

Use of Third-Party Assistance for Investigations

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Agenda

- Reasons for using outside experts for internal investigations
- Types of experts to consider
- Risks associated with using outside experts
- Best practices for working with outside experts



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When/Why Use Third Parties?

1. Independence
2. Specialized expertise
3. Capacity or geographic reach



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When/Why Use Third Parties?

- **Independence**
 - For example, certain investigations of C-level execs, board members, etc
 - Relationships – family, financial, etc
 - Past history with subject/department
- Appearance/reputation also matters, not just independence in fact
 - Certain critical/public investigations
- However, make sure the third party is independent
 - In larger organizations and larger third party firms, this isn't always obvious
 - Independence checks should be performed



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When/Why Use Third Parties?

- **Specialized expertise**
 - eDiscovery
 - Data extraction and analytics
 - Case management
 - Interviewing
 - Subject matter expertise (e.g. accounting fraud,)



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When/Why Use Third Parties?


- Capacity or geographic reach
 - We have talented people, but not enough time
 - Remote location, impractical for us to investigate



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Policy Consideration

- Among the policies that should be in place pertaining to investigations, the issue of when to use third parties should be included
 - Authority to hire third parties
 - Under which circumstances




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Group Discussion (1)

- Your organization has decided to utilize third parties to assist with an investigation triggered by a whistleblower call on your hotline. You have determined that three outside parties will be hired:
 - Forensic accountant
 - An eDiscovery specialist (record collection and organization)
 - A technical subject matter expert (one of the allegation concerns whether a product your company billed the government for met the technical specifications in the contract)
- You have also decided that due to the sensitive and potentially material nature of the investigation, external legal counsel will be retained



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Group Discussion (2)

- What risks are created by using this team of external parties in conducting your internal investigation?



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Understanding the Goals

- What are the goals of the investigation?
 - Determine who did it?
 - Determine how they did it?
 - Determine damages?
 - Terminate guilty employees?
 - Take legal action to recover?
 - Criminal charges?
 - Minimize organizational liability?
- This may drive some of the decisions surrounding the use of outside experts



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Outside Experts – Two Types

- Consulting experts
- Testifying experts
 - Subject to U.S. Federal Rule of Evidence 702 and Daubert challenge - A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - b) The testimony is based on sufficient facts or data;
 - c) The testimony is the product of reliable principles and methods; and
 - d) The expert has reliably applied the principles and methods to the facts of the case



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Using Third Parties – Engagement Phase

- Key issues before engaging:
 - Background check
 - Firm
 - Individuals working on your engagement
 - Clarification of scope
 - Fee structure (fixed price, hourly, etc)
 - Engagement letter, proposal, standards



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Third Parties & Privilege

- Use of third party consultants, retained by legal counsel, reinforces privileged status of investigation
 - Underscores that investigation not a routine business function
 - Facilitates legal counsel control of third parties' work product
 - Controls distribution of third parties' work product to protect privileged information



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Privilege Issues with Third Parties

- Keeping legal counsel "in the loop" with third party consultants
- Risk of waiving privileges when third party consultants communicate exclusively with non-lawyers
- Third party consultants using subcontractors



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Using Third Parties – Work Phase

- How should you deal with each of the following key issues?
 - Introduction, integrating into the “team”
 - Supervision of third party contractors
 - Responsibility for their work product
 - Third parties communicating with third parties
 - Managing the investigation
 - Scope creep
 - Reports from outside experts
 - Closeout of engagement



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QUESTIONS ??

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