



COUNSEL TO GREAT COMPANIES

Presented to the SCCE

Internal Investigations

Updating Your Approach to Achieve Better Outcomes

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Common Business-Unit Concerns



- “Investigations are too expensive/divert company resources.”
- “Do we really need to do interviews, review emails, etc.?”
- “How long will this take?” / “We need to wrap this up.”
- “Sue was employee of the month – we can’t investigate her!”
- “It was wrong, but that’s how business is done in [Country].”
- “That person is a troublemaker – why can’t I give employees an update on the investigation findings?”
- “Do we really need to report this to [the board, shareholders, our auditors, authorities]?”

Update Your Approach



- Why Companies Investigate
- Elements of an Effective Investigation
- Handling Complaints
- Preparing for an Investigation
- Evidence Collection and Review
- Effective Interviewing
- Concluding the Investigation:
 - Communicating Findings (while maintaining privilege)
 - Designing an Effective Remediation Plan

Why Companies Investigate



Purpose of Investigations

- Identify potential violations of policy or law
- Discipline or remove problem actors
- Safeguard your company (business, brand, reputation)
- Signal and pursue constant improvement
- Gather important facts for leadership
- Demonstrate corporate engagement and commitment to oversight from the top down

Why Companies Investigate: Consequences of “Bad” Investigations



- Miss Fixable Problems
- Damage Legal Position
 - Shareholder derivative lawsuits; wrongful termination claims
 - Also in criminal investigation
- Increase Penalties
 - Failure to investigate/bad investigations can lead to greater fines, personal liability and higher long term costs
- Failure to Identify Ineffective Controls (operational issues)
- Likely Problems Will Repeat
- Brand-Damaging Press

Elements of Effective Investigations



- Approach is **neutral, fair, appropriate in scope**
 - Relevant parties are interviewed
 - Data preservation, collection, and review targeted to relevant issues
- **Confidentiality** is maintained
- Investigation has (and is *viewed* as having) **integrity**: results are reliable and evidence-based
 - Appropriate follow-up with all relevant parties
- **Root Cause Identified**
- **Effective remedial action** taken to address misconduct and deter similar conduct
 - Any remedial actions are supported by evidence

Handling Complaints: Source and Form of Complaint



- **Complaints need not be through formal channels**
 - Anonymous letters/emails
 - Complaints to supervisors
 - Whistleblower complaints
 - Hotline or media reports
- **Not always in writing**
- **No “magic words” needed to warrant investigation**
 - Knowledge of potential misconduct may be enough to trigger need to investigate

Handling Complaints: Choosing an Approach



- **Does complaint require investigation?**
 - Key considerations include credibility of source, and nature and seriousness of allegations
- **Does complaint involve:**
 - Government, regulatory, ethical, or safety violations (corruption/bribery, fraud, trafficking/child labor)?
 - Misappropriation of trade secrets/confidential info?
 - Harassment, discrimination, retaliation, violence?
 - Violations of Code of Conduct or Handbook?
 - Conflict of interest (financial or administrative)?
 - Breach of contractual agreements?

Preparing for an Investigation: Selecting an Investigator



- Investigators are not “one size fits all”
 - Select appropriate investigator for each matter
- Possible investigators:
 - Human Resources
 - Internal Audit
 - In-house Legal department
 - Outside counsel/investigators

Preparing for an Investigation: Selecting an Investigator (cont'd)



Things to consider:

- Type of complaint being investigated
- Positions, personalities, and backgrounds of **people involved**
- Potential **witness** considerations (will those conducting investigation need to serve as fact witnesses?)
- **Scope** of investigation/number of investigators
- Likelihood of **detection**/risk to company image
- History of similar issues
- Likelihood of subsequent litigation
- Likelihood of **disclosure to authorities**
- **Legal privilege** protections

Preparing for an Investigation: Selecting an Investigator (cont'd)



- **Investigator must be:**
 - Neutral (free of any conflict of interest)
 - Experienced/credible
 - Able to conduct investigation and complete it in a timely manner (availability and resources sufficient for scope)
 - Comfortable with the subject matter
- **Who will review the results?**
 - Will investigation results be shared with the Board
 - Will result be shared outside the organization

Preparing for an Investigation: Other Pre-Investigation Steps/Considerations



- Document the complaint; **acknowledge receipt**
 - Particularly if complaint comes from an anonymous source or whistleblower
- Consider potential need for **disclosure** to auditors, shareholders, authorities
 - Prepare media statement if allegations are public
- Consider whether to **remove/suspend accused parties** (if in company's best interest)
 - Timing: Before confronting accused?
 - Disclosure: What should accused, others be told?
 - Form/Terms: Written notice? With pay? Access to company systems?

Preparing for an Investigation: Ensuring Alignment



- Written investigative **work plans** help define scope; ensure alignment
- Work plan should address/include:
 - Summary of the issue(s) being investigated
 - Scope and scale of investigation
 - Sources of evidence – people and form of data
 - Plan for preserving, collecting, and reviewing evidence
 - Potential interviews
 - Reporting process and form (interim and final)
 - Need for experts or other service providers
 - Confidentiality/privilege
 - Schedule/Expectations

Evidence Collection and Review



- **Data Preservation Matters**
 - Consider legal hold to reduce risk of data loss
 - Interrupt regular data retention practices
- **Identify Potential Sources of Evidence**
 - **Who is likely to have relevant information?** – Consider current/former employees, assistants, supervisors
 - **What form may evidence take?** – Employee email, share files, voicemail, data from company-issued computers/phone, policies and procedures, Internal Audit files, vendor due diligence files, contracts, personnel files, expense reports/invoices/other accounting records

Evidence Collection and Review (cont'd)



- Review should target potentially relevant data
 - For electronic records, use **keyword search terms**
- If more than one reviewer, prepare and follow review protocol (ensure consistency)
- Develop system to track/summarize key documents
- Document everything
 - What was collected, from who, when, how, etc.
 - Explain any limitations in scope (intentional or not)
- Beware of **foreign data privacy laws**
 - Permission may be required to collect/review data in other countries

Effective Interviewing: Structure and Approach



- Do not record interview or allow recording
- Initiation of interview
 - Explain purpose of meeting (only necessary facts – accused parties not entitled to know who reported them)
 - Fairness is key – create appropriate environment
 - Provide “Upjohn advisements” – clarify that you represent the company, not interviewee; explain privilege; etc.
 - Reference “no retaliation” policy – confidentiality considerations
 - Confirm interviewee understands advisements
 - Be prepared for “Do I need a lawyer?” and other questions

Effective Interviewing: Structure and Approach (cont'd)



- Ask **open-ended questions** – don't assume facts
- Get precise answers to questions
 - **Don't permit evasion** - obtain specifics, sources of info
- Use documents to corroborate
- Allow interviewee to explain documents/facts
 - Avoid pre-judgment but probe answers that seem suspect
- Avoid confrontation – maintain neutrality
- At conclusion of interview:
 - Ask who else to talk to/documents to obtain, and encourage witness to follow up with additional thoughts
 - Inform witness that company is working to resolve issue

Effective Interviewing: Memorializing What You Learned



- During the interview:
 - Take clear and copious notes
 - Note time of interview, length, location, people present
 - Document *Upjohn* advisements and witness agreement
 - Only record facts and observations – do not interpret
 - Observe and note witness behavior
 - Note use of documents
- After the interview:
 - Promptly after the interview, interviewer should prepare summary (formal memorandum or informal summary)

Concluding the Investigation ...



- How do companies use investigation results?
 - Remediate identified problems (terminate/discipline wrongdoers; improve internal controls, etc.)
 - Address other potential legal risks (amend public filings; report to government regulators)

- How can the results (or work product) be used against you – and what you can do about it?
 - Government Investigations
 - Shareholder Derivative Suits
 - Employee Lawsuits
 - Whistleblower Protections
 - Transnational Investigations (and Lawsuits)
 - Privilege Waiver

Relaying Findings (While Maintaining Privilege)



- **Determine form of reporting (privilege)**
 - Written report, verbal readout, or presentation?
 - Do results warrant readout to auditors, shareholders, creditors, regulators? – stick to facts
- **Substance of report – are facts in dispute?**
 - Corroborate, corroborate, corroborate
 - If facts are conflicting, be ready to present mixed, well-documented findings
- **Interim reporting while investigation is ongoing**
 - Status updates should focus on process; avoid “findings”
 - Only update those who “need to know” (i.e. not investigation targets) – protect privilege

Relaying Findings (While Maintaining Privilege) (cont'd)



- Report of findings should:
 - Identify all parties involved in investigation; roles (including outside vendors)
 - Identify what was reviewed (and what was not); any other **limitations** to the investigation
 - Create a **chronology** – complaint, preparation, document collection, interviews, corroboration, findings, and remedies/actions
 - Written reports should focus on facts; **avoid legal conclusions**
 - Any discussion of wrongdoing should focus on company policies and procedures

Designing an Effective Remediation Plan



- Did investigation identify misconduct?
 - Remember: governance/process/internal controls issues
- If yes, consider:
 - Desires of complainant (and reaction of authorities/board members/management/jurors)
 - Presence or risk of regulatory action/civil litigation
 - Existence of similar violations within the company/industry
 - Determine goals (deterrence, punishment, restitution)
- Use existing company policies and procedures

Designing an Effective Remediation Plan (cont'd)



- Possible remedies
 - Written warnings/reprimand
 - Acknowledgement of wrongdoing
 - Administrative leave
 - Reduction/elimination of bonus
 - Additional training
 - Transfer
 - Suspension
 - Termination
 - Reporting to authorities

Questions ?

