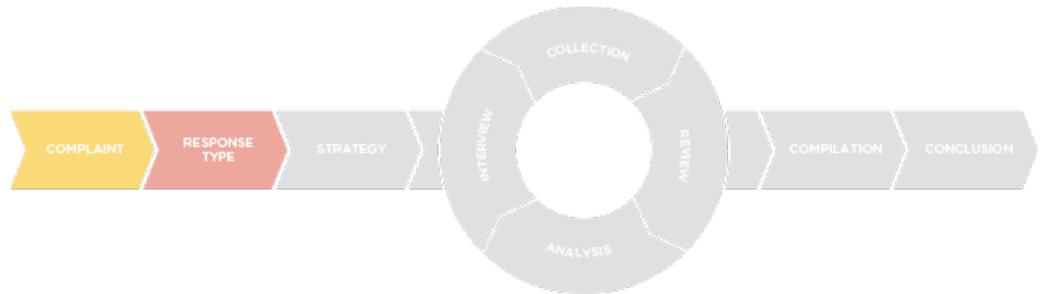


It's All in the Approach: Internal Investigations

As corporations go global, the importance of conducting pertinent, effective and defensible investigations also grows. Investigations are no longer limited to employee issues, such as violation of work rules or other misconduct. They now include more critical matters, such as corporate fraud, whistleblowing, discrimination and retaliation.¹ More than ever, authorities ranging from local to foreign are investigating private and publicly held companies. How can a company approach an imminent internal investigation — whether triggered by a subpoena or its own initiative — or be prepared to conduct one in that event in the future? This white paper discusses types of complaints filed, best practices, must-have base competencies of investigators, Technology-Assisted Review benefits, Do Not Destroy notices privilege and more.



I. COMPLAINTS AND RESPONSE TYPE

There are a variety of complaints that can be filed and lead to an internal investigation. The complaint can stem from any of the following sources: internal, third-party supplier or consumer, government agency and anonymous.

Once the complaint has been received and reviewed, a determination must be made as to the response: Is it eligible for Alternative Dispute Resolution (ADR)? Does an internal investigation need to occur on its own or in parallel with an ADR? ADR refers to the variety of processes, including mediation, arbitration, neutral evaluation and collaborative law, that help parties resolve disputes without a trial.²

In order to formulate the correct strategy and response, it is important to consider the source of the investigation. Considerations can include if there is a threat to go public with the allegation; if there is attorney representation; if there is the possibility of a government investigation or other regulatory issues; and if there have been previous, similar complaints.

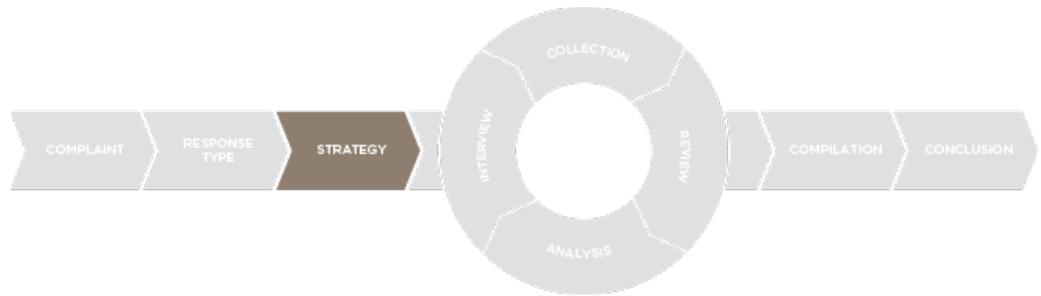
Be Prompt, Thorough and Fair

It's a fine line between being prompt and yet not rushing into a matter. According to D. Jan Duffy of the Management Practices Group, when it comes to internal investigations, companies "must proceed more expeditiously than with other business matters" as juries and regulators will not take employers' arguments (excuses?) for any delay in an investigation lightly.³

Juries and regulators will not approve of an investigation that is less than thorough, either. Any omissions or lack of investigative effort can be viewed with suspicion.⁴ In addition to proper planning and organization, checking the investigation for missing information or avenues that have not been pursued is important.⁵

The complaint can stem from any of the following sources: internal, third-party supplier or consumer, government agency and anonymous.





II. STRATEGY

An internal investigation will generally proceed if a complaint cannot solely be addressed by an ADR, if a policy change assessment needs to take place or if additional exposure is a possibility.

While an internal investigation often carries a sense of urgency, particularly if the company just wants answers, careful strategizing can reduce mistakes, ensure investigatory standards are upheld and help demonstrate to prospective reviewers — regulatory agencies, judges and juries — that a sincere effort was made.⁶

Strategizing begins with a thorough assessment of the investigation, which raises a host of questions:

- Who is involved?
- What is the issue?
- What is the purpose of the investigation?
- What are the objectives?
- Is litigation anticipated or can it be forestalled?
- Have there been similar issues and litigation in the past?
- Is there a risk of upsetting key relationships?
- Who should conduct the investigation?
- What is the timeframe for the investigation?

Additional areas to consider that affect coordination, planning and reporting portions of the strategy are whether there is a pending government investigation and if it's advisable or required by the government to co-coordinate the investigation. Also, whether there are potential self-reporting obligations.

From there, the necessary steps, resources and timing can be determined, plotted and prepared for.

Build a Team

Who should conduct the investigation is also of great importance. When considering whether to have an internal or external team, there are certain considerations to keep in mind. In particular, there is a base competency that can be divided into three areas: experience, impartiality and access. These three areas have to be weighed against each other. In different situations, one area may carry a greater weight than the others.

In thinking about the three areas of experience, impartiality and access, it is important to consider the following:

Does the team have the necessary experience with other investigations, including with Upjohn warnings and questioning? Will there be adequate impartiality and objectivity?

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One can't emphasize enough the importance of experience with issuing Upjohn warnings — when counsel formally informs an individual that he/she represents the corporation, not the individual.

The perception of impartiality is an important point when a company is being proactive and attempting to stem further troubles. Will the team have adequate access and build a rapport with employees? Also, what is the team's understanding of the organization's process, its corporate knowledge and knowledge of a specific policy and technology?

One can't emphasize enough the importance of experience with issuing Upjohn warnings — when counsel formally informs an individual that he/she represents the corporation, not the individual. Not issuing such a warning, which is intended to reduce conflict, can prove hazardous for the corporation, individuals and counsel.⁷ It's recommended that counsel not only issue an Upjohn warning and "contemporaneously memorialize it," but also to review the record of representation and ensure that no conflict exists.⁸

What follows are a few specific benefits when considering inside versus outside counsel.

Inside Counsel:

- More control over the investigation
- Greater familiarity with organization (structure, employees, operations, etc.)
- Natural rapport with employees, greater cooperation and insight

Outside Counsel:

- Stronger case for privilege
- May have greater familiarity with nuances of the law at issue
- Increased independence and impartiality

Whether inside or outside, it can be preferable when building a team to have investigators who are not only well trained and experienced with investigations, Upjohns, questioning and more, but also who are subject-matter experts (SME), who can provide illuminating expertise in a specific area, such as "engineering, IT, CAS, forensic accounting, quality assurance, HR, environmental health and safety, internal audit and criminal defense."⁹

Other recommended personal characteristics can include the following:¹⁰

- impartiality, fairness and objectivity
- integrity and courage
- analytical ability
- empathy, sensitivity, perceptivity, and general emotional intelligence
- persistence and determination
- tough-mindedness
- quickness
- patience
- common sense

Fairness should be emphasized here. It must be present throughout an investigation. According to D. Jan Duffy, "jurors and regulators are surprisingly capable of detecting its absence and united in their antipathy toward an employer whose investigation deviates from their standard."¹¹

"U.S. regulators such as those charged with enforcing Sarbanes-Oxley and the Foreign Corrupt Practices Act, for example, have made it very clear that in assessing organizational practices or responses relevant to potentially illegal behavior, they will focus heavily on certain commitment issues."¹²



In-house team resources can include legal, internal audit, security, or human resources, compliance or ethics personnel. External resources can include outside counsel, accountants, security firms and specialized investigation teams composed of business, criminal, ex-government, and labor and employment lawyers.¹³ A strong team can lend credibility to the investigation.¹⁴

Outline the Scope

After the investigative team has been assembled and, most important, who is in charge has been determined, the initial scope of the investigation must be outlined, and goals and objectives must be determined. The initial scope can include who must be involved, such as senior personnel, the issue at hand, risk, financials, and whom the team is ultimately reporting to. The level of confidentiality, timing of the start and presence of the key component fairness must also be considered.

If a subpoena triggered the investigation, it's important to understand and clarify with prosecutors what they are seeking.¹⁵ If an internal tip set the investigation in motion, defining the scope is just as important.¹⁶ Both circumstances require the investigation to be as specific as possible about its direction.¹⁷ A company knows its employees and data best, so it should take the lead in guiding and refining the scope, rather than allow a regulator to more broadly define it for them.

Coordination

The success of an internal investigation can also depend on the coordination of the procedures of internal departments, including IT, Regulatory, Law, Auditing, Corporate Security, Public Relations and Human Resources.¹⁸ It's important to ensure that appropriate documentation is both accurate and precise, and that there is transparency in the investigation.

Early transparency for example — documenting the why — can create an open dialogue with the regulator and may help reduce the initial set of documents to a smaller set. Transparency builds trust.

To hold up under scrutiny, an investigation must also be accurate and precise. There must be sufficient, specific facts that are clearly linked to investigators' conclusions.¹⁹ According to D. Jan Duffy, "findings and related conclusions should be reviewed for accuracy, preferably by someone other than the fact finder, before an ultimate decision is reached."²⁰ This should be an iterative process that encourages review of the information and direction throughout the investigation.

Consider a Timeline

It would also be beneficial to create a timeline of events as they are understood at the outset of the investigation. As new information is gathered in interviews and from document review, the timeline can be expanded. A timeline can help highlight or draw attention to other individuals that need to be interviewed or other sources that need to be reviewed for additional data. It can also point out whether a team has or needs to find corroborating documents or witnesses. Additionally, the timeline can be annotated to note information that appears to be inconsistent with each entry. When completed in this way, the dynamic timeline can help recommend courses of investigation.²¹

Do Not Destroy Notice: Yes or No?

There are two schools of thought on the consideration of the issuance of a Do Not Destroy notice (DND). On the one hand, the preservation of documents that could be relevant to the investigation is of great importance, particularly if the government will be reviewing it. In fact,

A timeline can help highlight or draw attention to other individuals that need to be interviewed or other sources that need to be reviewed for additional data.



Barry Pollack, a member of Miller & Chevalier's White Collar & Internal Investigations Group, stated to Inside Counsel, "One of the biggest pitfalls [in investigations] is that you might have an allegation that, at the end of the day, the government would not have pursued, but because they have concerns about after-the-fact destruction of evidence, they pursue it."²²

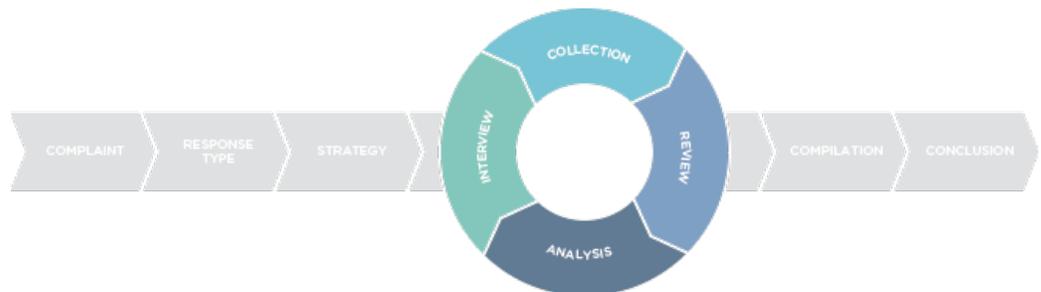
When determining whether to issue a DND or not, identifying the key players in the investigation is important. Referring to the organizational chart when the issue took place can be helpful. Be aware that it's easier to add people to a DND than to release them. If the scope of an investigation increases, preservation must increase accordingly. Finally, it's important to actively manage preservation, not simply "set it and forget it."

On the other hand, issuing a DND could also have consequences. Would it tip off some personnel who, in turn, destroy or tamper with data?

Other matters to consider around data and document collection can include whether a company needs to determine in advance if data was tampered with; if company policy allows for access on IT systems; if any applicable laws need to be reviewed; and whether access to information needs to be restricted during the internal investigation.

It's important to consider if preservation without notification is possible. Can data be collected and/or preserved in advance of a notice? The team needs to determine not only if company data is accessible or is stored outside of IT's reach, but also all the policies relating to that access.

Be aware that it's easier to add people to a DND than to release them. If the scope of an investigation increases, preservation must increase accordingly.



III. INTERVIEWS

Once potential witnesses have been identified, deciding whether to interview them before or after document review depends on how much time a situation permits.²³ Complicated circumstances can require an investigation to be flexible. Then there are times when counsel would prefer to enter into the interviews with complete knowledge of the documents that were uncovered during review.

A strategy for conducting interviews must be prepared:

- Will it be covert?
- Should witnesses receive advanced notice?
- Where should the interviews be conducted?
- Are there safety concerns?
- Will the statements be signed?
- Are there any terminations?
- What order shall the interviews be conducted?
- Can any questions posed by the witnesses be anticipated and responses prepared?
- Who will be present?

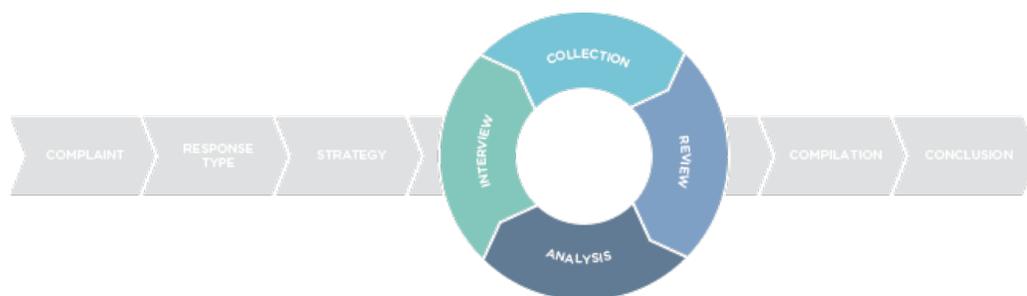
To reduce the high cost, time and complication associated with reviewing an ever-increasing volume of data, Technology-Assisted Review (TAR) is recommended.

The order a team conducts interviews is important. Interviews should be concentric: Interview witnesses who are less involved first, then interview those who seem to be more heavily involved second.²⁴ If, however, a case reveals which personnel or agents are of primary interest, then the strategy should be reversed: interviews begin at the center and move outward, either confirming or contradicting the main account.²⁵ Then, subsequent interviews can explore any account discrepancies.²⁶ Ultimately, the order is a very strategic component that needs to be considered. Not only can a correctly done order help gain the factual information desired, but also reduce time and cost. In addition, attorney-client privilege must be considered and, as previously mentioned, Upjohn warnings issued.

During the interview, careful notes must be taken not only for confidentiality issues, but also for accurate reporting. All relevant info gathered must be documented, plus the time, place and who was present during the interview. Concluding instructions must be provided, such as a confidentiality statement and, if relevant, not to interfere with a government investigation. Identify if additional interviews are required. Separate facts gathered from impressions, which can enhance work-product privilege.

Compilation of Interview Notes

A review of notes can be done after each interview as well as after all interviews are concluded. The interviewer needs to document all relevant information gathered; if Upjohn warnings were given, when and by whom; if any concluding instructions were provided; if additional investigation or interviews are required as a result of the interview; identify if additional data needs to be collected as a result of interview; and separate facts gathered from the impression to enhance work product privilege.



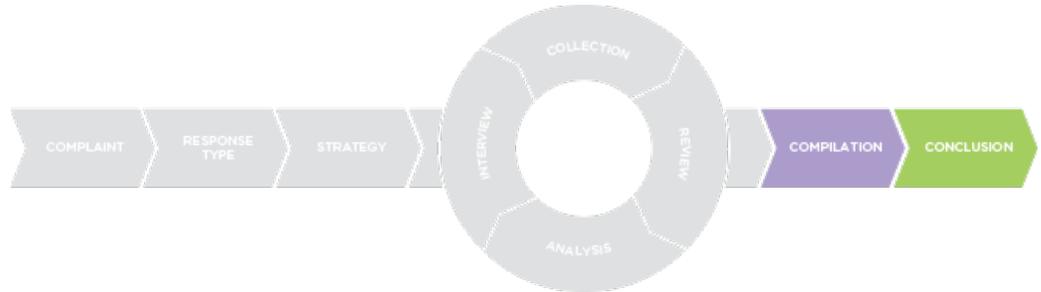
IV. COLLECTION, REVIEW AND ANALYSIS

The foundation for a successful internal investigation is the collection, identification and proper use of key documents.²⁷ One approach is to review collected documents for relevancy. To reduce the high cost, time and complication associated with reviewing an ever-increasing volume of data, Technology-Assisted Review (TAR) is recommended. The proven, defensible TAR not only operates as a first-pass tool that significantly speeds up access to important documents, it also narrows the scope of data and refines collection precision.²⁸

When deciding which TAR provider and software to select, it's important to consider the following qualifications.

- Does the provider have a proven track record? Without relevant expertise, TAR quality can suffer and cost can increase. It's important to research potential providers and learn of their experience and case involvement.
- Does the provider employ a proven technology or algorithm?
- How user-friendly is the software, and does it offer tools that provide transparency throughout the process?

Internal investigations are iterative processes. Once document review has been completed and all interview notes have been compiled, careful review and analysis can begin to determine if the relevant documents have addressed the issues at hand. Such an analysis permits investigators to assess whether they should either continue or move on to the report/results compilation stage. During review, the timeline is an essential tool for understanding the significance of the gathered information.²⁹ Have problems, processes or people been identified that need further review? The timeline can point to whether or not additional data and documents need to be collected and pre-existing witnesses re-interviewed/new witnesses interviewed.



V. COMPILATION AND CONCLUSION

Once enough information and facts have been collected to address the core complaint and satisfy the goals and objectives defined in the initial scope, the final report can be created. This can be considered the most critical phase of the investigation.³⁰

When a report is being compiled and prepared for sending, consider the recipients and the format, which are “driven by the results of the investigation, the seriousness of wrongdoing uncovered, and the individuals involved in the wrongful conduct.”³¹

With regard to recipients, how much information and content should be shared and with whom? For example, the complainant, complainant’s representative, supervising personnel, board of directors, government agency or public relations team.

The format of the report — oral, presentation, detailed document — also depends on the investigation’s objectives, cost considerations, the ability to deliver the conclusion in an effective manner and the need to document against further issues.

Consider attorney-client privilege and Safe Harbor, too. According to Jones Day, the Department of Justice’s (DOJ) “nuanced stance on waiver does not guarantee that a corporation can keep its privileged material privileged and still get the full benefit of a cooperation credit.” Additionally, other agencies’ approaches to waiver of the attorney-client and work-product protections vary.

“Even now, corporate counsel must be keenly aware of government interest in a corporation’s waiver of the attorney-client and work-product protections and be prepared to counsel her clients on the benefits and drawbacks of waiving the privilege or withholding that waiver.”³³

Next, determine remedial actions. For example, will financial restatements need to be made? Will policies need to be reviewed and changed? Will the remedial action satisfy the complainant or result in potential claims of retaliation? Can a settlement agreement, like an ADR, be obtained? If so, what are the terms? Will the remedial action or resolution satisfy applicable law? It can be helpful to review comparable situations. Be sure to ask the complainant if he or she is satisfied with the investigation and remedial actions.

Foley & Lardner LLP recommends that new compliance measures can be helpful in the event the government were to investigate. A failure to follow up with new procedures can be viewed as having a “lack of concern regarding the seriousness of the conduct.”³⁴

The format of the report — oral, presentation, detailed document — also depends on the investigation’s objectives, cost considerations, the ability to deliver the conclusion in an effective manner and the need to document against further issues.

According to D. Jan Duffy, when an investigator is carefully evaluating the results of the investigation prior to making a recommendation to the “ultimate decision maker,” he or she should weigh all of the evidence, not just what is provable in court.³⁵ “A good investigator will critically examine all alternatives and possible consequences of each of those alternatives.”³⁶

Once the report has been concluded, generate and send it to the appropriate parties. Big-picture effects, such as claims, settlements, financial restatements and more, will follow.

The SEC Heat Is On

The Security and Exchange Commission’s (SEC) recent Dodd-Frank awarding of half a million dollars to a former company officer demonstrates to companies everywhere to “act now on every concern” or let the SEC handle the investigation for them.³⁷ The SEC continues to affirm its position in public statements that “no matter who you are or how you learned of the fraud, you are encouraged to come forward and you will be heard.”³⁸

Given the SEC’s increased scrutiny, companies are encouraged to “work with knowledgeable counsel to review and upgrade their internal investigations systems to promptly and effectively address all internal concerns.”³⁹

Furthermore, when an issue or complaint arises, a company must determine whether to self-report to the SEC.⁴⁰ A well-planned, organized and timely investigation can help a company make an informed decision.

In 2008, Siemens AG agreed to pay \$800 million in combined penalties to the U.S. Dept. of Justice and the SEC to settle a Foreign Corrupt Practices Act investigation. When combined with penalties from Germany, the fines ballooned to \$1.6 billion. The SEC has also been investigating serious bribery charges levied against Wal-Mart. While the retail giant has spent hundreds of millions of dollars conducting its own internal investigation into the matter, this should not deter other companies from starting their own when one is warranted. The costs can be even greater if an investigation is delayed or avoided.⁴¹

Conclusion

An internal investigation can potentially avert great costs to a company’s bottom line, reputation and employees’ loyalty and morale. In order to conduct an internal investigation effectively, it’s all in the approach. Like with any corporate undertaking, it’s about sound planning and organization, assessing the scope of the matter, and building the right team and using the right technological tools. Furthermore, assessing the current internal investigation protocol in place and being prepared can position a company securely for the future.

An internal investigation can potentially avert great costs to a company’s bottom line, reputation and employees’ loyalty and morale.



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