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The Art of Internal Investigations

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Forward

I am always skeptical of anyone who labels a professional activity as an “art.” Despite my own reservations on the title for this e-book, let me try to justify the term in this context.

My use of the word “art” reflects the fact that conducting an internal investigation in today’s risky enforcement environment requires numerous – if not continuous – judgment calls. The answers to these questions are not black and white, cut and dry, except for a few assorted issues.

The stakes in an investigation can be very high. Some can even threaten the company’s very existence. I do not mean to be overly dramatic but this is an area where lawyers earn their keep. For lawyers and clients, there are numerous pitfalls that can undermine an internal investigation to the point of making the exercise worthless.

For example, a high-stakes internal investigation conducted by Governor Chris Christie concerning the bridge lane closings ordered in retribution for political purposes provided no value to the Governor because a close friend of the Governor at the law firm led the investigation. It was received with a big dud, and quickly ignored because of the obvious bias.

Federal prosecutors often rely on a high-quality and independent internal investigation. The skill set needed for such investigations is not very common in the legal profession.

My e-book is meant to outline some of the more significant issues that may come up. There are many more beyond this short compilation but this is meant to provide a quick outline of issues that need to be flagged for practitioners and students.

I wanted to thank Corporate Compliance Insights for its support for my effort. They are a unique and wonderful team to work with and I look forward to many more collaborations.

-- Michael Volkov

The Importance of Internal Investigations

Companies face difficult decisions every day. In the last 10 years, federal law enforcement criminal investigations have grown exponentially. One major cause of this has been the criminalization of civil or regulatory violations. As a consequence, companies face increasing risks, along with board members and senior executives.

The Justice Department is relying on criminal enforcement as a more effective means to curtail corporate misconduct. It is easy to see why – criminal prosecutions involve large fines and threaten individual corporate officers and employees with jail time. In addition, criminal cases are quickly resolved and take priority over civil cases on court calendars. Prosecutors can quickly get the attention of a corporation by executing a search warrant or serving a grand jury subpoena.

The criminalization of enforcement also has led to an increase in internal investigations as a tactic to deflect, delay or avoid a full-blown government investigation. The increasing frequency of internal investigations reflects a growing phenomenon – companies are investigating themselves under the direction and oversight of government prosecutors.

Some have criticized the government for relying on companies to conduct their own investigations. But what choice does the government have? There is no way the government could conduct the number and extent of criminal prosecutions with existing resources, especially in this tight budget environment.

Whether corporate self-investigations are fair or appropriate is a question for another day. Companies are very familiar with the internal investigation routine – hiring of outside counsel, appointment of a special committee at the board, regular reports from the investigators, and action items that are recommended while the investigation continues.

Types of Internal Investigations

Companies rely on a variety of internal investigations. It is important to consider the range of variables in internal investigations.

Most internal investigations are “routine” and conducted internally by an in-house staff of investigators. The focus of these internal inquiries is employment, theft or embezzlement of funds, conflicts of interest and other routine disciplinary issues involving enforcement of the company’s code of conduct.

A second category of “internal investigations” which I will focus on are those where there are allegations of corporate wrongdoing which can result in *corporate* criminal liability for violations of federal or state law.

The decision to launch an internal investigation in this context is important. Once launched, it is very hard to stop or ignore the course and results of the investigation. If a corporation is divided on whether or not to conduct the investigation, such a conflict will undermine the ability of the investigators to conduct a full and fair investigation.

In addition, internal investigations are not limited to instances when the government has launched its own investigation or there is some immediate outside threat. To the contrary, internal investigations can be conducted for important fact-gathering purposes. Professional investigators know how to focus on important facts and ignore diversions from the overall purpose. In certain circumstances, an investigation can play a critical role in corporate decision-making.

Here are the factors that support a decision to conduct an internal investigation:

1. The company has discovered credible evidence of a potential violation of law for which the company could be held liable.
2. The potential violation of law would have a material impact on the company.
3. The company does not have sufficient information to assess the nature and extent of any violation of law.
4. In order to make a decision concerning the potential violation of law, the company needs to understand the law and the facts surrounding the conduct.
5. The company does not have the capability to quickly gather and analyze such facts through its internal resources.

These factors frame a company’s decision-making process for launching an internal investigation.

Companies have to be mindful of the circumstances that require an internal investigation. One should never underestimate the power of inertia. Corporate directors and senior managers sometimes cling to inertia in the hope that potential problems will disappear or fade into the sunset. Differences in corporate responses often reflect corporate governance strategies and practices.

Foreign companies, which are frequent targets of FCPA investigations, face real challenges. Corporate governance principles in other countries are not necessarily sensitive to all of the risks of operating in the United States. For example, companies based in France have a far different risk appetite than those based in the United States.

When faced with suspicions of potential foreign bribery, directors and senior managers have to take an important step – acknowledge a potential problem, adopt a proactive strategy, and build an internal consensus to move ahead.

Let's face it – it is much easier for the directors and senior managers to ignore the problem and hope that it does not come up again. In many cases, directors and managers are trying to preserve their own skins by avoiding a risky, internal investigation, which may result in major problems and potential management changes.

Companies that try and brush potential problems under the rug are only creating greater risks. In the fast-paced business world, it is hard to stop, allocate time and resources to an internal investigation and then, depending on the results, deal with the consequences – possible enforcement, disclosure and remediation. Internal inquiries are viewed as antithetical to the corporate desire to grow the business and maximize profits. This is a very “ignorant” or shortsighted view of corporate operations.

With the increase in potential reporting to government enforcement agencies – i.e. disgruntled employees or whistleblowers – companies face an increased risk of detection of potential corruption and other legal violations. The whistleblower bar is growing and becoming more sophisticated in screening potential cases and pursuing SEC rewards. Employment attorneys know how to use allegations of improper payments and other legal violations to gain leverage in a contentious employment dispute.

Board members and senior managers face increasing risks of liability. Ignorance is not necessarily bliss – it can cost a company a large amount of money and reputational damage that may take years to overcome.

Companies need to develop protocols to identify potential enforcement and compliance risks, to respond to the risks in the most efficient way, and to ensure careful review of initial suspicions. The threshold for such internal inquiries should be properly balanced to avoid unnecessary inquiries into matters that are better left to the internal auditors, compliance officers and attorneys, while making sure that

significant risks are reviewed and appropriate steps are taken to investigate the matter.

An Executive Compliance Committee consisting of senior managers critical to the compliance focus can play an important role in this process. The Committee can supervise an initial review of an issue, conduct a preliminary inquiry and recommend further steps, if any. The Committee should have significant authority and direct reporting lines to the CEO and the Audit or Compliance Committee.

Initial Steps and Purposes for an Internal Investigation

There is an “art” to conducting internal investigations. A practitioner has to be able to establish a “vision” of the investigation. I like to analogize the process to a painter starting with a large canvass and visualizing the end product. The practitioner has to visualize the process, starting with a purpose, adding in document collection, interactions with the government (if applicable), and keeping the eye on the ball.

Companies do not want to be surprised by the results of an internal investigation. If the company has no idea what the results will be, then the company’s governance is seriously lacking. A major disconnect can lead to a disaster, and an internal investigation will not fix the problem.

An internal investigation requires a goal, a strategy and careful design. Too many practitioners develop a checklist, go down the checklist, and follow it without regard to the specific situation and client needs.

Too often, an internal investigation becomes the strategy and goal itself. A more practical approach is needed which requires strategic thinking – what are the overall risks, the worst-case scenario and the best-case scenario? How likely is each scenario? Assuming a result of the investigation, there are ways to conduct it knowing how it needs to be used. No company should ever blindly authorize an investigation and wait for the results to determine what steps may be needed. A proactive approach is more appropriate – weigh the likely outcomes, the remediation alternatives, and develop a strategy for dealing with the government, the public and shareholders.

Board Oversight Structure

The privilege to serve on a corporate board is no longer the cushy experience of our forefathers. The increase in enforcement actions has led to a dramatic change in the role – and the risks – facing corporate boards.

Companies dread hearing lawyers recommend the need for an internal investigation. Alarm bells and whistles go off and corporate board members have to take a deep breath and get ready for a ride on the legal landscape. It is a dangerous landscape.

Almost three-quarters of all publicly-traded companies have disclosed at least one internal investigation in the last year. Ten years ago, maybe one –third of all companies disclosed an internal investigation each year. This has had a major impact on board members and the role that they need to play when supervising an internal investigation.

As soon as the decision is made to conduct an internal investigation, board members need to consider retaining an attorney to represent their individual interests, especially if they played a unique role in the matter being investigated. A board committee – e.g. audit, governance or compliance and ethics – which is assigned responsibility for managing and overseeing the internal investigation has to retain an attorney to represent the committee's interests during the internal investigation. In some situations, even the entire board may hire its own attorneys to represent its interests in the handling of the internal investigation.

There are a number of scenarios where a board member, an Audit Committee or the entire board's interests may not coincide. It is easy to imagine and hard to reconcile how this is supposed to work but lawyers are good at that, especially in complex situations involving board supervision of an internal investigation.

It becomes even more complicated, however, when you remember that the lawyers retained to conduct the internal investigation have to report to senior management and to the supervising committee. In many cases, the need to report to the full board may not be necessary, but there are situations where full disclosure may be required. In reporting to the board, the investigators are subjecting themselves to second-guessing and close questioning as to information that was learned, why decisions were made to focus the investigation in certain areas, and the manner in which it is being conducted.

The risks in these situations are multiple. The last thing an investigator needs is to have board members questioning the conduct of the internal investigation. Such scrutiny can undermine the value of an independent internal investigation but may

be necessary for the committee to exercise its oversight responsibilities. It is better to iron out any differences while the investigation is being conducted so that everyone – senior management and the board – are comfortable with the internal investigation and will defend its findings and recommendations.

To the extent that the investigators and the committee differ, each is opening themselves up to second-guessing by the government and potentially by shareholders and even other board members. These situations can quickly devolve into nightmare scenarios.

It is important, therefore, to develop an investigation strategy early, to keep the board and its committee fully apprised as to the conduct of the internal investigation, and invite questions, suggestions and strategy discussions. The more the issues are ironed out, discussed and resolved, the better for everyone.

Oral reports should be made by counsel: In order to avoid possible confusion, credibility issues and possible unfairness to officers and employees, counsel should avoid any written memoranda during an investigation. Written interim reports are only an invitation to disaster. Preliminary or interim findings should always be avoided. A written report may be prepared at the conclusion of the investigation but the handling of that report must be carefully analyzed depending on the circumstances. In almost all investigations, it is fair to assume that the written investigation report will be disclosed to the government and possibly other interested parties. For that reason, it has to be carefully crafted and protected.

At the beginning of the process, the company has to make sure that the proper board oversight structure has been set up. The board has to designate an oversight committee, which can be either the audit or compliance committee, or it can appoint a special committee. Whichever form the supervising committee takes, the board should adopt a resolution outlining the purpose of the investigation, the scope of the inquiry, and any specific procedures that need to be addressed. If a special committee is set up, the board will need to adopt a resolution creating the committee and outlining the scope of the investigation as well as any specific procedures that are required.

Initial Investigative Steps

The initial steps in handling an internal investigation are critical to the ultimate success of the inquiry. Vast numbers of articles have been written on how to conduct internal investigations. More attention needs to be paid to the initial steps

– in some respects, if the initial steps are bungled, it is hard for the inquiry to succeed.

An internal investigation can be initiated in response to a number of events: (1) an employee complaint (anonymous or disclosed identity); (2) government subpoena or inquiry; (3) complaint from vendor or other third party business partner; (4) conflict of interest inquiry; (5) government search warrant; or (6) government or third party litigation.

In response to the need for an internal investigation, the company needs to assess how serious the initial allegation is, the source and credibility of the allegation(s) and then assign the required staff, or outside counsel, to address the issue. This can be broken down into two basic questions:

1. Does the issue require the investigation to start by preserving and reviewing relevant documents or should the initial steps be focused on interviews?
2. Given the preliminary assessment of the scope of the issue(s), who should be assigned to the matter and is outside counsel required?

To answer these basic questions, the company needs to examine how senior the employees are in the organization and the specific role they played in the alleged misconduct. In addition, the company needs to consider how big an investigative team is needed and if any specific knowledge is needed to investigate the particular issues. For example, the company needs to assess whether team members should include employees with experience in information technology, forensic accountants, quality assurance, security, environmental health and safety, or internal audit.

In assembling an investigative team, the company needs to ensure that team members have interpersonal skills needed to conduct the investigation. This skill is a critical factor in every investigation – the ability to conduct effective interviews depends on the ability to relate to the person being interviewed, to gain their confidence and to convince them that disclosure of the information is necessary. The ability of the investigation team to present the results of the investigation to senior managers, the company's board, and the government, if necessary, depends on the ability to understand personal motives, influences and persuasion techniques.

Aside from this basic requirement, team members need to have investigative experience, objectivity, analytical skills, an understanding of corporate policies and procedures, and sensitivity and professional demeanor.

In the initial stages, the more baseline information known by the team members, the quicker they can focus on the real issues relating to the investigation. For example, if a quality assurance issue has been raised, then it will be important for a team member to be familiar with the company's quality practices and controls; understand the specific quality requirement, how it works and who is responsible for the specific quality standard.

There are a few other significant issues that need to be carefully considered. The investigative team should keep an open mind as to the facts and the focus of the investigation. A pre-conceived determination can lead to a poor investigation that ignores potential issues and complications. The ultimate success of an investigation depends on objectivity and fairness. If a narrow investigation is conducted with a pre-determined result, then it is likely to be an ineffective investigation.

In its initial focus, the investigative team has to protect against any involvement or influence by a senior manager who may be involved in the alleged misconduct. If a senior manager is potentially involved or should have exercised supervisory responsibility over the conduct, the investigative team needs to freeze out those senior managers with potential involvement so that it can preserve the results from allegations of conflict of interest.

Finally, the investigative team needs to decide if the allegations require a response to ongoing misconduct or deficiencies, including: (1) suspension of an employee allegedly involved in the misconduct; (2) improper charging for goods and services; (3) harassment or threatening or violent behavior; and (4) procedures for handling of employee-whistleblower.

The alleged "facts" will dictate the steps to be taken internally to preserve the company's position. Most cases will involve collection of written or recorded evidence, interviews, and computer and network forensics. The investigation usually will require consultation with managers, human resource staff, legal personnel and potentially law enforcement.

For most employees, cooperation in an internal investigation is a required condition of their continued employment. However, if the suspected wrongdoing turns out to have been conducted by one or more employees, the investigation may lead to anything from disciplinary proceedings against employees to criminal charges.

As a strategic matter, companies have some leverage over their officers and employees who have relevant information for the internal investigation. The threat of termination is a real one and most officers and employees want to avoid being discharged. There is a fine balancing act here because if an officer or employee has

engaged in misconduct, the company will have to terminate the officer or employee in order to demonstrate its commitment to compliance and discipline. Such an action, however, may raise the risk that the officer or employee will report the matter to the Justice Department or the SEC, especially given the new whistleblower bounty program. Companies have to balance these considerations carefully because they can result in early disasters for an internal investigation.

It is critical to determine if a whistleblower is involved in the case. If so, Dodd-Frank whistleblower protections against retaliation may apply. Any improper retaliation against the whistleblower could result in reinstatement, double back pay, and payment of attorneys fees and other costs. The Dodd-Frank whistleblower rules apply to foreign subsidiaries of US corporations. It is also important to determine if any foreign laws may apply to protect any whistleblower in a foreign subsidiary. For example, in the UK, there are whistleblower protections for reporting illegal activities. The financial incentives for whistleblowers who report violations are limited to violations of the cartel laws by companies and individuals. It is likely that the UK will expand its whistleblower protections to resemble the US whistleblower laws.

The status of each officer and employee who may be involved needs to be reviewed as the investigation progresses. Cooperation is important for these individuals to maintain their existing positions in the company. Working with the Human Resources department, it is important to document how each employee is treated, the reasons for their status, and the commitment to review and reassess such actions as new information is learned.

Initially, the following questions need to be addressed:

1. What planning needs to occur before launching the investigation?
2. Who should be informed of the investigation (at every stage)?
3. Should the complainant and/or the “suspect” be informed of the investigation?
4. If there is a reason to begin the investigation before notifying any of the subjects of the investigation, what tactics would be effective and are there any legal restrictions on use of such tactics (e.g. one-party recordings)?
5. What departments/divisions need to be involved in the investigation?
6. What steps need to be taken to preserve evidence or prevent tampering with evidence?
7. What items, if any, should be confiscated (e.g. computer), and will that have any adverse impact on the investigation?

In response to an initial complaint or the discovery of alleged misconduct, an investigator should notify only a small number of people required to know about the

investigation. Human resources usually should be notified. Depending on what type of assistance in the organization is needed (e.g. IT for documents and other evidence; internal audit for financial information), notifications should be kept to a minimum.

The answer depends on the nature of the suspected misconduct. Necessary skills may include forensic accounting, email discovery and review, computer forensics, video surveillance, access card logs or inventory audits. As a consequence, an internal investigation can require cooperation from physical security, IT, finance, human resources, management and possible outside forensic firms.

If you determine to notify the parties of the investigation, the investigator should send a confirming memorandum notifying the parties, including the complainant, of the existence and scope of the internal investigation. Victims and witnesses need to be assured that the wrongdoer will not intimidate or threaten anyone involved in the investigation. If there is a risk of intimidation, the investigator may keep the initial stages of the investigation confidential and make a disclosure at a later point in time when the risk of intimidation may decrease.

Internal Investigation Plan

While it is hard to predict at the outset the course that an internal investigation will take, a preliminary investigation plan is an important management tool. There are several helpful steps to take:

1. Define the objective of the investigation and the most efficient way to achieve the goal.
2. Consider how best to achieve the results in a timely manner, while protecting confidentiality and fairness to the subjects of the investigation;
3. Ensure that the investigation is thorough and adequately documented;
4. Ensure that the investigation is conducted in accordance with company policies and legal requirements (e.g. Upjohn warnings to employees).

The reporting relationship between the investigator and the corporate board is a minefield which has to be navigated carefully to protect the company and the individual directors.

It is important for investigators to carry out their assignment with an appreciation of the board's responsibilities to gather, review and assess the facts, and make

critical decisions on what steps, if any, the company needs to take to deal with potential FCPA liability.

1. Investigation Scope – The Audit/Special Committee needs to define the scope of the internal investigation. It needs to be narrowly tailored to the scope of the alleged FCPA misconduct. If the investigator discovers evidence of a broader bribery scheme, the investigator should seek authority to investigate. The mission needs to be defined and the focus should stay within the limits prescribed by the Committee. The Committee needs to understand how the investigation will be conducted, what actions will be carried out, and the timing of such tasks. It is important for the Committee to establish deadlines and require regular reporting from the investigator so that the Committee can show it has responded to the allegations in a responsible manner.

2. Reporting – The Audit/Special Committee should avoid written interim reports. There is no reason to require the investigator to submit written interim reports. Such reports will only undermine the eventual resolution of the matter and provide fodder to government officials who may second guess the steps taken by the company. The Committee should only note a general entry to confirm the interim oral report and discussion by the Committee. The same rules apply when the Committee and the investigator report to the Board.

3. Conflicts of Interest – The appearance of potential or existing conflicts of interest can undermine the integrity of an internal investigation. For that reason, the appointment of a Special Committee, or reliance on the Audit Committee, needs to ensure that there are no potential conflicts of interest in the selection of outside professionals – law firm and accounting firm – to conduct the internal inquiry, and in the composition of the board members on the Audit or Special Committee. If members of the Committee have a unique interest in the matter – financial or other interest – they should be replaced with more disinterested board members. The Committee can even consider appointing Committee members who are not part of the Board of Directors but who have unique talents to support and carry out the board’s mission.

4. Macro and Micro-Managers – The Committee needs to take an active role in managing the investigation. That does not mean micro-managing. It does mean a careful review and questioning of each step. The investigator should be an “arm” of the Committee and follow the evidence where it may lead. Reasonable diligence should be taken to investigate all leads. That does not mean every part of the company has to be investigated; it means there must be a reasonable probability to believe that misconduct may have occurred. The Committee can direct an

investigator on the scope and the nature of the inquiries that are made. However, the Committee needs to listen and be informed by the investigator on all significant aspects of the investigation. The Committee needs to be active but it also needs to defer on some issues to the investigator.

5. The Audience – It is important to remember the audiences who will be reviewing the actions of the board, the special committee and the investigator.

A. The Government — The Justice Department and the SEC will review the investigation in great detail. They will inevitably question the conclusions reached, the evidence gathered, and the steps taken during the investigation. Of course, there will be situations where a company conducts an inquiry and decides not to report the matter to the government. That decision can never be made until all of the evidence is reviewed and it is important to conduct an investigation assuming that the matter will be disclosed to the government.

B. The Public – If the matter is a high profile matter which is reported in the press, the stakes are even higher for managing the investigation and the communication of the results. The government’s focus and resolution of a matter will change since the public will be watching over how it ultimately handles the matter. For the board, the stakes are even higher. The company’s reputation will be at risk and the consequences of a shoddy or biased investigation can be devastating to the company.

C. The Shareholders – The plaintiff’s bar monitors all FCPA internal investigations and public disclosures. They are effective in organizing shareholder groups to file civil actions which trail the internal and government investigations. As an example, a single disclosure by a public company lead to the filing of 23 separate shareholder actions within 30 days after a public disclosure of potential FCPA violations.

Independence

An internal investigation is only as good as its independence. Even if a matter is investigated with a fine-tooth comb, employing brilliant tactics, document reviews and witness interviews, it will all be a waste if there is a serious question as to the “independence” of the investigation itself.

There are a number of basic questions and affirmative steps that have to be taken. If you find yourself unable to get the independence you need, then you should question whether to continue the investigation.

At the beginning, you need to be clear as to who is actually hiring you to conduct the investigation. If it is a special committee of the board or the general counsel, you need to make sure that no one on the board or the general counsel or other counsel has exposure in the investigation. If there is a potential exposure, then steps need to be taken to “wall off” the individuals or even an entire department, if necessary.

The value of an internal investigation is premised on an independent and objective view of the evidence. Government prosecutors will not credit an investigation that has been conducted by a biased party. It is easy to identify a slanted internal investigation when issues were ignored or downplayed or evidence was omitted. Credibility is the key to every investigation.

The selection of outside counsel is only one piece in the puzzle. Independence does not start with the selection of outside counsel – it starts from day one: the company has to appoint a special committee consisting of independent directors to oversee the internal investigation. If there is any question as to the “independence” of outside directors, the company’s board needs to appoint a special committee consisting of distinguished individuals, some of which may be non-board members.

Senior management, including the General Counsel or the Chief Compliance Officer, should play a limited supportive role in the internal investigation by facilitating outside counsel’s access to documents and personnel. If the conduct of any senior manager may be investigated, they must be walled off from any role in the internal investigation.

The independent special committee should facilitate outside counsel’s access to the company and should supervise the conduct of the investigation to make sure there are no barriers to access. If outside counsel does not have unfettered access to the special committee, then the investigation will be threatened by interference from subjects of the investigation. That is unacceptable and creates serious risks for the company.

The selection of outside counsel is always a balancing act. On the one hand, outside counsel who is familiar with the company and has worked with the company before may be a good candidate because of his or her ability to navigate the company and quickly move the investigation. On the other hand, the existing relationship between outside counsel and the company will create the appearance of a potential conflict of interest – did outside counsel go soft on the company in order to curry favor for future work?

My advice on this issue is to steer clear of any potential conflict of interest – if the stakes are high, independence is critical. If the investigation is more routine in nature and deals with a more common occurrence (e.g. employment issue, regulatory infraction), then existing outside counsel may be appropriate.

I subscribe to a straightforward principle — the larger the stakes the more important the independence of the fact finder. In the context of an FCPA internal investigation, I consistently recommend an independent outside counsel – the stakes are simply too high to cut corner on this fundamental requirement.

The standard model for an “independent special counsel” – an independent committee of Board members supervising outside counsel is designed to maximize the “independence” of the inquiry so that the results of any investigation will be viewed as thorough and free from any potential bias. According to the concern, established corporate counsel may have an incentive to conduct an inquiry that “pulls punches” out of favoritism from the company. But are there alternatives? Of course there are.

These days, most Fortune 500 companies, have a laundry list of firms they turn to on specific matters. (One in-house counsel recently told me they use 400 outside law firms). What matters more is not whether the company turns to a firm it has not used before to conduct the inquiry, but who the company engages to supervise and conduct the inquiry.

Once that team is selected, and a counsel is chosen who has a reputation for conducting fair and impartial, as well as aggressive inquiries, that team can be kept separate from any established counsel who may have a relationship with the company.

It is important to keep in mind that any experienced counsel wants to maintain his or her integrity and his or her reputation for conducting thorough, fair and “let the chips fall where they may” inquiries. To think that somehow a respected investigative counsel is going to somehow pull punches is unrealistic. So long as transparency is followed and fairness is pursued, these issues can be overcome.

Keep the investigation as narrow as possible: Assuming that an independent board committee has retained special investigative counsel, the focus of the investigation should be crafted as narrowly as possible to serve the company and shareholder’s interests. Why? Two reasons: (1) You do not want to have special counsel investigating in areas where they do not need to investigate; and (2) if the scope

needs to be expanded at a later point, the independent committee can do so. You should start the inquiry with a focus and only adjust that focus if appropriate..

When outside counsel reports on the status of an investigation, the board members who are present should be limited to those who are members of the special committee. The minutes of the meeting must be kept separate from regular board minutes.

If corporate counsel retains outside counsel, it is important to wall off any counsel who may be involved in the matter under investigation. If the general counsel blessed the conduct that is now at issue, the general counsel should play no role in the investigation and should not be the official who hires you for your investigation. The tricky issue becomes how to keep the counsel's office informed of the investigation, without going into details that may undermine the investigation's independence itself. One solution is to wall off the counsel's office but take down the wall once you have reached a conclusion exonerating the counsel's office.

If the counsel's office has conducted a preliminary review or a due diligence review, and outside counsel is retained to conduct an independent review, it may be difficult to report to the general counsel's office given its conflict of interest. In such case, the general counsel's office should have nothing to do with the hiring and supervision of the investigation. If the legal office is under investigation or under a conflict, you may have to report to the board, a committee, or a special committee.

The preservation of independence is critical in those cases where your investigation includes recommended remedial measures. If there is a government investigation or your internal investigation is being reported to the government, then the value of your remedial recommendations has to be preserved through independence.

If the government questions your impartiality or independence, your remedial recommendations will fall on deaf ears, and the company could face more severe sanctions and remediation requirements.

From day one of an internal investigation, you must take steps to ensure that the reporting relationship is free of any real or potential conflict. When reporting on the status of the investigation, the question for each person present is: Does this person have a real reason to be here listening and providing input or could someone later claim that this person had a conflict, and wanted to influence the direction of the investigation?

Document Collection and Review

In all honesty, document collection and review during an internal investigation is not a very sexy issue. It is not like interviewing techniques, strategy calls on how to conduct the investigation, or even like reporting to the Board on an investigation.

Like all other issues in an internal investigation, document collection and review has to be done carefully. If the collection or review is mishandled, the overall integrity of the internal investigation can be called into question and may even raise criminal obstruction of justice issues. It is another way in which an internal investigation can become a nightmare.

In the ideal world, you should review relevant documents before conducting any interviews. That is an ideal that is rarely met – in most cases, it is important to interview immediately the key witnesses in a crisis situation. It really depends on the nature of the issue that is being investigated.

I cannot emphasize this enough: to reduce costs, avoid the accumulation of unnecessary records, and to facilitate the actual record collection, it is absolutely critical to have a document retention policy in place before an investigation begins. A document retention program must address the following topics: the legal framework; the scope of the records covered by the policy (electronic, emails, hard copies and other types of records); records retention periods that vary by record type and quality; a designated employee or office responsible for compliance; review of practices to ensure compliance with Policy terms; procedure for destruction; employee training; oversight mechanisms; and policies to be applied in the event that litigation or investigation becomes reasonably anticipated.

The first step in gathering the documents is to meet with in-house personnel to identify the locations of possible relevant documents – electronic and hard copies. One member of the team should be assigned to document preservation and responsibility. The investigative team should determine if an outside vendor is needed to preserve and collect the relevant documents.

In order to preserve documents, the investigative team has to make sure that a hold notice is issued to every company where relevant documents may exist. A company's obligation to preserve documents is triggered when the company reasonably anticipates litigation or knows that evidence may be relevant to future litigation.

It is important to cast a wide net when preserving documents. It does not mean you will review every document but it is important to preserve documents that may become relevant as the focus of the investigation changes. The preservation notice should be defined to include archived documents and stored email messages.

The preservation notice should include:

1. General description of the alleged conduct and the relevant dates for preservation of documents;
2. Instruction to employees to preserve documents;
3. Identification of a legal point of contact to answer legal questions
4. Identification of a technical point of contact for technical questions related to preservation of documents.

Before any interviews are conducted, documents should be collected, organized and reviewed. In most cases, these include personnel files, telephone records, expense account records, computerized personnel information, appointment calendars, time cards, building entrance/exit records, computer/word processing disks and hard drive, e-mail records and voice mail records.

Special investigative techniques have to be carefully reviewed and subject to legal approval. These include: an internal audit, physical investigation (fingerprint, handwriting), physical surveillance, polygraphs, searches of organization or private property, and electronic monitoring or surveillance.

Document control for the investigation is critical beyond just preserving relevant documents. One of the most difficult issues is determining whether the documents fall outside the reach of United States process. Any documents that “reside” within the United States are then subject to grand jury subpoena. In this electronic age, the definition of documents within the US borders can be met when a document exists on a server or a computer located in the United States. It becomes very trick when reviewing documents in an internal investigation.

For example, if viewed on a webex technology, government prosecutors could later argue that the document was under control within the US borders. However, if the webex prohibits any person in the US from controlling the document when displayed on a webex does that lack of control mean that the document is not subject to US jurisdiction? In order to avoid these issues, counsel is well advised to protect against such arguments by reviewing documents in a foreign location. Of course, if the company decides to disclose and cooperate with the Justice

Department investigation, the company will be required to submit these documents to US authorities to demonstrate its cooperation.

It is important to involve in-house personnel familiar with the company's record management and storage systems from the outset. The key focus in these meetings is to learn where all potential hard copy and electronic documents may be located and how they can be retrieved. As part of this inquiry, the company needs to consider what documents, if any, are in the possession of third parties – lawyers, accountants, and consultants.

Some say collection of records should follow the lead of the document hold notice and reach as far as possible. This is unwise in some situations. In adverse litigation, for example, meeting and agreeing with opposing counsel on the systems, custodians, and record-types that will (and will not) be collected is an invaluable opportunity to narrow the scope of costly discovery.

The internal investigation should carefully assemble as much information as quickly as possible. To accomplish that task, the document universe has to be defined, preserved, and efficiently reviewed. Early interviews of some employees may be needed focused only on documents and responsibilities in order to identify who has relevant documents and who has relevant information. A revised document storage and retention policy should be adopted to facilitate the investigation. The gathering of the relevant documents should include technology experts, and possibly, regular counsel familiar with the company's document system.

To the extent possible, witnesses should not be interviewed until all relevant documents have been gathered and reviewed. Otherwise, it is likely that additional interviews will be needed. No witness ever tells a lawyer everything they know at the initial interview, even if they have been able to review the documents before the interview.

Special care has to be taken with regard to document preservation, collection and review. In-house counsel, regular outside counsel, and special counsel need to act with care but do not need to be hyper-concerned about every little step that is taken. As special counsel become more familiar with the scope of the investigation and the issues, regular counsel and in-house counsel should play a critical role in making sure that sufficient steps are taken to preserve documents, collect an appropriate scope of documents, and identify, and even interview, some individuals to determine whether or not they may have relevant information. All of this can and should be done quickly, and may be completed before special counsel is ready to

proceed and take over. These are critical initial steps with enormous importance to the overall success of the internal investigation.

Two significant pitfalls arise in the early stages of such an investigation: (1) data privacy laws and regulations outside the United States may prevent or hinder collection, dissemination and review of relevant documents; and (2) documents which are brought within the United States may then become subject to subpoena by United States authorities. Both of these concerns are significant and can undermine an investigation if careful attention is not paid to these potential risks. Document collection and review may have to take place in foreign locations in order to avoid running afoul of these restrictions.

If the Government is Involved, Develop a Working Relationship

If an internal investigation is being conducted as a result of a government investigation, the investigator and company have to take affirmative steps to establish a professional working relationship with the government prosecutors. In significant investigations where government prosecutors and/or regulators are aware of the matter, the company and outside counsel should regularly consult with the government prosecutors and regulators to ensure buy-in and acceptance of the overall pace and scope of the internal investigation. Government prosecutors and regulators are the critical audience in many cases, and they need to be informed regularly throughout the process as to the overall progress. That does not mean that counsel describes in painstaking detail the ins and outs of an investigation; rather, the strategic disclosure of information is critical in order to gain the support of the government.

Attorney-Client Privilege, Work Product and Waivers

Before initiating an investigation, counsel need to consider attorney-client privilege and work product issues which inevitably arise. First, an overall practice and procedure for protecting the privilege for the investigation needs to be adopted. Second, no decision on whether to waive the privilege should be made until the investigation is completed and an overall strategy and plan has been adopted. Third, the privilege must be protected when dealing with retained experts and professionals when they are assisting in the investigation.

While many outside counsel and Boards wrestle with the difficult issues of waiving attorney-client privilege and work product protections in order to deal with prosecutors and regulators, they may be spending too much time on an issue that is

more form than substance. Prosecutors and regulators do not really care if the information is privileged or not – what they want is one thing – the information itself. With that in mind, how much of an internal investigation is legitimately privileged and how much of it is subject to work product protection? These issues depend on the specific circumstances. Yet, all too often, companies and counsel broadly apply privilege and work product claims on anything and everything that moves without regard to the importance of such information and possible strategies for use or disclosure of such information. Instead, counsel need to focus on what information will the government want and how can it best be packaged, without engaging in the dance or theoretical discussions about waiving privileges.

Witness Interviews

To be candid, how to conduct employee interviews is one of my favorites subjects (and tasks). I have written and spoken on the issue in a variety of contexts. It is a skill that can only be developed through experience – the only question is how much experience is needed to gain a mastery of the area.

I have a long list of dos and donts for witness interview and I don not intend to repeat them here. This article provides more technical guidance on witness interviews.

The selection of witnesses and order in which to interview is often obvious. Junior employees precede senior employees. Difficulties arise when trying to locate former employees and interviewing them.

Before interviewing a witness, it is important to prepare – to know as much about a witness as possible: career, family, education and background all can be factored in as part of an interview strategy. In addition, reviewing each document relating to the individual is important.

Some employees who may have a conflict because of their involvement in the incident or events may require separate counsel and those arrangements should be made as quickly as possible. This issue will usually turn on whether the individual is a witness or a “subject,” meaning that his or her conduct is being investigated.

As new counsel join the investigation to represent individual employees, it is important to establish a common/joint defense arrangement. To avoid any possible inquiry into these types of issues, these arrangements are usually reached verbally and never committed to writing.

At the beginning of each interview, every investigator is taught (and repeats often to others), “Don’t forget to give the Upjohn Warnings.” No one ever spends any time to learn exactly what the Upjohn Warnings are and why they are given.

An employee must be advised that: (1) the attorney conducting the interview does not represent the employee but represents the company; (2) the investigator’s purpose in conducting the interview; (3) outside counsel is conducting a confidential investigation; (4) the interview is being conducted to gather relevant information; (5) the information discussed is privileged and the company holds the privilege and whether to waive it; (6) the information might be disclosed at a later point including federal or state government investigators.

The Upjohn Warnings have to be memorialized either in the interview memo or in a separate written document provided to the employee. Some investigators hand out written warnings to the employee.

The failure to give proper Upjohn Warnings can have a serious impact on the company’s ability to use any interview statements when provided to the government to establish a company’s cooperation. If the government cannot use the statement, the company will not gain any credit from the government for such a statement.

The issue gets even more complicated and risky if the investigator actually represents the witness in a closely related matter (e.g. shareholder derivative suit against the witness). In this situation, the investigator could face serious consequences for failing to deal with an obvious conflict of interest.

If the employee asks the investigator if he or she needs an attorney, the investigator should not make any statement which suggests directly or indirectly that the employee does not need separate counsel. In addition, the investigator should tell the employee that he or she cannot advise the employee as to whether the employee needs an attorney.

Common Interview Mistakes

Based on my years of conducting complex criminal investigations and criminal trials, there are several important points for interviewing witnesses. First, it is critical to establish a rapport with the witness. Heavy-handed threats and scare tactics never work. Most witnesses know (and feel) what is at stake. Second, take your time and let the witness tell his or her story. No witness tells you everything

they know — some because they cannot remember and some because they do not trust you. Third, do not confront the witness by telling them they are a “liar” or other accusatory words. Use as many documents with the witness to narrow their story and boil down the discrepancies. Fourth, after the witness has told his or her version, go back and review the areas where you think they may be untruthful, use documents to narrow the story and ultimately demonstrate to the witness that the story does not make sense. You show them that you know they are being less than candid and why their story makes no sense. The interview itself, along with these explanations, should be memorialized and never recorded (audio or video).

Practitioners know that interviews should be conducted in reverse order – meaning from least important to most important. The more information gathered from interviews before conducting the key interviews, the better for the internal investigation.

As I have written before, there is a real skill to conducting interviews. Many practitioners know how to “prepare” for interview but *few* really know how to conduct an effective interview. Believe it or not, the most important requirement is for the interviewer to know themselves, their capabilities to interact and empathize with others, the impact they have on people, and their ability to “read” people and understand their motivations.

One of the most common mistakes committed by investigators is to conduct interviews from a “script” of questions. Investigators who rely on written scripts frequently miss the most important part of the interview – their ability to respond to verbal and non-verbal cues for follow up as needed. As someone long ago told me, you need to be able “play off” the witness. Many attorneys tend to avoid “playing off” and instead rely on “preparation” as a crutch to reduce anxiety. It is a common and critical mistake.

Inexperienced or unconfident attorneys will sometimes try intimidation and bullying to convince a person to disclose information. That is another misguided tactic which rarely, if ever, succeeds, and only exposes the attorney’s lack of confidence and inability to conduct an interview.

Keys to Success

When the issue is boiled down, a successful interview depends on interpersonal skills, knowledge of the facts, patience, persistence and the ability to elicit important information from subjects. Rapport is the lifeblood of interviews.

At the beginning of the interview, the investigator should try and establish rapport through basic “human” interactions. There is no reason to try and intimidate the subject who will be nervous no matter if they are a witness or the focus of the investigation. An investigator has to try and elicit as much information as possible by listening carefully and being firm when the witness is non-responsive or evasive. In addition, a basic introduction and exit statement should be given informing the witness of the purpose of the interview, the witness’ rights, the preservation of attorney-client privilege and the confidentiality of the interview. Every interview should be conducted with at least two persons, one of whom records the interview by taking notes to memorialize the events.

The focus of every interview should be on information the witness personally knows. It makes no sense to ask a witness to speculate as to how or why an event occurred. As a general rule, an investigator should interview any person who may have information that is relevant to the allegation. Questions should be open-ended and should focus only on the details that particular person should know. Every interview should be conducted in a professional manner. The investigator should not comment on the investigation in the presence of any witness.

Use Senior Attorneys for Interviews

Internal investigations can cost lots of money, especially when conducting a global investigation. Avon and other companies have been hit with astronomical legal bills in authorizing and conducting internal investigations needed to resolve government enforcement matters.

Companies have responded by managing internal investigation expenses. One area where law firms reduce costs is in conducting interviews – assigning junior attorneys who lack seasoned experience to conduct interviews.

This trend, while cost saving, is a classic example of pennywise and pound-foolish. Instead of saving costs through errant strategy calls, companies need to look for other areas to cut costs. For example, too often internal investigations lose focus. As a consequence, internal investigators often conduct unnecessary interviews or document searches.

A better use of resources is to focus an investigation and most importantly, have senior, experienced attorneys conduct many of the interviews. There is no excuse for delegating important interviews to a junior attorney. It is easy to justify delegating the important interviews – client expense.

There are a lot of reasons for senior attorneys to conduct witness interviews. It is important for an investigator to take the measure of the witness. The substance of an interview is critical but so are some of the more subtle issues – credibility, surrounding behavior and demeanor. A witness who tells his or her story to a junior attorney is unlikely to be challenged on the facts or presented with conflicting documents, and confronted with hard-to-answer questions.

An experienced investigator knows when a witness is deceiving based on experience from conducting trials, questioning witnesses, and keeping focus on the important issues. Junior attorneys with little to no experience in these areas are likely to ignore subtle signs of deception, challenge a witness or test a witness' credibility. If the company is dedicated to discovering the truth in an investigation, will reserve the important witness interviews for senior and experienced attorneys.

A senior attorney can prepare for important interviews more efficiently than a junior attorney. They understand the importance of focusing the interview, weaving in documents that are important to review with the witness, and the objective of the interview.

A company that sends junior (or inexperienced) attorneys to conduct witness interviews is sending the wrong message. Witnesses who do not want to disclose important information feel more comfortable when a junior attorney questions them. They are more confident during the interview and are emboldened to deceive.

To ensure that witness interviews are conducted in the most effective and efficient manner, companies need to consult with outside counsel to plan for and designate the important interviews. To reduce cost, the investigator has to ensure that the universe of witness interviews is limited to those that are relevant to the issues in the investigation.

Investigation costs can be managed and continuously monitored. Every step in a n investigation has to be questioned – Are documents likely to be found by searching a specific office? Will interviewing a specific person result in relevant evidence?

While it is important to manage investigation costs, the cost and the benefit of each step in an investigation has to be weighed. Witness interviews are critical to an internal investigation and appropriate resources have to be assigned to conduct the important interviews.

Internal Investigation Pitfalls and Challenges

Everyone has tips on how to conduct internal investigations. The how-to articles present advice on how to conduct an internal investigation. Unfortunately, the reality is far more complex and risky.

Behind many of the FCPA settlements reached between companies and the Justice Department are intriguing twists and turns in every investigation as the facts are gathered. In some cases, the “truth” is never actually revealed, and in others the investigation reaches a roadblock.

Recent reports of corporate intrigue have dramatically underscored how an internal investigation can be derailed or even shut down. In many cases, directors or senior managers may oppose or resist considering an internal investigation. Board members or senior managers may resist such steps not necessarily because they involved in the illegal conduct but sometimes because they do not want to embrace the inevitable change resulting from an internal investigation and enforcement action.

Given the Justice Department’s use of broad enforcement theories of liability, board members and senior managers who may fear their own liability will put up roadblocks. This is what we call a complete corporate governance failure. This is when the board and senior managers become complicit in the cover-up and obstruct an internal investigation in the hope that the allegations will never see the light of day. Believe me, it happens, and it is not as rare as you think.

Companies have to be extremely careful when considering allegations of misconduct and deciding whether to initiate an internal investigation. Such a decision is rarely unanimous. From the beginning, support may waver – sometimes these attitudes can reflect culpability and sometimes a general resistance to change. It is important to try and nip resistance in the bud. This requires careful political maneuvering and alliance building. An outside counsel, or internal investigator, who conducts the investigation with scare tactics and a heavy hand are often unsuccessful because they do not take the time to understand the political factions or how to build alliances inside the company.

In an even more problematic scenario, the culpable players are involved in the supervision of the internal investigation. They can obstruct the investigation by restricting the focus and authority of the investigation. When this happens, outside counsel’s engagement and investigation is in serious jeopardy. Factions within the

company may struggle and the victor may be the wrongdoers, or the obstructionists, themselves.

If the factions on the board or in management are at odds, the situation can break down very quickly. Individual board members and senior managers may obtain their own counsel. Allegiance to the company can break down into individual actors seeking to protect themselves.

If a board member (or group) fears their own liability, they may inform the other board members of their disagreement. If they are not satisfied with the response, they may be forced to resign. For the remaining board members, this record makes it even more risky for them if the investigation reaches the board's actions or inaction.

Senior officers of the company can frustrate an investigation by blocking an independent investigator from reporting to the board, seeking additional authority from the board or providing a status report. Senior managers may seek the ouster of the investigator/outside counsel and replace the investigator/outside counsel with someone more loyal to the officers. The outside counsel always walks on very thin ice and is frequently at risk as these internal struggles play out. Along the way, outside counsel has to adhere to ethical rules and professional integrity. No engagement is worth the risk of compromising professional or ethical integrity.

Investigation Conclusions and Reporting

“When a decision has to be made, make it. There is no totally right time for anything.” – General George Patton

Companies need to be careful when resolving an internal investigation. Assuming the results of an internal investigation are only used internally and not reported to a government agency, companies have to act transparently and with care.

During the internal investigation confidentiality is important to the integrity of the investigation. At the conclusion, the company needs to communicate its decision to the parties, and the reasons for its decision. Some companies include a procedure for appealing the results of an internal investigation.

Before reaching a decision, an investigator has to evaluate the evidence. In some cases, the decision is straightforward. Where there is no evidence to support a complainant's claims against other employees or to explain allegations of theft or other misconduct, the investigator can quickly make a decision. That decision may be challenged on procedural grounds but not on substantive grounds.

The harder cases are those where the evidence is a lot closer. Credibility may be the key to resolving the case. In those situations, the investigator's judgment and experience are critical to defending the investigation.

In the investigation report, the investigator has to cite as many facts as possible to support the decision and document each conclusion supporting the decision. If there is conflicting evidence and no corroborating evidence, an investigator can still make a decision based on the credibility of the parties and the interviews. It is hard to challenge credibility determinations because of the importance of intangible factors or changes in critical witness stories relied on by an investigator.

There may be times when the evidence is inconclusive and the investigator cannot reach a decision. The company cannot take any action. It would be irresponsible to place blame or deny an allegation when the "truth" cannot be determined. If the company acts without a solid evidentiary foundation, the company could face claims of wrongful discharge, defamation, or retaliation.

In this situation, the company needs to make an effort to "communicate" its decision or non-decision. It has to explain to the parties or a complainant why the evidence did not support the claim or their respective positions. It should offer the complainant or the parties an opportunity to submit any additional information and consider any additional arguments.

There is no such thing as a "perfect" decision. No one expects a company to reach perfect decisions in resolving these kinds of issues.

The goal is to be fair and reach a decision based on a complete examination of the evidence. For example, courts are reluctant to second-guess employer actions, even when later proven wrong, if management acted fairly and in good faith in making the decision.

The last step in the decision-making process is to communicate the decision to the appropriate parties. The resolution of the investigation should only be communicated to those individual who "need to know" how the matter was resolved. The message should be fair and communicated in good faith.

Internal Investigation Reports

The ultimate outcome of an internal investigation is, in many respects, dictated by the investigation report. But not all reports are created equal.

Every report reflects the specific external and internal circumstances facing a company.

On the external front, the key issues are whether the government has initiated a civil and/or criminal investigation(s)? Is there a potential whistleblower action? Is there pending related civil litigation?

Internally, the report should reflect who is supervising the investigation and the specific charge of the investigation. The report should be coordinated with the person(s) responsible for presenting the results of the investigation to the supervising entity, e.g. the Audit, Compliance or Special Committee.

One initial question that needs to be answered is whether or not outside counsel should prepare a written report for the client/company? It is important to remember that such a report could end up in the hands of the government if the company chooses to cooperate and waives its attorney-client and work product privileges. Before preparing a report, the purpose of the report, the basic findings and the recommendations should be evaluated in the overall strategy adopted by the company.

Most reports have two fundamental purposes: (1) to describe the facts surrounding relevant events and potential violations of the law or corporate policies; and (2) to identify and recommend remedial or correction actions.

As Jack Webb coined the phrase, "Just the facts, ma'm." An investigation has to set forth all the relevant facts. To the extent there are inconsistencies and potential credibility issues, the report should fairly describe the issues. The report should also identify factual issues which remain unknown.

The report should describe potential criminal and civil risks and liabilities, as well as potential liabilities for company officers, managers and employees. As part of the potential liability issues, the report should analyze and assess all potential disclosure obligations under the securities laws, Sarbanes-Oxley and any other applicable requirement.

Of course, the report is protected by attorney-client privilege and attorney work product. Nonetheless, it should only be shared with those company officials who have a need to know the results of the investigation.

If there is an ongoing government investigation, the company needs to develop a strategy for dealing with the government. The goal of the company's internal investigation is to stay in front of the government's own investigation, or even have

the government suspend its investigation while the company conducts its internal investigation.

If the company decides to cooperate with the government, the company has to define the nature and scope of the cooperation, including production of documents, availability of witnesses for interviews, and preserving or waiving the attorney-client privilege.

The company has to weigh the full implications of a waiver of the attorney-client privilege. It has consequences in the government investigation but in a number of collateral matters – potential State government enforcement and civil litigation. Once the privilege is waived it is difficult, if not impossible, to try and assert the privilege in other contexts.

If the company chooses to cooperate with the government, the company must commit itself to full cooperation. Prosecutors who detect foot-dragging or half-hearted attempts to cooperate become very frustrated and are likely to hold it against the company when it negotiates a resolution of the investigation.

About the Author



Michael Volkov is the CEO of The Volkov Law Group LLC, where he provides compliance, internal investigation and white collar defense services. He can be reached at mvolkov@volkovlaw.com. His practice focuses on white collar defense, corporate compliance, internal investigations, and regulatory enforcement matters. He is a former federal prosecutor with almost 30 years of experience in a variety of government positions and private practice. Michael maintains a well-known blog: [Corruption Crime & Compliance](#) which is frequently cited by anti-corruption professionals and professionals in the compliance industry. Michael has extensive

experience representing clients on matters involving the Foreign Corrupt Practices Act, the UK Bribery Act, money laundering, Office of Foreign Asset Control (OFAC), export controls, sanctions and International Traffic in Arms, False Claims Act, Congressional investigations, online gambling and regulatory enforcement issues. Michael has assisted clients with design and implementation of compliance programs to reduce risk and respond to global and US enforcement programs. Michael has built a strong reputation for his practical and comprehensive compliance strategies. Michael served for more than 17 years as a federal prosecutor in the U.S. Attorney's Office in the District of Columbia; for 5 years as the Chief Crime and Terrorism Counsel for the Senate Judiciary Committee, and Chief Crime, Terrorism and Homeland Security Counsel for the Senate and House Judiciary Committees; and as a Trial Attorney in the Antitrust Division of the U.S. Department of Justice. Michael also has extensive trial experience and has been lead attorney in more than 75 jury trials, including some lasting more than six months. His clients have included corporations, officers, directors and professionals in, internal investigations and criminal and civil trials. He has handled a number of high-profile criminal cases involving a wide-range of issues, including the FCPA and compliance matters, environmental crimes, and antitrust cartel investigations in countries all around the world. **Representative Engagements**

- Successfully represented three officers of a multinational company in two separate criminal antitrust investigations involving a criminal antitrust investigation in the District of Columbia and the Southern District of New York.
- Defended pharmaceutical company before the Food and Drug Administration and Senate Finance Committee relating to application for approval of generic drug.
- Conducted internal investigation which exonerated company against allegations of false statements in submissions to the FDA and against improper conduct alleged by Senate Finance Committee.
- Represented company before the US State Department on alleged violations of ITAR which lead to voluntary disclosure and imposition of no civil or criminal penalties.
- Advised several multinational companies on compliance with anti-corruption laws, and design and implementation of anti-corruption and anti-money laundering compliance programs.
- Advised hospitals, pharmaceutical companies and medical device companies on compliance issues relating to Stark law and Anti-Kickback law and regulations.

- Conducted due diligence investigations for large multinational companies for anti-corruption compliance of: potential third party agents, joint venture partners and acquisition targets in Europe, Africa, Asia and Latin America.
- Represented individual in white-collar fraud case in Alexandria, Virginia and secured dismissal of criminal charges and expungement of criminal record.
- Represented company before Congress and Executive Branch in effort to modify Justice Department regulations concerning use of federal funds.
- Advised and assisted World Bank in review of global corruption policies, enforcement programs and corruption investigations and prosecutions.