

What to Do When the Whistle Blows: Best Practices for Conducting an Internal Whistleblower Investigation

WRITTEN BY

Kristin H. Jones | Abigail A. Hazlett | Jason A. Kurtyka

It is nearly inevitable that at some point every company will receive an internal allegation of wrongdoing that will require the company to conduct an investigation. This primer on internal investigations raises key issues and concerns that both in-house and outside counsel should consider both before starting, and while conducting, an internal whistleblower investigation.

Take All Complaints Seriously

Anonymous whistleblower tips often include information that may be somewhat vague, and the allegations could, at first, appear baseless. It is crucial, however, to take every complaint seriously because an allegation that seems unfounded could actually be just the tip of the iceberg.

Corporate stakeholders are now demanding thorough internal investigations. Shareholders of public corporations view credible and timely investigations as something that brings value to a company. Statutes, like Sarbanes-Oxley, require internal investigations in certain instances. An effective and objective internal investigation can also be looked on favorably by government agencies, such as the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), in their consideration of whether to assess a company with civil or criminal penalties.

Avoid Retaliation

It is crucial to maintain a strict prohibition on retaliating against the whistleblower, particularly in situations where the whistleblower is known to the company. Retaliation can take the form of an adverse employment action, such as termination or demotion of the employee, or the creation of a hostile work environment. Often, whistleblowers will already be disgruntled employees who are more sensitive to any type of negative treatment. Whistleblowers who were retaliated against can bring statutory claims against the company.

Develop an Investigation Plan

Both adaptability and flexibility to appropriately scale an investigation relative to the allegations are necessary in order to take every complaint seriously. Once a complaint is received and the decision is made to investigate, in-house counsel must lay out a plan, from start to finish, that will ensure the investigation will be thorough, efficient, objective and credible.

Consider the Scope of the Investigation

The investigation's scope may be influenced by a number of factors, such as criminal or civil exposure to the company (both domestically and globally), seriousness and nature of the allegations, possibility of shareholder litigation, or potential breach of company policy. Scope may be determined after consultation with outside counsel.

Should Outside Counsel Be Brought On?

There are a number of benefits to utilizing in-house counsel to conduct the investigation. In-house counsel are more likely to be familiar with the company and its people. Management would likely be more receptive to being investigated by a familiar face, particularly because of the cost savings.

Retaining outside counsel, however, brings greater assurance that the investigation will be independent. Outside counsel may bring expertise and a depth of knowledge that can help guide the company through an array of unknowns. Agencies, such as DOJ and SEC, may also look more favorably on an investigation that has greater assurances of objectivity and thoroughness. Company officials should also be sure to consider whether outside counsel is too connected to the company in a way that distorts the investigation's independence. Familiar outside counsel may be able to perform a more efficient investigation, but government officials may be more persuaded by an investigation that is truly objective.

What Are the Investigation's Goals?

The nature of the allegations is likely to determine the desired outcome of the investigation. An investigation into a violation of internal company policy, for example, may be geared towards gathering enough information to decide whether to terminate the subject's employment. Allegations of illegal or improper behavior, however, may generate multifaceted investigation goals, such as determining whether the alleged conduct occurred, figuring out whether the conduct was widespread, or gathering sufficient information to highlight weak points in internal controls.

What Is the Investigation's Timetable?

The timing of the investigation may be crucial if the company is facing an impending government investigation or a *qui tam* lawsuit was just unsealed. An investigation may need to conclude before a company makes a filing with the SEC to avoid any material misstatements. The investigation plan must be realistic enough to meet a potentially strict timeline but must also build in enough time to thoroughly interview witnesses and review relevant documents.

Keep Costs in Mind

Many general counsel still report that business-focused managers are resistant to investing in thorough investigations. In-house counsel should strive to sell prophylactic legal solutions as a value-based investment that pays long-term returns. Data comparing the costs and risks to a company that chooses not to seriously investigate damaging allegations versus one that prioritizes it can convince management to commit resources to an investigation.

Preserve Relevant Documents

A specific document preservation and retention policy must be implemented once an investigation is initiated. A notice should be sent out to all relevant employees warning them not to destroy, alter or conceal documents. Document preservation and retention policies should be put in place regardless of whether a subpoena has been issued because the credibility of any investigation can be impaired by document destruction. In-house counsel should also be sure to work closely with the IT department to suspend any regular document deletion program and to create backups of all documents collected.

Assemble the Investigation Team

The composition of the investigation team will largely depend on whether outside counsel is retained. An investigation team should have a diverse group of talent that is capable of handling each portion of the investigation in a professional and thorough manner.

Reporting Lines and Supervision

An internal investigation may alter established modes of supervision and reporting. Upper management may be implicated in the allegations, and looping them in on the investigation's progress may be improper. If general counsel is implicated in any allegation, then it may be appropriate to have investigation staff report directly to the CEO or board of directors. Care must be taken to wall off an investigation from those implicated in order to preserve its independence.

Privilege Considerations

Investigations conducted by either in-house or outside counsel will likely be protected by the attorney-client privilege, work-product doctrine or both. It is important to remember that the company is the client during an investigation, and the company holds the authority to waive privilege. Company officials may not have sufficient information to decide whether to waive privilege until the conclusion of the investigation. Thus, it is crucial for the investigation team to maintain privilege. Failure to do so may allow for the release of sensitive company information into the hands of the government, litigation opponents, shareholders or competitors.

Investigators must be well-versed with the U.S. Supreme Court's *Upjohn* decision. Before every witness interview, the investigator should administer an *Upjohn* warning that makes clear:

- Counsel represents the corporation, not the employee
- Communications are privileged, but the privilege belongs to the company
- The company may waive the privilege and share information with third parties, including the government
- To maintain the privilege, the subject should keep the information discussed in the interview confidential.

Courts distinguish between "factual" and "opinion" work product produced by investigations. Factual work

product merely recounts objective facts learned in the investigation, while opinion work product contains legal analysis and mental impressions. Factual work product could be discoverable through a showing of “substantial need” by the government or litigation opponent. Conversely, opinion work product enjoys stronger protections. For example, instead of producing a verbatim transcript of a witness interview, counsel should intersperse legal analysis and mental impressions about the witness’s testimony in the transcript.

Utilize the IT Department

The IT department can be an immensely helpful resource in collecting and preserving documents and analyzing data. Experienced investigators enlist IT staff to further their fact-finding mission.

Witness Interviews

Witness interviews are an indispensable source of information pertaining to an allegation. Due care should be given to preparing the strategy and process for witness interviews because of their critical importance. It is best to begin the process early on in the investigation in order to lock in the narrative and to prevent witnesses from being influenced.

Often, the best practice is to interview lower-level employees first to gather facts, then speak to upper management. Counsel will often only have one chance to speak to senior officials, so the more robust the conversation can be, the better. Investigators should take into account the possibility of resignations, government requests or internal disciplinary action that could complicate the order in which witnesses are interviewed.

Witness interviews should start by administering an *Upjohn* warning, as described above. Ideally, two lawyers should staff each interview — one who conducts the interview, while the other takes notes. Privilege considerations may dictate whether the interview is recorded or transcribed.

An in-person interview is best because it can be insightful to read the body language of the witness. This allows the interviewer to gauge the witness’s demeanor and make judgments about the approach that are likely to elicit the most information.

Reporting

A final report represents the culmination of the investigation and is likely the first time the client will be apprised of all the facts and the investigation team’s conclusions. The client’s initial decision to receive an oral or written report is critical due to the implications each carry.

Weighing an Oral Versus a Written Report

A written report provides the client all the key facts based on the witnesses interviewed and documents reviewed, allowing the investigators to make conclusions about how the company should respond to their findings. Written reports are proof that the investigation was handled in a credible and thorough manner. This evidence could be crucial if advocating for leniency from DOJ or SEC.

On the other hand, written reports can codify damaging information about the company. Oral reports can control who receives the findings of the investigation and better fortify privilege. To be sure, even oral reports come with drawbacks, such as the appearance that the company is trying to conceal the findings.

Counsel should advise their client of the various alternatives and propose creative solutions, such as a limited written report followed by an extensive oral report.

Structure of the Report

Reports should be structured in a way that best protects the client. A report should also follow a logical path that lays a basis in fact for the conclusions the investigators make.

Robust reports will have the following components:

- Summary of the issues raised or mandate from client
- An executive summary
- Relevant facts and documents
- List of witnesses interviewed
- Specific methodology used
- Findings
- Recommendations.

Counsel must pay close attention to the recommendations made and must tailor them to the capabilities and culture of the company. Proposing unrealistic reforms may open the company up to future scrutiny by regulators. At the same time, investigators should be forthright in identifying changes the client should make to mitigate the issues examined.

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