

P
R
E
S
E
N
T
A
T
I
O
N

High-Stakes Internal Investigations: How to Investigate When Your Company's Future is on the Line

Martha Boyd

mboyd@bakerdonelson.com

615.726.5652

Sam Bowman

sbowman@bakerdonelson.com

615.726.5701



BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

Scenario

You are the new VP of HR for a hearing aid company that is a large, privately-held company. Your company supplies hearing aids to local health care facilities, including the Veterans Administration.

You have been at the Company only about 3 weeks and are just finishing hanging your diplomas and getting your office in the order you want it. Late on Friday afternoon, you receive an urgent phone call from the Chair of the Board of Directors. She has received an anonymous tip through the Company's fraud and abuse reporting hotline from an individual who claims to be an employee. The tipster claims that the company's COO and CFO and some other top managers have set up a fake company that is selling your Company certain electronic components that are used to amplify sound for the hearing aid. The fake company is actually purchasing the processers from a company in China at one price and then selling the processers to your company at a higher price. What's more, the tipster claims that the COO and CFO are romantically linked, even though both are married to other people, both of whom work for the company. The tipster indicates that he is worried about his job if someone finds out that he has raised these allegations. The Chair of the Board is skeptical of the tipster's claims, but she recognizes that the issue must be investigated. She wants you to figure out whether to conduct an investigation yourself or to engage someone to assist you.

Where do you begin?

Potential issues raised by this scenario

- Anonymous tipster/whistleblower – What is his motivation?
- Electronic components – Are they substandard? If they are coming from China, does that violate government contracting regulations?
- Defrauding the company – How much? How far back?
- Potential impact on the Company's reputation and the reputation of those accused
- Who else might be involved?



Who should conduct the investigation? HR Manager, In-House Counsel, or Outside Counsel?

HR Manager

- Optimal for sexual harassment, discrimination, and other internal, employee-related investigations
- May be perceived as part of management
- May not be equipped to investigate wrongdoing involving superiors
- Conversations with employees are not protected by the attorney-client privilege



Who should conduct the investigation? HR Manager, In-House Counsel, or Outside Counsel?

Company's internal general counsel

- Benefit is that conversations with employees may be protected by the attorney-client privilege
- But internal GC may be viewed with suspicion, as part of the management that is engaging in the wrongdoing
- Additionally, the GC may not be best suited to (or want to) confront her own superiors with accusations of wrongdoing



Who should conduct the investigation? HR Manager, In-House Counsel, or Outside Counsel?

Outside counsel:

- Need to consider whether to use one regularly retained by your company or someone you've not used before
- Benefit is interviews with employees may be protected by the attorney-client privilege
- Downside is unfamiliarity with Company and its policies and procedures and personnel





Attorney-client privilege – a primary consideration

- Recent case law upset the appellate court – District Court in D.C. held that the A-C privilege did not apply to a company’s internal investigation, finding that the investigation was “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.”
- Overturned by the D.C. Court of Appeals – *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (2014), which found the district court’s ruling “legally erroneous.”
- Key to obtaining protection is that “one of the significant purposes of the investigation is to obtain or provide legal advice.”

Attorney-client privilege – protecting your company:

- Investigation should be overseen/directed by an attorney; that oversight should be documented
- Best practice is for attorneys to conduct interviews. If non-attorneys do it, make sure attorneys are directing the non-attorneys and have the attorney specifically state in writing to the non-attorneys that their actions are intended to facilitate the attorney's provision of legal services to the Company
- Advise employees of the nature of the interview (use Upjohn Warning)
- Mark as privileged documents obtained or created



Planning your investigation – initial steps:

- Make contact with anonymous reporter – de-anonymize him and learn everything you can about him
- Ask him to produce evidence of wrongdoing and/or others who can corroborate his claims
- Learn everything you can about the accused
- Review financial and audit reports
- Investigate the fake company
- Determine whether there is video evidence (such as surveillance cameras) that you may want and preserve it



Planning your investigation – next steps:

- Consider whether you should attempt to catch the accused persons off-guard to prevent them from destroying evidence and/or collaborating on their stories.
- If so, consider what to do with the accused during the investigation. Consider putting them on leave during pendency of investigation.
- Consider who will run the company or carry out their duties in their stead.
- Consider and prepare for what happens if the press gets wind of the investigation – retain PR
- Engage IT to immediately lock out accused personnel from Company's electronic network and to secure and image computers
- Consider hiring security

Preparing to confront the accused – know your goals and how to reach them:

- Who do you need to interview and in what order? Plan this and make sure you know when people are working.
- Who will notify accused what's going on? Who will notify them of their employment status?
- Where will you conduct interviews? Where will security be?
- How do you prevent employees who are likely to be interviewed from talking to each other?
- Select the best time to confront the accused with an eye toward meeting these goals without disrupting company operations
- Consider whether you need interpreters
- When/how will you notify the rest of the workforce?

How HR can assist:

- Provide access to personnel files and pay records
- Provide access to employee schedules
- Provide access to company policies/procedures
- Help orient investigators to the business operations and personnel
- Help orient investigators to the layout of the building and where people's offices are
- Help shepherd employees in and out of investigator's interview rooms
- Handle morale issues and provide you feedback on what employees are saying

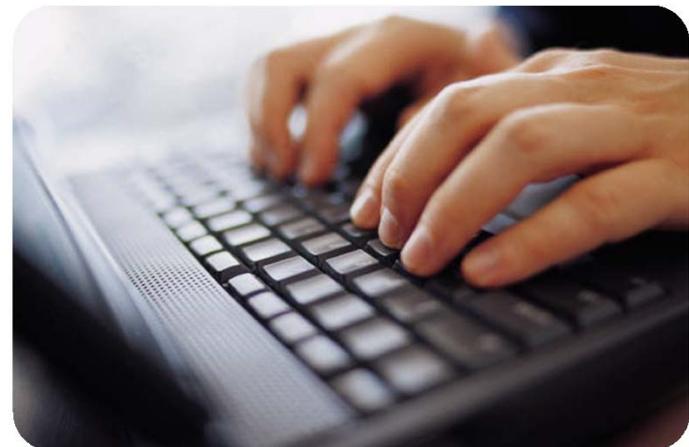
Four Areas to Discuss

1. Immediate steps to take once entry into business is made
2. Mandatory requirements when interviewing employees
3. Important considerations on after-action reporting
4. Points of interest when the government shows up with a warrant or to inspect



Entry is made – now what?

- Information Technology
 - Before entry - Internal employees or Vendor
- Witness Separation/Isolation
- Securing Personal Workspace and/or Locker



Interview

Upjohn Warning (ABA)

Attorney or Agent of Attorney Only:

1. Upjohn warnings should inform the Constituent that the investigating attorney is representing the corporation and is not representing the Constituent.
2. The warnings should be explicit and unambiguous to ensure that the Constituent does not believe that the Constituent has formed an attorney-client relationship with the investigating attorney.
3. The purpose of the interview should be made clear so it is apparent that counsel is acting on behalf of the corporation, and that counsel is gathering information for the corporation in order to provide legal advice to the corporation.

Upjohn Warning (cont'd)

4. Counsel should give the Constituent the opportunity to ask questions about the Upjohn warnings and counsel's role. This helps ensure that the Constituent understands the Constituent's relationship with counsel.
5. The warnings should inform the Constituent that the interview is subject to the attorney-client privilege and, as such, the interview is regarded by the corporation as confidential and the Constituent may not disclose the substance of the interview – questions asked by counsel and answers given to those questions – to third parties outside the corporation because that could effectively waive the privilege.

Upjohn Warning (cont'd)

6. The warnings should further inform the Constituent that, while the interview is subject to the attorney-client privilege, the privilege belongs only to the corporation, not the Constituent. That means it is up to the corporation – and the corporation alone – to decide if or when the substance of the interview should be disclosed to third parties (*i.e.*, without the consent of the Constituent).

Sample Warning (ABA)

“I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally. I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.

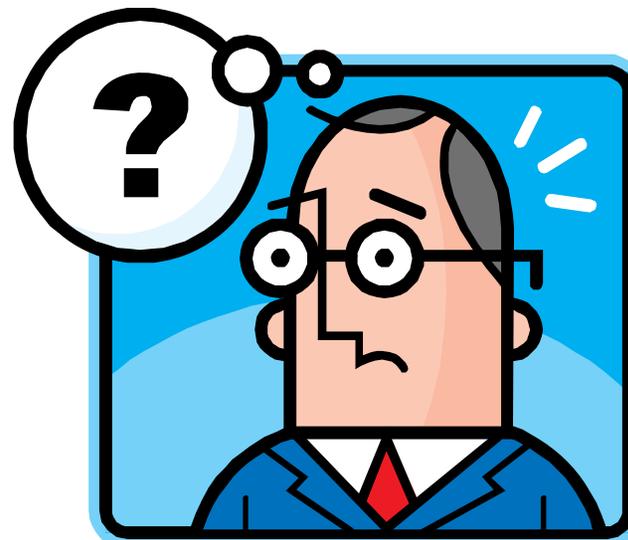
Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

Sample Warning (ABA) (cont'd)

In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss *this* discussion.

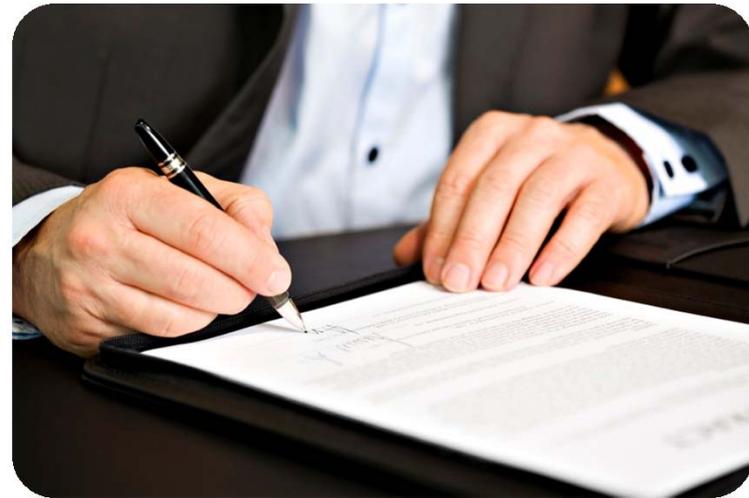
Do you have any questions?

Are you willing to proceed?"



General Procedures When Interviewing (ABA)

1. Provide Upjohn warning before interview is conducted
2. Prepare written statement to use with all interviewees
3. Maintain record of interviewee's names, date and time warning given



New Twist on Upjohn Warning

- Prosecutors charging employees with obstruction of justice when employee lies or tampers with evidence during internal investigation
- How is this occurring when private investigation?
- 18 U.S.C. §1519
 - Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

New Twist on Upjohn Warning (cont'd)

- Active government investigation not necessary



Examples

- Security Officers assaulting inmate while at hospital
- CEO and VP of HR lied to in-house counsel who subsequently submitted reports to SEC
- Employee charged when tearing up documents before meeting with in-house counsel
- Our scenario



Recommended de facto Miranda Warning

1. Inform employee of potential criminal consequences for lying to the internal investigator
2. Allow employee to make informed decision on the nature and accuracy of information he or she will provide to investigating attorney



One of the most important factors to successful interview is Experience

- Examples of Importance of Experience
- Everybody Likes a Story!



Reid Technique

TRUTHFUL INDIVIDUAL

Attitude

- Composed
- Concerned
- Cooperative
- Direct and
- Spontaneous
- Sincere
- Open

Non-Verbal

- Smooth Posture changes
- Open Gestures, good eye-to-eye
- Maintains frontal alignment
- Leans forward
- Open palms
- Upright, open, casual

Verbal

- Reasonable answers
- Smooth tone of voice and speech
- Complete and clear answers
- Uses realistic words
- Volunteers information
- No long delays
- Direct, credible responses

Reid Technique (cont'd)

DECEPTIVE INDIVIDUAL

Attitude

- Overly anxious
- Defensive
- Unconcerned
- Evasive

Non-Verbal

- Erratic & rapid
SPC on key questions
- Frequent gestures
- Barriered posture
- Rigid & Immobile
- Slouched, overly
casual
- Lacks frontal
alignment

Verbal

- Answers too early
- Irrational answers
- Mental blocks
- Challenges
- Unjust anger
- Avoids realistic
words
- Specific denials
“I don’t know”
“I can’t recall”

Reid Technique (cont'd)

DECEPTIVE INDIVIDUAL (cont'd)

Attitude

- Overly Polite
- Guarded

Non-Verbal

- Insincere tone of voice
- Hand over mouth
or eyes

Verbal

- One word answers
- Qualifies answers
- Refers to God or
religion

Written Report of Internal Investigation

- Already received question
- Points to Consider
 1. Check jurisdictional requirements especially if state actor
 2. Your preference but have explanation ready
 3. Joe Friday Report
 - a) No opinion
 - b) Separate opinion letter if requested



Search Warrant and Raid Protocol

- Contact counsel as soon as you know or think a search will occur.
- Before agents arrive at company site, they may have visited employees at home.
- Agents like to question employees in surprise early morning visits at home before they go to the work site.



Search Warrant and Raid Protocol

- Have a point person, a senior manager for example, designated to be the point person until counsel can arrive.
- Questions from agents should be directed to the point person.



Search Warrant and Raid Protocol

- Ask that the search/raid stop until counsel can get on site (Agents will probably ignore this request).
- Ask if you can accompany them on their search. If so, document extensively:
 - Where searched
 - Files or data retrieved
 - Persons interviewed and questions asked
 - Names of agent
 - Discussions amongst agents
- Label top of page Attorney-Client Privilege and Attorney Work Product

Search Warrant and Raid Protocol

- Agents should give you a search warrant or other paper authorizing their entry, prior to their entry.
- Request time to review its content before Agents enter.



Search Warrant and Raid Protocol

- Check the scope of the search warrant or other document authorizing the raid or search and get a copy and try to insure the agents stay within the scope.
 - What locations are covered by the warrant?
 - What documents, files, objects are they permitted to get to under the terms of the warrant?
 - Do not agree to expand the scope of the search beyond the warrant's terms.
 - Refer to counsel any disagreements on scope.

Search Warrant and Raid Protocol

- DO NOT OBSTRUCT ACCESS TO DOCUMENTS AND ELECTRONICALLY STORED DATA
- DO NOT INTERFERE WITH AGENTS



Search Warrant and Raid Protocol

- Try to identify who the agents/officials are by name and title and who is in charge.
- Agents will usually give you their business card.



Search Warrant and Raid Protocol

- Instruct – preferably in advance – employees that they can direct agents or officials to where documents covered are located but they are not required to answer questions of substance.
 - They should be instructed that they are not required to answer substantive questions and that they have the right to consult with counsel before they respond.
 - It is important that employees understand that they are not being instructed to refuse to talk with government officials.
 - The choice is the employee's, but whenever they do choose to talk they must be TRUTHFUL.

Search Warrant and Raid Protocol

- Nonessential employees can be sent home.
 - Confirm with investigating agency



Search Warrant and Raid Protocol

- Ask the agent for an inventory of what was taken and record of where documents and electronically stored material were seized.



Search Warrant and Raid Protocol

- Even though a general inventory is usually left behind, you will want to know more thoroughly and even document where Agents searched.
- Note that often a subpoena duces tecum is also served to cover any documents missed by the agents or officials.

In the _____ Court of the City/County of _____
State of _____

SUBPOENA DUCES TECUM

To: Interested Parties of Victim Impact Panels

YOU ARE HEREBY COMMANDED to appear at an organizational meeting of a Victim Impact Panel
This Panel on the ____ day of _____, 20____ at the hour of _____ at _____
(ROOM) (BUILDING) (ADDRESS) (CITY, STATE)

You are to remain until discharged, or to give testimony regarding the above-entitled matter, on
behalf of yourself and the general public interest, and to bring with you the following:

Attentive Ears Bright Ideas Thoughtful Insights
 General comments about the proposed Victim Impact Panel program

Failure to appear on the date of this notice will result in a bench warrant for your arrest.
He/she, fail to appear at your peril!

Signature

Search Warrant and Raid Protocol

- Since some files contain attorney-client privileged materials or work product, designate these files to the agents or officials – and preferably have them appropriately labeled in advance.
- If there is an attempt to seize them, even under the offer of a taint team review, have counsel negotiate the procedure for dealing with those files.

Search Warrant and Raid Protocol

- Since computer files will be seized as well, designate which of these, as well as hard copy documents, are critical to daily ongoing operations.
- Counsel can negotiate a procedure for copying them or establishing a return date.

Search Warrant and Raid Protocol

- Since there may be general questions from agents and even press coverage, designate a single company official to be the spokesperson, but have legal issues handled by counsel.
- If there is press coverage, “We are cooperating to the fullest” is the catch phrase.
- “No comment” is not a good idea.

Q&A

