidence and documents
 - Consider scope and type of review necessary
 - Consider issuing legal hold
- NOTE: If, at any point during the investigation, there is substantial and credible evidence that any improper or illegal conduct is ongoing, even if not related to the allegations giving rise to the investigation, steps should be taken to stop such conduct immediately.

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Conduct Interviews

- Reporter should generally be interviewed first, followed by those who:
 - Have first-hand knowledge of the claims
 - Were party to any after-the-fact discussions
 - Were contacted by any external parties regarding the claims (e.g., government official, lawyer, reporter, etc.)
- Explain the role of counsel in the investigation.
- Consider whether there is a need to provide an Upjohn warning.
- Request confidentiality.
- Ideally, interviews should be conducted by two individuals, with one serving as the “witness”/note-taker.
- A script should be prepared for each interview including all standard disclaimers, but be prepared to “go off script.”

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Reach and Memorialize the Outcome

- Consider whether a report of the investigation is necessary, and whether it should be oral or written
 - If the report is written, it should cover the details of the investigation, including the claims raised, investigation process, key factual findings, interview summaries, and recommended outcome
- Outcome and next steps (including disciplinary measures) should be communicated to any individuals who have been determined to be engaging in misconduct.
 - Discipline must be fair and impartial.
- Let the reporter know that the investigation has been closed, again emphasizing non-retaliation.

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Constitutional Implications of Internal Investigations

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Communications Implications of Internal Investigations

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A New Set of Communications Expectations

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One-off incidents treated as discrete with low risk of publicity

HR operates as a siloed function and leadership is silent

Low expectations for accountability and enforcement

Culture of secrecy and silence

Highly varied levels of sensitivity

Now

Holistic public scrutiny of company policy, process, and culture

People issues rise to the Management/Board level

Demand for greater accountability and due process

Greater likelihood for exposure; increased publicity

Emerging cultural consensus; but some backlash, too

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Changing Dynamics of the Media Landscape

First News Cycle

EVENT DISCLOSURE
Focus on a specific incident often leaked to a reporter from within the organization.

Second News Cycle

PROCESS
Scrutiny of how the incident was handled by the company.

Third News Cycle

CULTURE
Surfaces additional allegations and deeper cultural issues within an organization through multiple interviews and investigative reporting.

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Increased Preparedness Mitigates Reputational Risk

Category 1

Proactive planning and review to strengthen policies and build safeguards ahead of a potential incident.

Category 2

Recognizing a growing risk related to live issue(s) and proactively preparing to address it well in advance of information becoming public either through the media or legal filings.

Category 3

Notified of information imminently being made public through the media or legal filings and taking control of information cycle by "going first" with the information and remediation measures.

Category 4

Taking remedial action only after information about past and/or present matters has been made public through the media or legal filings.

Increasing Reputational Risk 

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Best Practices

Ask the hard questions and surface all the answers.

Risk is born from the unknown

Identify organizational strengths and weaknesses.

This is an opportunity to demonstrate leadership

Lead through the crisis.

How you respond will define your reputation

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Hypothetical



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Part I

You are a compliance lawyer who is part of the legal department, reporting to the General Counsel of a private U.S.-based company with offices overseas. The General Counsel reports to the CEO but has a dotted reporting line to the Audit Committee of the Board.

One afternoon, Mary, a business unit VP, comes to your office and says she urgently needs to speak to you. As soon as you close the office door, she begins crying and says she wants to tell you about a problem she is having in the office but asks you to promise that you will keep confidential what she is about to tell you.

Can you honor this promise?

- A. Yes
- B. No

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Part II

Once Mary finally starts talking, she tells you that the company's CFO, Jim, has been making lewd advances to her over the course of the last year during their monthly one-on-one budget meetings. She has decided that she wants you to investigate her complaint.

Who should conduct the investigation into Mary's complaint?

- A. You (as in-house counsel), taking direction from your normal outside counsel as necessary
- B. Another internal resource acting under your direction (e.g., HR or Employee Relations)
- C. Outside Counsel

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Part III

You decide to conduct the investigation into Mary's claim yourself, relying on direction from your regular outside counsel as needed. You bring in Jim for an interview. He is aware that you are investigating sexual harassment allegations against him. He says that he hasn't done anything wrong, and that Mary is trying to get him fired because he has just discovered some serious misconduct on her part, which he told her he would disclose if she didn't come clean first. He tells you that he has decided to invoke his Fifth Amendment privilege not to speak. He also says that he wants to have his attorney present before you speak with him further.

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Part III, Cont.

What should you do?

- A. Do not allow Jim to assert his Fifth Amendment privilege, and do not allow him to have his attorney present.
- B. Allow Jim to assert his Fifth Amendment privilege, but do not allow him to have his attorney present.
- C. Do not allow Jim to assert his Fifth Amendment privilege, but allow him to have his attorney present.
- D. Allow Jim to assert his Fifth Amendment privilege, and allow him to have his attorney present.

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Part IV

You are able to conduct an interview with Jim. He presents you with information indicating that, over the course of the prior year, Mary had authorized the provision of expensive gifts, meals, and entertainment to foreign government officials considering several project bids made by the company in various locations.

What should you do next?

- A. Simultaneously investigate Jim's claim and Mary's claim yourself.
- B. Continue to investigate Mary's claim and engage your normal outside counsel to investigate Jim's claim.
- C. Continue to investigate Mary's claim and engage special outside counsel to investigate Jim's claim.
- D. Engage your normal outside counsel to continue to investigate Mary's claim and special outside counsel to investigate Jim's claim.
- E. Engage special outside counsel to investigate both claims.

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Part V

While you are investigating Jim and Mary's claims, the Communications Department learns that Mary has approached The New York Times to tell her story. They are looking into her claim and are also reaching out to current and former employees on LinkedIn to inquire about their experiences with Jim and the company culture more broadly. The company has not been contacted to participate in the story.

What is the best course of action?

- A. Proactively reach out to the reporter and try to kill the story.
- B. Proactively reach out to the reporter with full details of the investigation to date, including Jim's side of the story.
- C. Wait to be contacted, but begin preparing a holding statement and background points about company culture.
- D. Wait to be contacted and take no action at all. The reporter is only fishing, and there is nothing we can say until the investigation is complete.

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Part V, Cont.

The next day, the Communications department receives an email from the New York Times reporter. They are writing a story based on Mary's allegations and are asking for a comment. How do you respond?

- A. Do not respond. See how the story turns out, and then address it.
- B. Do not provide an on-record statement, but talk to the reporter on background to provide context on the situation.
- C. Send the reporter the full status of the investigation, and offer an interview with Jim.
- D. Provide an on-the-record statement, backed up by background examples demonstrating the company's commitment to its values.

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Part VI

You engage special outside counsel to investigate both Jim's and Mary's claims. Mary's allegations are not substantiated but Jim's are. As a result, the company terminates Mary's employment.

Should you voluntarily disclose these results to the government?

- A. Yes
- B. No

If you do want to engage in voluntary disclosure to the government, what should you disclose?

- A. Facts related to the investigation into Mary's complaint?
- B. Facts related to the investigation into Jim's complaint?
- C. Both

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Questions



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