

Internal Investigations 101: Part 1

By Anne M. Lockner

InsideCounsel

July 12, 2016

Many in-house counsel are fortunate not to have handled a report of fraud or other illegal conduct within their companies. But, sooner or later, the problem likely will come up.

When it does, there will be little time to figure out what to do. This two-part series provides guidance about what to do, what to expect and how to mitigate the risks inherent in internal investigations.

Who should handle the investigation? If the matter is a straightforward allegation against a mid-to-lower-level employee, conducting the investigation internally may make sense.

But if the allegation implicates high-level executives, you should obtain outside independent counsel. Likewise, if the allegation relates to a criminal act the company could be liable for, such as violations of the Foreign Corrupt Practices Act or antitrust laws, you'll want outside counsel. If the allegation amounts to a significant scheme of a high-monetary magnitude or could have serious public relations ramifications for your brand, outside counsel is also the way to go.

Is a special committee necessary? The need for a special committee is usually rare, but it will be necessary if members of the board or high-level executives are implicated. Otherwise, if those overseeing the investigation have material stakes in the outcome, the investigation's findings can be called into question.

The special committee often consists of independent directors of the board who are not implicated in the allegations, but it can also include well-respected individuals completely unrelated to the company.

The protection provided by the attorney-client privilege is the primary reason you want a lawyer to conduct the investigation, not solely a former law enforcement officer. Your outside counsel may hire former FBI agents or other independent investigators to help, but they will work with and at the direction of the attorney to maintain the privilege.

In addition, whoever is conducting employee interviews must take care to ensure that the employees understand that the attorney conducting the investigation represents *the company* — not the employee. Furthermore, the employees need to understand that, although the conversation they have with the investigator is privileged, the company controls that privilege and may decide to waive it. This is known as an Upjohn warning, based on *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Keep in mind that if a special committee is appointed, only its members should have privileged communications with the investigators. Sharing those communications with the rest of the board or with a general counsel who is not on the committee can waive the privilege.

While it is important to maintain the privilege during the course of the investigation, there may come a time when the company decides to waive that privilege. For instance, if the company is a victim of fraud or embezzlement, it likely will want to submit an insurance claim and refer the matter to the authorities by disclosing the factual findings of the investigation.

Voluntary disclosure

If the company is implicated in a crime, it may want to voluntarily disclose the factual findings of the investigation in hope of obtaining leniency. Anything disclosed to auditors will likely lose the privilege, but sometimes disclosure to auditors will be required to ensure that the company's financial statements are accurate.

Publicly traded companies have additional considerations for what constitutes material events that need to be disclosed.

If you are at the point at which you believe an internal investigation is needed, you have an obligation to preserve documents. How you go about preserving those documents may vary slightly from how you would do so in a routine litigation matter.

If the subjects of your investigation do not know that you are investigating, you do not want to send them a legal hold memo that will alert them to that fact. Therefore, it is imperative that you can effectuate a necessary legal hold from the back end — meaning that you preserve the subjects' emails and other documents from the company's server or cloud host without the intervention or permission of the employee.

And do not forget to revisit which documents need to be on legal hold as the investigation goes on; the scope of what should be preserved often expands during the investigation.

In part two of this series, find out whether you should fire the subject of the allegations; how to control the costs of an investigation; how long it might take; and the toll it can have on your employees.

First published by [InsideCounsel](#), July 12, 2016