

Advanced Internal Investigations

Association of Corporate Counsel

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Mark Merritt & Pearlynn Houck

Overview

- Purpose of Internal Investigations
- Preliminary Decisions
- Privilege Considerations
 - Upjohn
 - Experts and Consultants
 - Waiver and Cooperation
- Whistleblowers
- Interviews
- Confidentiality
- Social Media
- Risk Management Takeaways

Purpose of Internal Investigations

An internal investigation is the development and analysis of facts by an organization that will form the basis for a decision *by that organization*.

- Corrective action
- Personnel action
- Restatement of financials
- Voluntary disclosure to government entity
- Reaction to litigation or criminal prosecution
- Commencement of litigation
- Cultural review (consider culture survey)
- Training and policy review

Preliminary Decisions

- What gets investigated?
- Why investigate?
- Who supervises?
- Who investigates?
- Who knows?

Preliminary Decisions – What gets investigated?

Allegation of Misconduct

Investigate?

The nature
and gravity of
the allegation

The source
and
circumstances
of the
allegation

The extent of
corroboration
of the
allegation

Who is
involved

Preliminary Decisions – What gets investigated?

Investigation likely for the following:

- Whistleblower complaints
- Government investigations
- Auditor inquiries
- Complaints of harassment or discrimination
- Civil litigation
- Media reports of wrongdoing
- Internal financial defalcation
- Data breach
- Theft of trade secrets/intellectual property

Preliminary Decisions – What gets investigated?

Risk Velocity

Risk Recovery

Preliminary Decisions – Why investigate?

- Promote culture of compliance and accountability
- Stop damage to the business
- Internal compliance and codes of conduct
- Law enforcement incentives
- Director and officer duties
- Certifications (SOX)
- Adverse publicity and pressure from public or customers
- Remediation

Preliminary Decisions – Who supervises?



Preliminary Decisions – Who investigates?

Inside Counsel	Outside Counsel	Independent Counsel
<ul style="list-style-type: none">• Sophisticated legal departments• Less expensive• Familiar with company• Familiar with industry• Familiar with individuals involved• More efficient	<ul style="list-style-type: none">• Independence• Objectivity• Cover for difficult decisions• Give undivided attention• Greater resources• Added privilege protections• Could later serve as a witness• Preserves in-house relationships	<ul style="list-style-type: none">• Did not give relevant advice• Not a witness• Need regular counsel for litigation or defense• Credibility/independence• No management relationships• Special committee formed

Preliminary Decisions – Who investigates?

- Outside or independent counsel strongly recommended
 - Regulators or prosecutors involved; potential criminal charges
 - Involves executive misconduct or those who report to executives
 - Important reputational issues for the company
 - Legal department involved
 - Likely to result in civil lawsuits
 - Media attention or scrutiny
 - Financially or operationally material (publicly traded)

Preliminary Decisions – Who knows?

- Difficult to conduct in secret, although sometimes necessary
- Consider early memo to affected people that includes:
 - Lawyers are here
 - Why they are here
 - Description of issue
 - Instruction to cooperate
 - Instruction of confidentiality
- Engage IT for preservation of electronic information

Privilege Considerations

- *Upjohn*
- Experts/Consultants
- Written Reports
- Waiver and Cooperation

Privilege – *Upjohn*

- *Upjohn Co. v. United States*, Supreme Court held that privilege applies to communications between current employees and corporate counsel when:
 - Communication made at the direction of corporate superiors;
 - To secure legal advice for the corporation;
 - Concerning matters in scope of the employee's duties; and
 - *The employee knows he is being interviewed for the company to obtain legal advice.*
- **Former employees** – potentially, if discussing information related to time of employment
- **Third parties** – unlikely, have to rely on less absolute work product privilege

Privilege – *Upjohn*

- *Upjohn* Warning
 - I represent the company.
 - I do not represent you.
 - I am collecting facts to provide legal advice to the company.
 - This conversation is protected by attorney-client privilege.
 - The company, and the company alone, may decide to waive the privilege and can do so without notifying you.

NOTE: Do not tell witness that you intend to waive the privilege during the interview; if you do intend to waive at that time, the interview is not privileged.

Privilege – Experts

Helpful Experts

Forensic accountants

Computer forensics

E-discovery consultants

Subject matter experts

Benefits

Increase detection of issues and defenses

Often save expense despite fees

Can enhance credibility of results

Privilege – Experts

United States
v.
Kovel

Attorney-client privilege extended to outside experts

Focus is on *translation* – is the expert helping the attorney translate relevant information?

Kovel Agreement
Rules

Must be hired by counsel

Should sign an engagement that they are providing assistance for legal advice

Report to counsel to assist in giving legal advice

Privilege – Outside Consultants

- Consultant work is generally not privileged on its own.

If consultant
retains counsel



not privileged

If counsel
retains consultant



Privileged*

**Kovel*

Privilege – Reporting

- Oral or Written Report?
 - Privilege; waiver
 - Cost
 - Speed
 - Control
 - Third parties access
 - Regulators/law enforcement access
- Written report likely required for:
 - Special committees
 - External auditors re financial irregularities
 - Maybe regulators/law enforcement

Privilege – Waiver and Cooperation

Prohibits prosecutors from explicitly requesting waiver of “core” attorney client privilege/work product (Category I) or crediting corporations that waive the privilege

Encourages corporate counsel who feel pressure to elevate up the ladder in DOJ

Filip Memorandum

SEC similarly discourages explicit requests for waiver of the privilege.

Ushered in a kinder and gentler approach to waiver...

Privilege – Waiver and Cooperation

- Problems
 - Applies to DOJ/SEC only
 - Still see enhanced cooperation credit with privilege waivers
 - “Relevant Facts”
 - Full disclosure still required for cooperation credit
 - Many “relevant facts” might be work product or privileged
- Solutions
 - Clearly identify privileged/work product materials
 - Keep attorney impressions separate or excluded
 - Consider oral attorney proffer with agreement there is no waiver

Privilege – Waiver Pitfalls

- Waiver in civil suit on same subject
- Waiver of entire subject matter (Fed. R. Civ. P. 502)
- Check insurance agreements for coverage if waived
- Waiver may not prevent prosecution or significantly reduce penalty
- Government may not seek corporate assistance despite waiver

Whistleblower Protection

- Legal protections
 - Sarbanes-Oxley Act of 2002 and Dodd-Frank Act protect whistleblowers against retaliation
 - Generally includes “discharge, demote, suspend, threaten, harass, or in any manner discriminate”
 - State laws protect whistleblowers (NC wrongful termination)
- Employee retention
- Preventing outside disclosure
- Public opinion
- Company culture

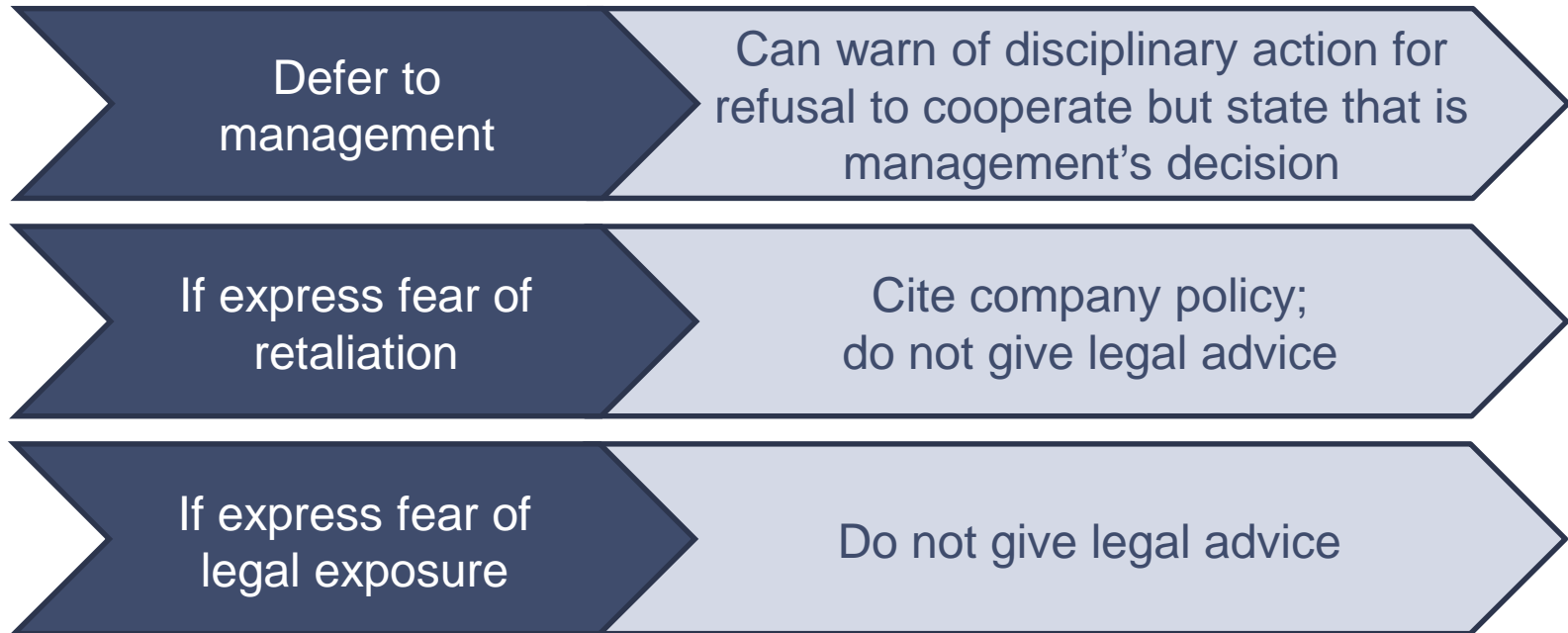


Interviews

- Who should participate
 - Only witness and counsel (union representative where required)
 - Ideally two lawyers
 - No group interviews
 - No subordinates who are “closer to the facts”
 - Maybe not in-house counsel
 - Preserve independence of investigation
 - Chilling effect on witness
 - Avoid confusion re representation

Interviews

Refusal to Cooperate



Interviews

- Witness requests counsel
 - Often no legal right, but consider it if requested
 - Fair if faced with civil or criminal sanctions
 - May ask for company to pay fees; indemnify
 - Media/public opinion considerations
- Company-provided counsel
 - Consider for key and former executives aligned with company
 - Indemnification agreements may require it
 - Allows greater control and cooperation (joint defense agreements)
 - Option to agree to indemnify, but not advance fees
 - Get undertaking if agree to indemnify

Confidentiality

- You **cannot** and **should not** guarantee witness confidentiality.
- Advising witnesses to keep conversations confidential is **standard** and **advisable**.

“

We ask that you not discuss this interview with anyone else—it is important that each interviewee’s recollection be his or her own.

”

“

We ask that you do not do any independent investigation or follow-up on your own—if there is a person with relevant information, tell us and we will follow up.

”

“

We ask that you do not create emails or documents related to this investigation—simply arrange a call or meeting with us to present any information you want to provide as follow-up.

”

Confidentiality

KBR SEC Enforcement Action, April 2015

KBR Confidentiality Agreement

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview, and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination.

- Cannot condition employment on confidentiality
- NLRB – broad prohibitions without justification may be improper

Social Media/Pretexting

- Disclosure of passwords – many states do not allow compelled disclosure
- Social media can reveal protected information (non-decision-makers should review)
- NLRB protection for concerted activity

Social Media/Pretexting



Fake profile?
Co-worker or friend access?
Private investigator or attorney?

Risk Management – Media and Publicity

- Involve internal PR professionals immediately.
- Provide a consistent message.
- Identify a single point of contact.
- Involve counsel in media messaging.
- Have a crisis management firm identified.
- Have patience.

Risk Management – Investigations Playbook

- Key internal contacts
 - Customers, board, clients, regulators
- Key IT personnel and vendors; latest data map
- Company policies and procedures
 - Whistleblower complaints
 - Human Resources
 - Collective bargaining agreements
- Crisis management firm contacts
- Legal counsel contacts (internal and external)



Mark W. Merritt

704.377.8337

mmerritt@robinsonbradshaw.com



Pearlynn G. Houck

704.377.8396

phouck@robinsonbradshaw.com