

The Do's and Don'ts of Conducting an Internal Investigation

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A well-executed investigation can assist a company to stop or even prevent wrongdoing. It can mitigate the harm or consequences of wrongdoing that may have occurred and prevent potential lawsuits by third parties. Government agencies also expect and reward internal investigations as part of an effective compliance program. Indeed, in several noteworthy instances, the government has declined to pursue charges against a company based on its handling of suspected illegal conduct, including the thoroughness of its internal investigation. A fair investigation also demonstrates to employees and other stakeholders that the company takes allegations of wrongdoing seriously and promptly addresses them, thereby improving a company's culture. However, a poorly executed investigation can make matters materially worse and potentially create liability where none previously existed. It can foster a lack of trust and whet the appetite of the same third parties or governmental agencies you would prefer to avoid.

Yet, despite the possible consequences, many companies are ill prepared to conduct an internal investigation. Many approach every investigation in the same rote manner by strictly adhering to a "playbook", or worse, they approach every investigation in an ad hoc manner with each investigator left to do as he/she sees fit. Advance planning and preparation can be the difference between a well-designed, minimally disruptive and ultimately effective investigation and an incredibly disruptive one that leaves stakeholders and employees frustrated or worse.

A thorough investigation has seven basic, but essential, steps: (1) choose the investigator; (2) develop the work plan; (3) collect and review the evidence; (4) conduct interviews; (5) reach a conclusion; (6) publish the conclusion; and (7) close the investigation. While these are generally listed in order, most investigations are not linear exercises and you will often need to circle back to

one step or another. The success of the investigation depends on executing each of these steps effectively.

Choose the Investigator

Choosing the investigator is not just the first step; it is also the most critical. Get this wrong and the outcome is predetermined. An effective investigator has some key essential characteristics or skills. The existence of these should determine who is assigned the task. The investigator should have the requisite experience and skill set to lead an investigation. Have they done it before? Can they communicate clearly and effectively? Are they organized? Detail-oriented? The investigator should understand the subject matter or issue at hand. For example, a leader in the human resources department may be the best person to handle an investigation into allegations of work-place harassment while an internal auditor may be better suited to investigation alleged accounting improprieties or allegations of embezzlement. The investigator must not be biased or susceptible to even the appearance of bias – nothing will destroy the credibility of an investigation faster, rendering the conclusion worthless and any action taken susceptible to challenge. The investigator should also be credible, independent and carry clout within the organization.

Develop the Work Plan

Once assigned, the investigator's first task is to develop the work plan. The work plan serves two critical purposes. It is the investigator's road map, detailing where he has been and where he is going, allowing him to stay on task. Equally, if not more important, the work plan is the backbone of the file once the investigation is closed. The work plan demonstrates whether the company conducted a fair and thorough investigation or cut corners and failed to consider critical sources of information. Because investigations are not linear and even the best plan requires revision, the work plan is a living

document. Accordingly, it should be reviewed constantly and updated often.

Collect and Review Evidence

Once the investigator has a plan, it is time to execute. The investigator should start by collecting and reviewing the evidence – at least that evidence that is easily or moderately accessible. The investigator can always go back and gather more, but they should "kick the tires" initially to get a sense of the veracity of the issue and ensure the work plan is on target. This initial review also allows the investigator to develop a timeline of the relevant events and ensure that they identified all key players. Email is frequently the most telling source of evidence and often provides a contemporaneous and often unvarnished view of what occurred, making it the ideal starting point for an investigation.

Conduct Interviews

Witness interviews are the next step in the investigation, and they are not easy to do – at least do well. Aside from selecting the right investigator, witness interviews are the most perilous step in conducting an investigation. A good interview can be invaluable in determining what actual happened – the ultimate goal in any investigation. A poorly handled interview can complicate the investigation, breed distrust and anxiety and even create liability. The investigator must always be honest but not necessarily open. They should share what they need to share to be effective, but also be sensitive to confidentiality and the reputations of others. The interviewer should be sensitive to the individual being interviewed as well as the person against whom an allegation was made. Be considerate and cooperative; let the person take breaks or end the interview if they insist. Don't bluff and don't make threats. That rarely works and usually backfires.

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Always have at least one additional person with you besides the person being interviewed. This does two important things. It allows you to focus on the interview – asking good questions, following up on leads, reading body language or facial expressions – while ensuring accurate and complete notes are taken. It also gives you a witness in the event things go awry and there is later a disagreement about what transpired or what was said.

Reach a Conclusion

Assuming you have circled back as necessary and are confident you have been thorough, fair and considered any evidence that is material to the issue and you are equally confident a *neutral* third party would agree, it's time to reach and publish your conclusion. Again, the role of the investigator is to do just that – reach a conclusion regarding what happened. It is not the investigator's job to prove or disprove an allegation. Taking that approach can lead you astray and make you more susceptible to confirmation bias or allegations that the investigation was neither fair nor thorough.

Publish the Conclusion

When publishing the results, the investigator should stick to the facts and be objective and balanced. They should document the evidence that supports the conclusions and factual findings, but also

document the evidence that may support a contrary conclusion. Again, be *fair* and be thorough. "Inconclusive" is not a bad word. As long as you were *thorough*, it may be the only *fair* conclusion.

Language matters. Avoid loaded, inflammatory or judgmental terms. They don't make the report any more persuasive. Instead, they subject the investigator and the investigation to criticism. For the same reason, the investigator should limit the use of adjectives and adverbs. Statements such as "egregious misconduct" or "patently unfair" do not assist in describing what happened, which is the investigator's role.

Close the Investigation

At this point, it is time to close the investigation, which has two essential elements. First, the investigator should create the investigation file. A complete file includes the final work plan (what you did), the evidence (what you considered) and the final report (what you concluded). A well-constructed file is one that a third party can review years later and conclude the investigation was fair and balanced and the conclusions were reasonable and accurate in light of the evidence. The next essential element is to close out with the people involved, e.g., the person who reported the issue, the people interviewed, and the people who assisted in gathering evidence. The goal here is to ensure people appreciate that an appropriate investigation was

conducted – the company took the matter seriously. There is no need to share your conclusions. Indeed, rarely should the investigator do so.

If executed well, the investigation and the contents of the investigation file will be of great value to the enterprise. If done poorly, the investigator will likely have made matters worse. Fortunately, with the right skill set, considerate planning and solid execution, the investigator can ensure the company is on the right side of this challenge.



About the author Butch Hulse is a member of Dykema's Litigation Department and Government Investigations and Corporate Compliance team. Hulse has extensive experience representing and

advising clients, including Fortune 100 companies, officers, boards and board committees on complex litigation, health care compliance, anticorruption compliance and other risk matters. Mr. Hulse has experience interacting with federal, state and foreign regulatory and enforcement agencies and has led numerous internal investigations, managed third party inquiries and investigations and litigated or managed litigation in a variety of complex and high stakes matters, including many "bet the company" disputes.

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