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
When/Why Use Third Parties?

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

• 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
When/Why Use Third Parties?

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

When/Why Use Third Parties?

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

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
Group Discussion (2)

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

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
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

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
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

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
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

QUESTIONS ??

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