



Conducting Internal Corporate Criminal Investigations

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Table of Contents

Introduction	1
Corporate Liability	1
To Conduct the Investigation	2
Advantages of Investigation	2
Disadvantages of Investigation	2
Conducting the Investigation.....	3
Outlining the Strategy.....	3
Employee Warning	4
Witness Interviews	4
Conflicts and Multiple Representations	4
Gathering Documents.....	5
Organization of Documents.....	5
Keeping On Top of the Investigation	6
Attorney / Client Privilege.....	6
Waiver of Privilege	7
Work-Product Doctrine	8
What to Do With Investigation Results	8
Significant Federal Statutes	9
Conclusion	10

Introduction

High level corporate decision makers, by their very nature, are usually aggressive problem solvers. One of the most difficult tasks facing a white collar criminal defense attorney is to demonstrate to corporate management that virtually every model of corporate problem solving could result in disaster when a corporation faces allegations of corporate criminal wrongdoing.

Prosecutors and defense attorneys can provide a litany of cases where allegations of relatively insignificant wrongdoing were mishandled by corporate management resulting in much more serious criminal conduct or significant civil liability.

This article will focus on the conducting of an internal corporate investigation and how to avoid the numerous pitfalls that counsel may encounter.

Corporate Liability

Historically courts have held corporations criminally liable by applying the respondeat superior doctrine in the criminal context. Early in the twentieth century the Supreme Court held that “the act of the agent, while exercising the authority delegated to him ... may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting... *“New York Central and H.R.R. vs. United States*, 212 U.S. 481 at 494 (1909).

Corporate criminal responsibility has broadened since the early part of this century. Courts have extended corporate responsibility for the acts of any of its agents unless those acts are totally unrelated to the employment relationship. The law essentially presumes that any activity by an employee is done with some intent to benefit the corporation at least in part. The corporation may find protection in those limited instances when the employee’s intent is to solely benefit himself and could not benefit the stock holders. See *United States v. Cincotta*, 689 F.2d 238 (1st Cir. 1982); Cert. denied 455 U.S. 991 (1982).

Obviously, any individual actor who has personal involvement in criminal conduct runs the risk of criminal liability. In the corporate arena, individuals may also be criminally culpable for activity where they were not personally involved but where they fall under the doctrine of “responsible corporate officer.” The doctrine basically imposes on corporate officers the responsibility for wrongdoing where they might have been in a position to avoid wrongdoing by someone within the corporate chain of command. For development of this doctrine see, generally, *U.S. vs. Dotterweich*, 320 U.S. 277 (1943); *Carolene Products Company vs. United States*, 140 F.2d 61 (4th Circuit); *United States vs. Park*, 421 U.S. 658 (1975).

A number of federal statutes have codified the concept of responsible corporate officer. See Clean Water Act and the Clean Air Act Amendment (1990). These laws attempt to identify what risk a responsible corporate officer should know and then hold that officer to an affirmative duty of care concerning those risks. Obviously, the standard is close to strict liability for individual crimes.

The 1991 Federal Sentencing Guidelines for Organizations further expanded the liability of business entities and followed the federal trend of placing the burden of self-policing and self-reporting upon business organizations.

The Federal Sentencing Guidelines place a premium on business organizations having in place a corporate compliance program which establishes codes of conduct and effective enforcement of those codes of conduct. The Guidelines make clear that corporations which have compliance programs which effectively self-police and self-report will receive not only lesser criminal penalties upon conviction, but also should receive favorable consideration when prosecutorial decisions are made. Whether such discretion is, in fact, exercised is a matter of much debate.

The broad sweep of corporate liability for acts of any agent of the corporation in conjunction with the sometimes draconian impact of corporate sentencing guidelines make it mandatory for corporate management to quickly respond to any allegation of wrongdoing within the corporation.

To Conduct the Investigation

A proactive client when confronted with allegations of wrongdoing will wish to deal with those allegations in a direct manner. Corporate management may wish to conduct its own independent investigation. This well-meaning act can lead to more severe charges of obstruction of justice.

One of the most difficult responsibilities of corporate counsel is to make clear to management that an independent and thorough investigation by counsel, although unpleasant, is the only reasonable approach when confronted with allegations of serious wrongdoing.

Advantages of Investigation

Why should the investigation be conducted? The conduct being investigated may have civil or criminal ramifications. A properly conducted investigation will help the corporation to quickly learn what happened and why it happened.

Where the allegations are raised by a potential private litigant, it is important to quickly assess the extent of the alleged problem and to address that problem in an effort to avoid civil liability.

In the criminal context, the investigation may allow the corporation to obtain a number of benefits. These benefits include possible reduction in criminal penalty, various leniency programs and agreements not to prosecute. Although the Federal Sentencing Guidelines only provide reductions in fines where a corporate compliance program has been in place prior to the criminal activity in question, great discretion is given to prosecutors to make the decision whether to prosecute. Oftentimes, these decisions are influenced by the way the corporation deals internally with allegations of wrongdoing. The initiation of a thorough internal investigation with correction of any problem and disciplinary action taken with respect to any wrongdoing may very well inure to the benefit of the corporation when prosecutorial decisions are made.

Disadvantages of Investigation

Any internal investigation also risks the possibility of uncovering additional wrongdoing or identifying relevant documents which may eventually aid the government or a private litigant in prosecuting their claim against the corporation.

Since management has an affirmative duty to use its business judgment in a prudent fashion, it would seem that any allegation of wrongdoing should require a responsible response by management. Therefore, it is very important to keep in mind the above disadvantages and to carefully conduct the internal investigation to protect, to the extent possible, privileged documents, privileged communications and to avoid “making a mole hill into a mountain.”

Conducting the Investigation

The first issue to address is who should conduct the investigation. Obviously, expense is always a consideration. There is a clear tendency to attempt to avoid the expense of retaining outside counsel. Usually, in-house counsel has a closer familiarity with the workings of the corporation in its day-to-day operations.

When the allegations of wrongdoing are serious, the safer practice is to employ outside counsel.

Outside counsel can provide a more objective perspective in evaluating the facts uncovered in the investigation. This also gives the appearance of independence to a prosecutor or private litigant who is looking over the corporation’s shoulder.

The most significant factor in choosing outside counsel is the experience of that outside counsel in conducting these types of investigations. As set forth below, issues surrounding protection of the attorney-client privilege, multiple representation, conflicts of interest, familiarity with criminal law, including obstruction of justice related offenses, all would militate towards choosing of experienced outside counsel.

Outlining the Strategy

The first step in conducting an investigation is to outline a strategy. By setting forth a strategy, counsel coordinating the investigation can carefully determine what needs to be done in the most effective manner.

Generally, the investigation will involve two basic steps: (1) the gathering and review of documents, and (2) the interview of witnesses. It may be necessary to identify one or two key witnesses who can be interviewed prior to the gathering of documents so that the most effective gathering of documents can be done.

By compiling and reviewing documents prior to conducting interviews, the interview of witnesses can be done in the most efficient and economical fashion. In this way, counsel will have a better working understanding of the facts based on the written records. The witness can be questioned by counsel about the facts without reference to specific documents to test the witness’ credibility and powers of recall. The documents can also be used to refresh recollection and to help understand the time sequence in which things took place. By gathering and reviewing documents prior to interviewing witnesses, witnesses can usually be interviewed in minimal time, thereby saving money and time in the investigation. Oftentimes, key witnesses will only be available one time and counsel should have his/her “ducks in a row” prior to meeting with that witness.

Employee Warning

If counsel is aware of the possibility of a criminal investigation, steps should be taken to notify corporate employees of their rights.

Employees should be informed of the existence of the investigation. They should be told that they may be approached by investigators at their home. The employees should be made aware of several important facts:

- They may choose to talk to the investigator or refuse to do so
- They may wish to consult with corporate counsel (or independent counsel). This issue of corporate reimbursement for individual representation can be addressed with reference to corporate bylaws and applicable state law prior to talking with any investigator
- Although corporate counsel recommends talking with counsel before talking with an investigator the decision to do so is solely the employees
- If the employee chooses to talk with the investigator it is imperative that he or she provide only truthful information

By setting forth the above advice in written form, counsel can minimize the chances that someone can later say that improper steps were taken to obstruct the investigation.

Witness Interviews

Witness interviews are an integral part of the corporate investigation. Prior to interviewing any corporate employee or former corporate employee, counsel should make several things very clear. The witness should be informed that counsel represents the corporation and that counsel does not represent this witness. The witness should be informed that the corporation is conducting an investigation and it must receive accurate information. The witness should be informed that the corporation will treat this information as confidential, but that the decision to disclose to others any information obtained from the witness will be made by the corporation and not by the witness.

There are no hard and fast rules about whether an employee should be informed about his rights of individual representation. Obviously, if a witness asks if he may retain counsel, an honest answer should be made. However, in representing the corporation, the presence of outside counsel in the initial interviews can oftentimes make obtaining information more burdensome and severely slow the process. If outside counsel is necessary, it is important to attempt to assemble a compatible defense team that will effectively represent the interest of each individual while also working together whenever possible.

The ideal situation is to clearly inform the employee about the investigative ground rules and then proceed to debrief the witness without presence of individual counsel. At the end of the interview, it may become apparent that a witness may need independent representation.

Conflicts and Multiple Representations

Counsel should be sensitive to potential conflicts involved in multiple-representations. Unless the corporation is very closely held and operated by one individual, corporate counsel cannot represent the corporation and an individual.

If it is apparent that individuals need independent counsel, reference should be made to corporate bylaws and applicable law to determine if the corporation should bear the expense of individual representation.

If individuals require representation, separate counsel should be located for each individual. Ideally, corporate counsel can assemble the team of attorneys. In this way, the corporate counsel can, hopefully, work to obtain the best result for the corporation while protecting the interests of individuals with attorneys who are able to work closely with corporate counsel.

Later in the investigation when multiple individuals have clearly been identified as only witnesses, these multiple witnesses may be represented by one attorney. Any attorney who represents a potential target of the investigation should not represent anyone else in the investigation.

Gathering Documents

The process of gathering documents in an investigation can vary depending on the particular investigation. If a subpoena requesting documents is received, the compiling of that information is dictated by the subpoena. If the investigation has been generated internally, the first step is to locate the individual with knowledge of record keeping procedures and company operations. In this way document retrieval can begin.

Invariably, the number of documents will be more voluminous than anticipated. It is important for counsel to be aware that multiple copies of documents exist and that oftentimes a "cc" lists or other distribution lists may be of tremendous significance in an investigation concerning who knew what and when they knew it. It is not unusual for different participants at a meeting to jot notes of the meeting and retain their copy of a specific document.

A non-destruction memorandum should be distributed at an early stage to accomplish several things. First, company employees are informed that this is a very serious matter. Secondly, this memorandum will help to avoid the situation where an employee thinks that destruction of records may help the company. It must be conveyed that this is never the case. Finally, this memorandum will be a record to any government investigator or civil litigant that proper steps were taken to ensure preservation of records and that this is a responsible corporation.

Organization of Documents

Organization of documents is an important consideration. It may be that chronologically organizing or organizing by subject matter will be the best approach. This will depend on the nature of the investigation, the nature of the business and other variables within the individual case. A key consideration is an effective system for knowing where the documents came from and a master list of original documents.

Any documents which are produced pursuant to subpoena should be Bates stamped and identified in an inventory. Further, copies of those documents should be retained. Oftentimes, subpoenas call for originals. A phone call to the Assistant U.S. Attorney can often be made in an effort to substitute copies for originals.

A separate file of significant or "hot" documents should be maintained. These documents will usually become the focal point of the investigation. They should be used in assembling a chronology of significant events during the course of the alleged wrongdoing.

In addition to a “hot” file, steps should be taken to maintain a “privilege file.” One attorney should be assigned to making this determination so that it is made consistently. A list should be maintained and updated which includes all privileged documents. These documents should be segregated and all steps should be taken to maintain the privilege and avoid any waiver.

In extremely complicated cases involving large volumes of documents, consideration should be made for a computerized document organization system. This can be done through computer indexing or electronic imaging of whole documents. This may involve an initial large outlay of expense. In a very complicated long-term investigation this decision may save money in the long run.

Keeping On Top of the Investigation

Organization of documents and interviewing of witnesses will uncover most of the necessary facts. A working chronology should be developed and updated on a regular basis. In this way, counsel can “keep tabs” on facts as they are being developed and plug in additional facts as they are uncovered.

Attorney / Client Privilege

It is of paramount importance for investigating counsel to take careful steps to preserve the attorney/client privilege. In *Upjohn Company v. United States*, 449 U.S. 383 (1981), the Supreme Court recognized an attorney/client privilege in favor of a corporate entity. The court realized that public policy dictated that corporations should be able to investigate wrongdoing and a corporate attorney/client privilege would encourage full and frank communications between attorneys and their clients. This would promote the broader public interest in the observance of law and in the administration of justice. The Supreme Court found the corporate attorney/client privilege applicable based on the following factors: (1) the communications were made by corporate employees to counsel; (2) the communications were made at the direction of corporate superiors in order for the company to obtain legal advice from counsel; (3) employees were aware that these communications were being made in order for the company to obtain legal advice; (4) the information provided was not available from upper management; (5) communication concerned matters within the scope of the employee’s corporate duties; and (6) communications were confidential when made and were kept confidential by the company.

Cases interpreting *Upjohn* have held that the privilege applies to communications with both in-house and outside counsel. However, it is important to bear in mind that the privilege only applies to legal advice. Oftentimes, in-house counsel plays a dual role of lawyer/manager. If those lines are blurred and any type of business decision is being made, the privilege may be unavailable. This is a very important consideration in conducting interviews and narrowing the scope of discussions surrounding those interviews.

The privilege clearly extends to discussions between low level current employees and corporate counsel. A number of courts have held that the privilege applies to communications with corporate counsel and former employees concerning their former employment. See *Valassis v. Samuelson*, 143 FRD 118 (Ed. Mich. 1992).

The purpose of the privilege is to encourage full and frank discussion by corporate employees and for that reason a document cannot become privileged by transferring it from the corporation to the attorney for the corporation. *Fisher v. United States*, 425 U.S. 391 (1976).

The privilege does not apply when the attorney's advice is obtained by the client in furtherance of a future or continuing crime. In ongoing federal investigations this is an important consideration.

Waiver of Privilege

The attorney/client privilege belongs to the corporation and the ability to waive that privilege is usually exercised by officers and directors of the corporation. This privilege can be waived voluntarily or involuntarily. Any communication of privileged information which does not involve corporate counsel or their agents (investigators, accountants or other consultants working under the direction of the attorneys) will waive the privilege. An accidental or inadvertent disclosure is usually held to be a complete waiver. *See, generally, Underwater Storage, Inc. vs. U.S. Rubber Company*, 314 F.Supp. 546 (DDC 1970). This is not an absolute rule. Therefore, circumstances of any inadvertent disclosure should be carefully reviewed and all steps should be taken to retain the privilege.

A number of cases hold that waiver to one party acts as a waiver to all parties. This often occurs in the parallel proceeding setting. A company may decide to present information to a prosecuting agency in an effort to avoid prosecution. Some courts have held that private litigants or parallel civil proceedings participants may gain access to this information because the waiver as to one party waives the privilege as to all parties. *See, generally, Permian Corp. vs. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

A second line of cases has identified a limited or selective waiver principle. In *Diversified Industries vs. Meredith*, 572 F.2d 596 (8th Cir. 1978), the court found that the privilege was not waived where the corporation voluntarily provided privileged material from an internal investigation to an agency in response to a subpoena in a non-public SEC investigation. In that case the private litigant sought information voluntarily provided in the SEC investigation. The court found that the total waiver would act contrary to public interest and would discourage self-investigation and voluntary reporting which was the purpose of the SEC investigation. Some courts have also articulated a self-evaluation privilege. However, until further acceptance by courts, reliance on such a privilege would be unwise.

It is important to bear in mind that presentation of certain documents or selected information may waive the privilege as to other documents. *In Re Martin Marietta Corporation*, 856 F.2d 619 (4th Cir. 1988) concerned a summary report which was provided in the course of litigation. The court found that the disclosure of the report acted as a waiver of the privilege for certain backup documentation for that report.

Obviously, it is important to carefully evaluate whether any documents being presented to any party or to any government agency are privileged and whether presentation of those documents may act as a partial or complete waiver. The cautious approach is to assume that any partial waiver will act as a complete waiver.

Work-Product Doctrine

Another method to protect information uncovered during the course of an investigation is the work product privilege. This privilege protects materials which would reveal an attorney's mental processes. The seminal case in this area is *Hickman vs. Taylor*, 379 U.S. 495 (1947). This privilege is now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure and Rule 16(b)(2) of the Federal Rules of Criminal Procedure which established protection for counsels' work product.

The Supreme Court in *Hickman* held "the protection extends not only to documents prepared by an attorney, but also materials prepared by consultants and investigators at the direction of the attorney." It is important to bear in mind that the attorney/client privilege is an absolute privilege. However, the work product doctrine may require the court to weigh the need by the other side for the document. Work product therefore is not an absolute privilege and documents with mental impressions may, in fact, be found to be so important to the other side that they may be ordered to be disclosed. Even where substantial need for the documents has been demonstrated, counsel should continue to urge that opinions or mental impressions within the document should be redacted.

Counsel should be aware of available privileges and take specific consistent steps to identify documents as privileged; confidential; subject to the attorney-client privilege; subject to the work product privilege. A legend should be placed on all documents identifying them as confidential. Careful steps should be established to segregate privileged documents. All individuals involved in the investigation should be cautioned about disclosure of any of that information because limited disclosure may act as complete waiver of the privilege.

What to Do With Investigation Results

Perhaps the most difficult aspect of a corporate internal investigation is to make the decision concerning what should be done with the results of the investigation. It should be borne in mind that corporate management is protected from individual liability where it has exercised its "business judgment" in a prudent fashion. Management has a fiduciary duty to shareholders to deal with allegations of wrongdoing in a responsible fashion. A solutions oriented, aggressive management team may suggest that the information be disclosed to a prosecutor so that this matter can be "put to bed." Indeed, a cursory reading of the Federal Sentencing Guidelines would indicate that the prudent course is to self-report, self-police and gain the advantages that flow therefrom.

However, what appears to be a reward for self-reporting may in fact be more akin to self-abuse. The apparent reward for self-reporting in the Federal Sentencing Guidelines is oftentimes illusory. In order to gain leniency under the Federal Sentencing Guidelines, a corporation must have an "effective" comprehensive compliance program in place at the time of the offense. The fact that an offense occurred may, in fact, lead a court to believe that the compliance program was not effective.

Counsel is left with the difficult decision of what to do once wrongdoing has been uncovered. At a minimum, counsel must correct the problem and deal with the wrongdoer in a reasonable fashion. Obviously, a duty is owed to the shareholders of the corporation to ferret out wrongdoing. The more difficult question is how to treat the information with respect to

prosecutive agencies that either have not learned of the wrongdoing or may be waiting with subpoena in hand.

This is a decision that must be made by management with all information at hand. That is why it is crucial to conduct a thorough investigation and to obtain informed advice from an attorney familiar with criminal, civil and administrative ramifications of the conduct. Certainly, the public integrity of the company and other business variables play a role in the decision.

Where an investigation is inevitable or has already begun, the approach must obviously be altered. Counsel familiar with a specific prosecutor's office should be employed. In this way, management can understand how prosecutive decisions are made and at what point the corporation should approach the prosecutor to discuss the company's position. Counsel should be aware of both the possible criminal and civil ramifications of any course of activity. In order to gain any benefit under the Federal Sentencing Guidelines, a prompt decision to cooperate must be made. Therefore, it is essential to quickly assess the facts. However, a cursory review of facts can often result in a misinformed decision to cooperate. This can result in serious additional charges and also heighten the possibility of a failed plea agreement due to a perceived lack of complete cooperation.

Under the Federal Sentencing Guidelines, virtually any plea agreement is going to include the establishment of a government audited corporate integrity program. Therefore, it is always prudent to put that program in place as quickly as possible even if it was not present at the time of the offense. If it is present at the time of sentencing it can inure to the corporation's benefit.

Specifically, a court may be less inclined to impose strict probationary conditions on a company which now has established an effective compliance program. This also demonstrates responsible corporate citizenship and will, hopefully, benefit the corporation should sentencing become a reality.

Significant Federal Statutes

Corporate counsel should be aware of the arsenal of federal statutes which are available to prosecutors. In addition to substantive charges, counsel should always be aware of obstruction of justice related charges including statutes prohibiting obstructing of justice, perjury, false statements and witness tampering. Under federal law it is unlawful to influence, intimidate or impede a pending judicial proceeding. A grand jury proceeding is considered a pending proceeding under federal law. Federal witness tampering statutes prohibit any attempt to persuade another person to engage in misleading conduct. These federal statutes are drafted in a very broad fashion.

Counsel interviewing witnesses in the course of an investigation should be cognizant that attempts to encourage witnesses to recall things in a certain fashion or attempts to correct witnesses' recollection to match that of other witnesses or documents in the case, may run afoul of these broad federal prohibitions. For that reason, it is important that each witness be instructed to provide truthful testimony. Procedures must be in place so that witnesses are interviewed individually and so that there is no appearance of establishing a "company line." General legal instructions should go out to all employees that the matter under investigation should not be discussed. In this way misconstrued comments, misunderstood language or even misunderstand body language can be avoided.

Any interview that may be significant in an investigation should involve the presence of a witness who can act as a later prover. Counsel who interviews witnesses in the absence of a third party prover runs the risk of possible removal from the case because a controversy might arise between counsel and the witness as to their recollection of that meeting. These controversies often arise where a witness later claims that the corporate attorney indicated to the witness that counsel represented the individual as opposed to the corporation.

Conclusion

With broadly drafted obstruction of justice and perjury statutes, counsel should take all steps to insure that witnesses provide accurate independent information. Frequently, prosecutors outline criminal charges which not only involve substantive offenses, but also encompass an alleged company cover up under the guise of a corporate internal investigation. For that reason, counsel should assume that every step of that investigation will be seriously scrutinized.

With whistle-blowing statutes, broad federal criminal statutes and the impact of Federal Sentencing Guidelines, a poorly or improperly run internal investigation could result in more harm to the corporation than the original wrongdoing. For that reason, counsel should take all steps to carefully gather information while protecting all applicable privileges.

Once the investigation is complete corporate management should take responsible steps to correct the problem with full knowledge of all facts and the likely consequences of any decision that management ultimately makes.