PROGRAM MATERIALS
Program #3190
April 27, 2021

When the Truth Matters Most: Best Practices for Conducting an Internal Investigation

Copyright ©2021 by

- **Anthony Cochran, Esq. - Smith, Gambrell & Russell LLP**
- **Lynsey Barron, Esq. - Miller & Martin**
- **Stacie Carraway, Esq. - Miller & Martin**
- **Lillian Caudle, Esq. - Mercedes-Benz USA**
- **Adria Perez, Esq. - Kilpatrick Townsend & Stockton LLP**

All Rights Reserved.
Licensed to Celesq®, Inc.

Celesq® AttorneysEd Center
www.celesq.com
5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
Phone 561-241-1919

BEST PRACTICES FOR CONDUCTING AN INTERNAL INVESTIGATION

Lynsey Barron
Miller & Martin PLLC

Stacie Caraway
Miller & Martin PLLC

Adria Perez
Kilpatrick Townsend

Lillian Caudle
Mercedes-Benz USA, LLC

Anthony Cochran
Smith Gambrell & Russell, LLP

The Decision to Investigate

WHY INVESTIGATE?

- Government action (subpoena, target letter, etc.)
- Concerns about possible whistleblower
- Internal or external complaint
- Merger, acquisition or IPO
- Public allegations/media reports
- Other

INVESTIGATIONS: CRITICAL TO COMPLIANCE PROGRAM

- Yates Memo and shift in evaluation of corporate cooperation credit
- Focus on holding culpable individuals accountable for corporate crimes
- Credit or leniency depends on the company's response to suspicions of wrongdoing
  - A timely, thorough, and transparent investigation that identifies source of wrongdoing and remediates any failure of internal controls can be the difference between whether the company faces liability and prosecution

WHO SHOULD DO THE INVESTIGATION?

Internal (other than Legal)?

- Human Resources, Audit, Compliance, etc.
- Understand how they are documenting
- Training on best practices?
- Protocol for when to escalate to Legal?

Internal (Legal)

- What does "at the direction of" counsel mean?
- Special concerns about international investigations?

OR MAYBE OUTSIDE COUNSEL?

Is it a large investigation requiring special skills or more resources than you can devote?

Are high-level employees implicated?

What is the risk of government/regulatory action or other litigation?

Will your employees trust an investigation led by corporate insiders?

Do you need to show the investigation was truly "independent" (and perhaps not performed by your usual outside counsel)?

Is it possible that any information or findings may be shared with the government?

Is there a need to have a better argument for privilege protections?

WHAT IS THE GOAL OF THE INVESTIGATION?

- Purely fact-finding?
  - Should you treat it as intended for litigation anyway so you can argue work product doctrine later?
- Prepare for litigation?
- Engagement letter needs to be completely clear, and may need to be amended as the investigation progresses
- Are there litigation or PR reasons to choose a different firm than your typical litigation/L&E firm?

SCOPE OF INVESTIGATION:

MODEL RULES 1.2, 2.1, 2.3, 2.4

Be clear on what you are (and are not) investigating

- May be a good idea to keep a separate document of miscellaneous issues you discuss with client to determine whether they want you to fold them into the scope, or whether they want a *post mortem* after the report

Hypothetical:

- In a race discrimination investigation, you interview a witness in Payroll whom you believe may have relevant information. The witness has spoken on the condition of anonymity, which the client has allowed you to offer. During the investigation, the witness mentions that the Director of Payroll has been embezzling money into a secret account for months. This witness is the only one who would be in a position to know what the Director was doing. What do you do?

REPORTING STRUCTURE:

MODEL RULES 1.2, 1.4, 1.13

- To whom should the investigator report?
  - Legal? Compliance? Board? Special Committee? Outside counsel?
  - Are there reasons not to report internally (perception of bias, fear of retaliation, etc.)?
  - Frequency of reporting?
- If the investigation is "independent," make sure everyone is on the same page about exactly what that means.

Privilege and the
Work Product Doctrine

ATTORNEY-CLIENT PRIVILEGE

- If investigator is an attorney, communications between client and investigator are likely within the privilege.
- This would include written and oral communication with inside counsel, employees, and experts/specialists hired to assist with the investigation.
- It also likely includes any documents memorializing those communications.

WORK PRODUCT DOCTRINE

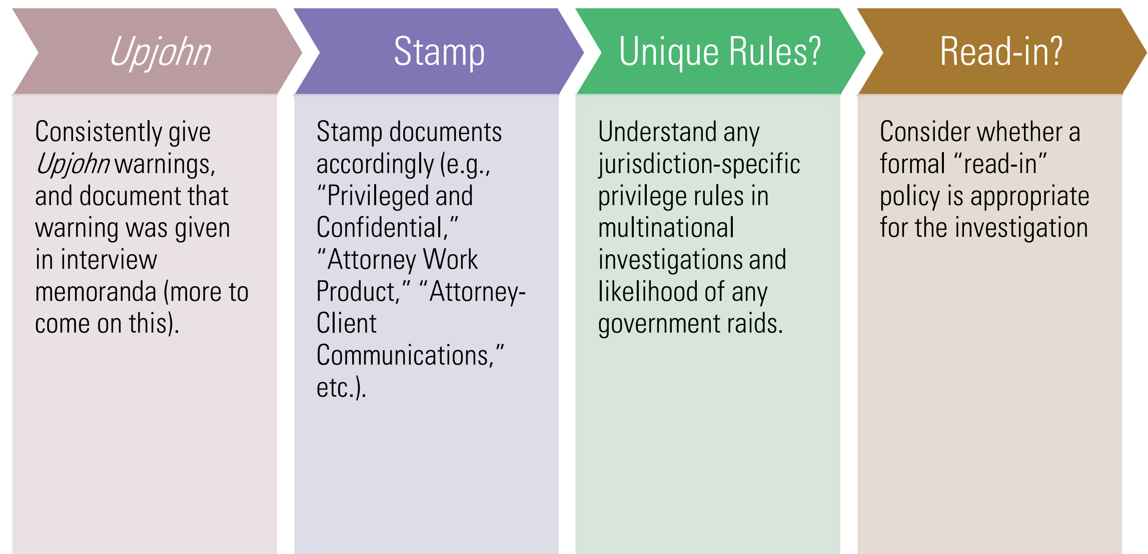
Federal WPD: (1) Documents or tangible things; (2) Prepared in anticipation of litigation; and (3) Prepared by or for a party, or by or for the party's representative

State WPD: May deviate from federal rule (*e.g.*, California and "absolute" v. "qualified" WPD)

Many countries do not have a broad WPD like in the U.S.

Know the applicable standard in the relevant jurisdictions.

TAKE STEPS TO PRESERVE PRIVILEGE



UNAUTHORIZED PRACTICE AND LICENSING REQUIREMENTS:

MODEL RULE 5.5

- For external investigations, many states require the investigator to be licensed as either a private investigator or an attorney in the state where investigation takes place.

- Does a purely fact investigation constitute the practice of law?
  - Implications for malpractice insurance?

Gathering Documentary Evidence

PRESERVATION OF EVIDENCE

Should you put a hold on certain documents?

If you investigate but don't put a hold on, even without a known threat of litigation, could an argument be made later that there was spoliation or a violation of 18 U.S.C. § 1519 ?

Meet with IT to discuss your collection and transferring capabilities

Surreptitious email audit?

Remote preservation, imaging and searching of devices?

Evidence of deletion?

Beware of international privacy and data protection laws

Consider engaging a vendor to image company-owned or paid-for devices

But before you start searching and reviewing, consider. . . .

EMPLOYEE PRIVACY CONCERNS

- Your investigative options turn on:
  - Company policy
  - Company practice
  - Steps taken by employee to preserve privacy
  - Applicable privacy laws

COMPANY PRIVACY POLICY

Make sure there actually is one (this is an internal document, different from the Privacy Notice/Privacy Policy that may exist on the company website for consumers)

Make sure it is available to all employees, and that it is provided during onboarding

Best practice is to get them to sign an acknowledgment, but at least make sure it has been produced to them

It should warn employees on the front end of what the company has access to search and monitor, and may protect company on the back end from a lawsuit

Consider including the following warnings in your employee privacy policy . . .

ABILITY TO SEARCH DEVICES

- For all company-issued or paid-for devices (laptops, cell phones, iPads, etc.), the employer can search at any time, without notice or warning.
  - Include clear statement that the devices are being provided for work purposes only
- A clear warning that laptops are furnished for work purposes “destroy[s] any reasonable expectation of privacy.”
  - *Muick v. Clenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002)

ABILITY TO MONITOR INTERNET USAGE

- The employer is allowed to monitor the real-time usage and history of any Internet activity on a company-issued device

- Employers are allowed to monitor this activity if they sufficiently warn the employees that they will oversee Internet use, and that the employee has no reasonable expectation of privacy in Internet activity.
  - *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000)

ABILITY TO SEARCH AND READ EMAILS

- For company-provided email accounts, the company reserves the right to monitor, search, and read all emails, including emails that have been deleted by the employee but are retrievable from archive
  - Warning may overcome argument by employee that "deletion" signals a subjective expectation of privacy

- Such warning will likely be enough to establish the employee's implied consent to search.
  - *In re Info Mgmt. Servs., Inc. Derivative Litig.*, 81 A.3d 278, 293 (Del. Ch. 2013)

PURPOSE OF POLICY:

REDUCE THE EMPLOYEES' EXPECTATION OF PRIVACY

- Does the policy ban or limit personal use of devices/Internet?
- Does the company monitor the use of computers and/or emails?
- Do third parties have a right to access computers and/or emails?
- Did the company notify the employee, or is the employee otherwise aware, of use and monitoring policy?

See In re Asia Glob. Crossing, Ltd. 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005); *In re Info Mgmt. Servs., Inc. Derivative Litig., 81 A.3d 278, 293 (Del. Ch. 2013); Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 561 (S.D.N.Y. 2008)*

HYPOTHETICAL

- Company policy addresses the company's right to search emails stored in, created on, received from, or sent to company email system, and also the company's right to monitor Internet usage

- The company searched the employee's Gmail account by searching the Internet from the employee's computer, and was able to access the Gmail because the employee left his username and password stored on his computer. Permissible?

- Likely not. *Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 561 (S.D.N.Y. 2008);* see also Sims v. Lakeside Sch., No. C06-1412RSM, 2007 WL 2745367, at *2 (W.D. Wash. Sept. 20, 2007).

Witness and Interview Ethics

IDENTIFY WHO YOU ARE AND YOUR ROLE:

MODELRULES 4.1, 4.2, 4.3

- *Upjohn Co. v. United States*, 449 U.S. 383 (1981): Conversations between company counsel and company employees are privileged, but the privilege belongs solely to the company.
- Inform employees that you represent the company, not them, and that only the company may waive the privilege.
- If you learn that a witness has an attorney in connection with this matter, stop the interview immediately. Document that you only learned they were represented during the interview, that you terminated it, and that you will follow up with the witness's counsel.
- Model Rules 4.1, 4.2, 4.3

SAMPLE UPJOHN WARNING

I am an attorney representing Company and Company alone. I do not represent you personally. I am interviewing you as part of an investigation so I can determine the facts surrounding [situation you are investigating] and then provide legal advice to Company.

This conversation is protected by the attorney-client privilege, but that privilege belongs only to Company, not you. Company may choose to waive that privilege and disclose this conversation to others, including the government, at its discretion. But to maintain that privilege, you have a duty to keep this conversation confidential, meaning that you may not disclose the substance of our this conversation with anyone except your own attorney. Are you willing to proceed?

BE AWARE OF POSSIBLE RETALIATION

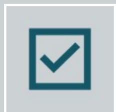
- Retaliation occurs when an employer takes an adverse employment action because an employee participated in the investigation, spoke with a lawyer, filed a complaint, or spoke with others about his/her concerns
- Can provide a basis for legal action even if the original complaint (e.g., harassment or discrimination) lacks merit
- It also undermines the integrity of your investigation
- There are overseas retaliation laws. For example, there are minimum requirements in the EU Whistleblower Protection Directive that the EU members will need to enact.

BE AWARE OF POSSIBLE RETALIATION

- Find out if the company has an anti-retaliation policy and whether those in supervisory roles are trained on it.
- Encourage your client to underscore that policy with all investigation participants.
- Communicate the policy to your witnesses and let them know who to contact if they feel they are the victim of subsequent retaliation.
- Could retaliation or fear of retaliation become a relevant tangent to the investigation you need to pursue further? Should you include any findings in your report?

WITNESS CONFIDENTIALITY

Are there special reasons to give witnesses protection from disclosure?



Get client's permission to offer anonymity/confidentiality, since the default is that the client owns all of your work product. Document this in writing.

Still may want to warn witnesses that, in the event of litigation, court may order you to produce notes and identify witness.

Document on witness memoranda that witnesses have asked for confidentiality and are speaking only on that condition

May help you on a motion to quash later, or at least argue for a protective order or redaction of names and identifying information

PLAN YOUR INTERVIEW SCHEDULE

- Does order matter?
  - Should you start with the target/respondent or wait until you've gathered facts?
  - Are there witnesses likely to "lawyer up" once they know you are investigating? Does this matter?
  - For corporate employees outside of the U.S., you may need to inform or seek approval from other stakeholders, such as a Works Council.

- Stay flexible and be willing to adjust your investigation plan if new developments or newly-discovered witnesses or evidence arise

- If you are unable to interview certain witnesses, make sure you document your efforts to reach out and why you were not able to conduct the interview.
  - If it is essential to the integrity of your work, make it clear that you may need to disclose any lack of cooperation or affirmative obstruction

DOCUMENTING THE INTERVIEW

- Best practice: two-person interview team
  - One note-taker who can also serve as fact witness instead of lead attorney

- Determine what should be documented and how the memoranda of interview (MOI) should be prepared
  - Headers (e.g., “Draft,” “Confidential,” “Attorney Work Product”)?
  - Warnings and caveats (e.g., *Upjohn*, MOI contains mental impressions and thought processes)
  - Interview logistics, including witness name, position, and contact information; date and location of interview; start/stop time; whether any follow-up is expected (such as witness providing documents)

- MOI should be prepared soon after interview, and should include author and date prepared

TO RECORD OR NOT TO RECORD?

- Is surreptitious recording allowed in your state?
- Do you really want/need a recording?
- Assume the witness is recording you.
  - Even if you are not planning to record, you may want to ask the witness whether they are recording and document their answer.
  - If they say yes, tell them they are free to do so but if they are going to record, so are you (you do not want them to have the only verbatim record).
- Be aware that recording interviews in certain jurisdictions may put the company at more risk, such as in China.

A FINAL WORD ON UPJOHN

- Witnesses (especially respondents) are likely to ask at some point whether they need a lawyer.
- Remind them that you do not represent them, you represent the company alone. Their decision to get independent counsel is theirs alone to make.
- If you are in-house counsel, you may want to be familiar with any indemnification obligations the company may have.

The Report

ADVANTAGES OF WRITTEN REPORT

- Clear findings that are consistent and are less open for interpretation
- Documents that company was timely, thorough, and transparent in responding to allegations of wrongdoing
- Useful for persuading government that misconduct did not happen or has been cured and therefore further government investigation unnecessary
- Helpful to show Board met duty of care in any shareholder proceeding

DISADVANTAGES OF WRITTEN REPORT

- Harder to keep confidential and control leaks
- Possibly discoverable
- Possible use as an admission of wrongdoing under FRE 801(d)(2)
- Alternative: oral presentation with slides that remain in custody of attorneys after reporting

Voluntary Self-Disclosure

CONSIDERATIONS

Duty to disclose?	Determine whether there is a duty to disclose (this is especially true in jurisdictions outside of the U.S.)
Risks?	Consider the related risks and whether leniency is necessary
Race to be first?	Consider whether others may also want to disclose information to the government (in other jurisdictions, such as Brazil, the first to disclose obtains the leniency)
To one, to all	If the investigation reveals conduct in multiple jurisdictions, understand that disclosure will need to be done to all relevant authorities