



609 Compliance in Internal Investigations

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Faculty Biographies

E. Scott Gilbert

Senior Vice President and Chief Compliance Officer
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Douglas A. Graham

Douglas A. Graham is an assistant general counsel at Exelon Corporation in Chicago. His responsibilities include litigation, bankruptcy, wage and hour employment counseling and litigation, and corporate compliance.

Prior to joining Exelon, Mr. Graham worked as an inside counsel for United Airlines and the Tribune Company. He started his legal career at Jenner & Block, in its Chicago office.

He currently serves on the board of directors for the American Lung Association of Metropolitan Chicago, where he is president-elect.
Mr. Graham received a B.A. from the University of Michigan

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Executive Vice President, Chief Legal and Governance Officer
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Daniel E. Karson

Daniel E. Karson, senior counsel of Kroll, in New York City, has extensive experience supervising and providing counsel on corporate internal investigations, the investigation of business crimes and misconduct, and strategies for gathering evidence. His experience also includes advising on corporate legal compliance and crisis management.

Prior to joining Kroll, Mr. Karson was general counsel and assistant commissioner of the New York City Department of Investigation. He was the first director of New York City's Inspector General Program. In this role, he directed investigations and determined policy for the internal investigative offices of 24 mayoral agencies. His office was responsible for investigating crime and misconduct by city employees and by persons and companies doing business with the city of New York. Previously,

Mr. Karson worked as an assistant district attorney for Bronx County, New York, where he served as chief of narcotics investigations.

Mr. Karson is a board member of ACC's Greater New York Chapter and is a frequent speaker at legal, banking, and professional seminars. He is the author of numerous published articles on conducting internal corporate investigations, due diligence investigations, and tracing concealed assets. He co-authored the chapter entitled, "Implementation and Operation" in The Bureau of National Affairs' Prevention of Corporate Liability manual. He also authored the chapter entitled, "Inside vs. Outside Resources" in the ACC publication, Corporate Internal Investigations.

Mr. Karson graduated cum laude from Ithaca College, and now serves as a member of its board of trustees. He received a J.D. from the New York University School of Law.

Gretchen A. Winter

Gretchen A. Winter is vice president and counsel, business practices, for Baxter International Inc. in Deerfield, Illinois. In that role, she is responsible for developing and communicating business practice standards as well as designing and supporting processes that ensure compliance with those standards and provide guidance to Baxter employees who see ethical dilemmas in their work. Ms. Winter also serves as a member of Baxter's political action committee board of trustees. While with Baxter, she has held positions as director of training and development, director of field human resources, employee relations/labor counsel, and a member of the company's re-engineering team.

Prior to joining Baxter, she worked as an attorney with the firm of Seyfarth, Shaw, Fairweather and Geraldson in Chicago.

Ms. Winter is chair of the Ethics Officer Association board of directors and has spoken at EOA national and regional conferences. She recently completed two years as chair of the Conference Board's Global Council on Business Conduct, and she has served on ethics committees for the ABA and DePaul University. She co-authored an article on "Breathing Life into Your Company's Code of Conduct" that appeared in the ACCA Docket and another on "International Business Standards: The Competitive Imperative" that appeared in the Thunderbird International Business Review. She is a member of the Illinois Student Assistance Commission and she serves on the boards of the Hispanic Lawyers Association of Illinois and the board of visitors for the University of Illinois at Chicago College of Liberal Arts and Sciences. She is immediate past president of Leadership Greater Chicago and serves on advisory committees for Lutheran Child and Family Services of Illinois, Project LEAP (Legal Elections in All Precincts), the University of Chicago Law School, and Pegasus Players, a not-for-profit theater.

Ms. Winter obtained her Bachelor's degree from the University of Illinois at Chicago and her J.D. from the University of Chicago.

Association of Corporate Counsel
Compliance in Internal Investigations

Questions for General Counsel

October 2005 Annual Meeting

Compliance in Internal Investigations

What are the first steps Marlowe should take? What records should Marlowe seek to retrieve?

Compliance in Internal Investigation

Who, if anyone in the corporation should Marlowe notify about the allegations?

Compliance in Internal Investigation

Whom should Marlowe interview first in the Purchasing case? Whom should Marlowe interview first in the Crawford case?

Compliance in Internal Investigation

What special actions, precautions, etc. should Marlowe take, if any, with respect to the Crawford complaint, given Mark's comment that he is getting "pressure at the C-Level," and had been "told to do this?"

Compliance in Internal Investigation

When should Marlowe interview Mildred Crawford? What should Marlowe do if Crawford refuses to repeat her allegation? Does Mildred have a legal obligation to answer Marlowe's questions?

Compliance in Internal Investigation

When should Marlowe interview Mickey Perk? When should Marlowe interview Mark Downs?

Compliance in Internal Investigation

Perfect is currently defending several unrelated class actions alleging mismanagement. Are the notes and investigative reports prepared in either investigation protected from discovery in those actions by the Work Product Doctrine? What can Marlowe do to preserve the Work Product Doctrine?

Compliance in Internal Investigation

Can Perfect claim that Mildred's conversation with Tyrone, the non-lawyer compliance officer, is protected by the corporation's Attorney-Client Privilege? What can Marlowe do to protect the corporation's Attorney-Client Privilege?

Compliance in Internal Investigation

How can Marlowe protect Work Product and the Attorney-Client privilege and still keep the CEO and the Chair of the Audit Committee informed?

Compliance in Internal Investigation

Is Marlowe under an obligation to notify law enforcement authorities?

Compliance in Internal Investigation

If Marlowe finds that there is credible evidence to support either of the complaints, and decides to notify law enforcement authorities, at what point in the investigation should she do so?

Compliance in Internal Investigation

One week after receiving the complaints, while the investigations are under way, Marlowe received a telephone call from an Assistant US Attorney. The AUSA told Marlowe that he heard she was investigating an allegation of financial fraud at Perfect. He asked her to brief him and provide him with a copy of her file. How should Marlowe respond?

Compliance in Internal Investigation

While interviewing an employee in Purchasing named Casper Cairo, Cairo told Marlowe's deputy that he was the anonymous caller. He provided both the correct complaint number and call back date. The next day Mickey Perk fired Cairo for habitual lateness. Cairo immediately called Marlowe's office and claimed that he was fired in retaliation for being a whistleblower? How should Marlowe react?

Compliance in Internal Investigation

If Marlowe finds that Mark Downs did order Mildred to falsely report financials, should Perfect report this publicly?

Compliance in Internal Investigation

Can Perfect add to its Code of Conduct a rule that imposes on employees an affirmative obligation to report violations of law or company rules?

**Association of Corporate Counsel
October 2005 Annual Meeting**

**Section 609
Compliance in Internal Investigations**

Faculty

**E. Scott Gilbert Patricia R. Hatler Gretchen A. Winter
Douglas A. Graham Daniel E. Karson**

Case Study for Discussion

PERFECT PRODUCTS CORPORATION

Phyllis Marlowe, the General Counsel of Perfect Products Corporation (Perfect), came to work on a Monday morning to find two unexpected reports on her desk. Both contained allegations of wrongdoing within Perfect. Perfect is a publicly traded on a national stock exchange.

One report came via Perfect's hot line reporting system. It was a standard form onto which the hot line operator entered information related by an anonymous caller.

The other report was written by Tyrone Maas, who serves as the local compliance officer in Perfect's western office. Maas is not a lawyer. Maas had sent his report to Harvey Stewart, Perfect's Chief Compliance Officer. Stewart is a lawyer. Stewart in turn sent the report to General Counsel Marlowe, and also to Frank Fairwood, the Chairman of the Audit Committee. Fairwood is not a lawyer. The three – Stewart, Maas and Fairwood - will decide by consensus what initial action will be taken and who will lead the investigations. Marlowe reports directly to the Perfect's Chief Executive Officer, but has a dotted line report to the Chair of the Audit Committee.

Marlowe believes she will be assigned to investigate the allegations. As she considers her options, she decides to consult the Association of Corporate Counsel Member to Member support service. This will put her in touch with other corporate counsels who might help her devise effective strategies.

The report from the hot line was as follows:

CONTINENTAL HOTLINE SERVICES

Report No. X/6122
Analyst: M. Archer
Date: October 16, 2005; 8:14 PM EDT
Identity of Caller: Anonymous
Call Back Date provided to Caller: October 23, 2005
Allegation: Unlawful Payments
Caller given Report Number? Yes

Summary:

The caller alleged that Mickey Perk, the Head of Purchasing for Perfect, has been taking payments from several vendors. The caller identified one vendor, Kick Back Travel (KBT). The caller said that KBT is the exclusive travel agency for Perfect.

The caller made the following allegations as to KBT:

- * They give Mickey free upgrades and free airline tickets for himself and his family for vacation travel. Mickey has told people that this doesn't violate company policy because it doesn't cost KBT anything and therefore has no "value."
- * They give Mickey the use of a hunting lodge they lease in Texas. Mickey says that lots of people use the lodge and he pays his own expenses while he's there.
- * Mickey owns a phony "brass plate company." The caller did not know the name. Mickey submits invoices for thousands of dollars to KBT for "consulting services" in the name of the phony company. The caller thought that Mickey also may have billed Perfect under his phony company name for services. Mickey pushed the invoices through for payment.

The compliance officer's report was as follows:

**PERFECT PRODUCTS CORPORATION
MEMORANDUM**

To: Harvey Stewart – Chief Compliance Officer
From: Tyrone Maas – Western Branch Office
Subject: Allegation of Misconduct
Date: October 15, 2005

On this date, at 3 PM I received a visit from Mildred Crawford, our Regional Controller. Mildred was very upset. She told me the following:

Shortly after the end of every quarter, she reviews the previous three month's sales reports and operating expenses for the region. She then compiles the quarterly report and

sends the report to Mark Downs, the National Controller at headquarters. Yesterday, she sent Mark the third quarter report. A few hours later, Mark called and told Mildred that she had to "adjust" the numbers.

According to Mildred, Mark said "Mildred, our numbers are horrific. You have got to pull some of these expenses out and hold them at least until Q1 of 2006. I'm doing what I can to move some items into the capital budget. Don't sweat it. We just need to ride out a bump in the road in 2005. It'll all be restated next year. We just can't take the earnings hit now. I am getting tremendous pressure at the C-level here to make these numbers better. I've been told to do this!"

Mildred said that she told Mark: "If the C-level is telling you to do this, then that's who's going to have to tell me." She hasn't heard anything further from Mark. Mildred was very nervous. She said "Look, now I've told you I'm not saying anything else and I'm not talking to anyone else." However, before leaving, Mildred said that in preparing the Q2 reports in June she had agreed to a request from Mark to move a small amount of anticipated Q3 revenue into Q2. He had also asked her to defer some expenses, but she had refused. She wondered if Mark was doing the same thing with any of the other three regional controllers.

The Perfect Products Corporation Code of Conduct provides as follows:

Payment of Benefits

A benefit is any gift, product, service, favor or other thing of value. No employee may ask for or accept any benefit for himself/herself or another person worth more than \$50.00 from any vendor that sells goods or services to the company, or any vendor seeking to do business with the company. The \$50.00 limit applies to the total of all benefits received in the course of a calendar year from all vendors.

Compliance with Federal and State Law

It is the policy of Perfect Products Corporation to comply with all applicable federal and state laws. If you are ordered by a supervisor or anyone else to take any action which you have a good reason to believe violates the law or company policy, you should not carry out the order. Instead you should tell the person who gave you the order that you think the order is a violation of law or company policy and explain why. If you are told that you still must carry out the order and you still believe the order violates the law or company policy, you have the right to refuse to do so. However, within 24 hours you must notify your local compliance officer in writing fully describing the circumstances and follow the compliance officer's instructions.

Questions Confronting General Counsel

1. What are the first steps Marlowe should take? What records should Marlowe seek to retrieve?
2. Who, if anyone in the corporation should Marlowe notify about the allegations?
3. Whom should Marlowe interview first in the Purchasing case? Whom should Marlowe interview first in the Crawford case?
4. What special actions, precautions, etc. should Marlowe take, if any, with respect to the Crawford complaint, given Mark's comment that he is getting "pressure at the C-Level," and had been "told to do this?"
5. When should Marlowe interview Mildred Crawford? What should Marlowe do if Crawford refuses to repeat her allegation? Does Mildred have a legal obligation to answer Marlowe's questions?
6. When should Marlowe interview Mickey Perk? When should Marlowe interview Mark Downs?
7. Perfect is currently defending several unrelated class actions alleging mismanagement. Are the notes and investigative reports prepared in either investigation protected from discovery in those actions by the Work Product Doctrine? What can Marlowe do to preserve the Work Product Doctrine?
8. Can Perfect claim that Mildred's conversation with Tyrone, the non-lawyer compliance officer, is protected by the corporation's Attorney-Client Privilege? What can Marlowe do to protect the corporation's Attorney-Client Privilege?
9. How can Marlowe protect Work Product and the Attorney-Client privilege and still keep the CEO and the Chair of the Audit Committee informed?
10. Is Marlowe under an obligation to notify law enforcement authorities?
11. If Marlowe finds that there is credible evidence to support either of the complaints, and decides to notify law enforcement authorities, at what point in the investigation should she do so?
12. One week after receiving the complaints, while the investigations are under way, Marlowe received a telephone call from an Assistant US Attorney. The AUSA told Marlowe that he heard she was investigating an allegation of financial fraud at Perfect and asked her to brief him and send him a copy of her file. How should Marlowe respond?

13. While interviewing an employee in Purchasing named Casper Cairo, Cairo told Marlowe's deputy that he was the anonymous caller. He provided both the correct complaint number and call back date. The next day Mickey Perk fired Cairo for habitual lateness. Cairo immediately called Marlowe's office and claimed that he was fired in retaliation for being a whistleblower? How should Marlowe react?
14. If Marlowe finds that Mark Downs did order Mildred to falsely report financials, should Perfect report this publicly?
15. Can Perfect add to its Code of Conduct a rule that imposes on employees an affirmative obligation to report violations of law or company rules?



**ASSOCIATION OF CORPORATE COUNSEL
ANNUAL MEETING 2005**

**PROGRAM SECTION 609
COMPLIANCE IN INTERNAL INVESTIGATIONS**

**THE RECOVERY OF EVIDENCE IN INTERNAL
INVESTIGATIONS**

Daniel E. Karson
Senior Counsel
Kroll Associates, Inc.*

When conducting an internal investigation in response to an allegation of misconduct or crime, corporate counsel must move swiftly. Counsel and investigators should determine quickly who should be interviewed and where evidence may be found.

In almost every internal investigation, important evidence is already in the possession and control of the corporation, but may not be readily apparent. The most common examples of such evidence include electronically stored documents, email, paper files and records of telephone calls.

The following is a list of steps and procedures designed to speed the search for evidence and prevent its intentional or inadvertent destruction. In all cases, original records intended to be used as evidence should be copied and preserved to prevent loss, and to establish a chain of custody. Counsel and investigators should work with copies whenever possible.

1. Electronically Stored Data

- a. Desktop and Laptop Computers; Handheld Organizers. Take possession of company owned computers and handheld devices used by subjects of the investigation (hereinafter "subjects.") Immediately image the hard drives. Secure the machines and original hard drives to preserve chain of custody. Take possession of peripherals such as thumb drives and diskettes that may have been used by the subjects.

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Suspend the scheduled deletion of email files on the company's server, so that email deleted beforehand by the subjects can be preserved. Make copies of the server tapes and preserve originals.

- b. Download voicemail. (Check with legal counsel first to ascertain that the company has provided proper notice to employees that telephone communications may be monitored.)

[These operations should be performed by computer forensic specialists and not by company personnel, even IT or MIS specialists. Data can be deleted even by turning on a computer. Also, chain of evidence custody is best recorded and preserved by using data retrieval and data recovery specialists.]

2. **Hard Copy Paper Files**

Take possession of paper files maintained by the subject.

3. **Telephone Records.**

The subjects may have telephoned individuals and business entities that are relevant to the investigation. In cases involving the theft of intellectual property, telephone calls made to suspect parties, such as competitors or former employees, will be relevant.

- a. Take possession of company owned mobile telephones used by the subjects (but see 'e' below.)
- b. Retrieve the records of outgoing telephone calls made from the subjects' office telephone extension and mobile telephones. Some telephone systems, especially mobile telephones, can produce records of incoming calls as well.
- c. Examine the records of telephone calls made through company paid calling cards.
- d. Telephone message logs. Take possession of the records kept of the subjects' incoming calls. Messages may also be stored in an assistant's computer, in paper telephone logs, and in bound books containing imprinted duplicates.
- e. Consider **not** canceling mobile telephone and calling card accounts. Continued use by the subjects may provide evidence.

4. **Card Access Records/Entry log records**

- a. In cases where access to offices or restricted areas is relevant, examine electronic card reader records to determine if the subject attempted or obtained access to the building, certain offices or restricted areas. These records also can establish a subject's presence or absence at specific times.
- b. Examine hard copy "sign in/sign out" records kept by the building's management or by the company for evidence of entry.

5. **U.S. Mail/Express Mail/Messenger Records**

Determine if there are records of mailings and deliveries (including intra-company mailings and deliveries) made by the subjects. Examine these records to determine mailings to questionable addressees.

6. **Transportation Records**

Examine records of transportation used by the subjects via company paid taxis, car services, rental cars, aircraft and any other transportation.

7. **Company Vehicles**

Take possession of and inventory company motor vehicles used by the subjects.

8. **Payroll and Expense Records; Company Credit Accounts**

- a. Examine the subjects' expense account reports for questionable travel, expense and reimbursement.
- b. Retrieve and examine cancelled pay, bonus and expense checks. High dollar value checks that were endorsed over to unusual or questionable payees (check cashing agency, liquor store, co-worker, and other investigative subjects) may indicate serious debt or evidence of complicit conduct.
- c. Cancel company credit cards issued to the subjects. Examine the charges made on the cards.

9. **Human Resources/Personnel File**

Examine HR files. Relevant information in HR files includes: indications of wage garnishments, requests for loans, medical notes, frequent address changes, changes in beneficiaries, complaints, disciplinary actions and absenteeism.

10. **Search the subjects' offices**

Ascertain first that a search does not violate law or company policy. Re-key lockable offices of suspended and terminated employees immediately, whether or not a search is intended, so that evidence is preserved.

[It is best to have an office search carried out by a team of professional investigators. In cases where the investigation is confidential, the office should be photographed with a digital or instant camera beforehand, so that it can be restored to its pre-search condition. As with searches of computers, the chain of custody should be preserved for evidentiary purposes. The retrieval of evidence should be formally recorded as to date, time and location discovered.]

11. **Obtain Corporate Vendor lists**

In vendor fraud and purchasing fraud cases, where the subjects may have had the authority to purchase goods and services for the company, investigators should match a company vendor list against any business names known to be associated with the subjects. Examine the vendor list for fictitious companies.

[The company should retain professional investigators to determine if a vendor may not be a legally established and/or operating entity, and if the vendor can be linked to the subjects.]