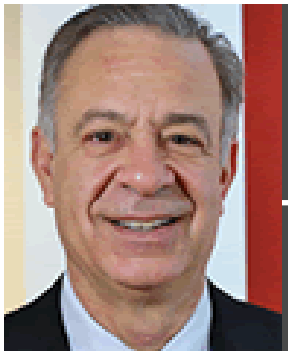


PANEL DISCUSSION: THE INTRIGUE OF INTERNAL INVESTIGATIONS

Joe Ortego
Nixon Peabody (New York, NY)
212.940.3045 | jortego@nixonpeabody.com

Internal Investigations: Practical Considerations for Avoiding Pitfalls
W. Scott O'Connell[1]

Internal investigations are a necessary tool for entities to get to the root cause of institutional problems that may cause liability and reputational harm. These internal reviews, when handled correctly, can be valuable tools to identify and account for misconduct, to restore brand confidence, to help victims heal, to educate regulators on corrective action and to set the institution on a new path. When handled poorly, the investigation can cause more problems than it resolves.

Every investigation has its own context, parallel processes and impacted constituencies. Those circumstances must inform and control the internal review process. There are, however, overarching considerations that can help shape the contours of an investigation and set it on a path for success. Detailed below are practical considerations designed to identify common "traps for the unwary" that can impair or derail the investigation. Careful and thoughtful preparation, together with consistent practices by all team members, can avoid failure. Attention to these issues can be the difference-maker for a successful process.

Threshold Issues

Before undertaking the investigation, it is essential that the following questions be clearly established. Navigating through the many challenges, competing considerations and interested constituencies that often surround investigations is greatly simplified when the following ground rules guide decision making.

Who is your client?

This is a simple question that can get murky during the investigation. Public companies, private business entities, colleges and universities, churches, and other nonprofit organizations, such as health systems or charitable organizations, are run by individuals. Officers, directors, trustees and special committees all perform important roles with associated duties in the governance and/or operation of the entity. Any of these constituencies in their respective roles may feel compelled to initiate an internal investigation in furtherance of some important institutional purpose. Any of these constituencies may make contact with outside counsel to get the process started. When such contact is made, the first questions must be: "Who is the client?" "From whom do I take direction?" and "To whom do I direct the report of investigation?"

Too often in the private practice of law, it is expedient to conflate the interests, desires and goals as expressed by a senior executive who is directing a project as being co-extensive with the interests of the institution. This is not a surprising circumstance, because all entities operate through the actions of their leaders. Internal investigations bring into sharp focus the potential problems with such conflation. Because the investigation

1 W. Scott O'Connell is the Chair of Nixon Peabody's Litigation Department and a member of the firm's Management Committee. He is a trial attorney who has appeared as lead counsel in 20 states. He focuses on class action and aggregate litigation, corporate control contests and unfair and deceptive trade practices claims. He is currently representing financial services, health care, manufacturing and energy companies in high exposure disputes with associated significant reputational harm in parallel civil, criminal and regulatory proceedings. Scott regularly performs internal investigations for clients. He is a former chair of The Network of Trial Law Firms. He earned his J.D. from the Cornell Law School, where he was an editor of the Cornell Law Review and the Chancellor of the Moot Court Board. He received his B.A. from St. Lawrence University. The author gratefully acknowledges the research assistance of Annica Bianco, Esq.

is focused on activities of personnel that may have diverged from the interests of the entity, it is essential that the client be identified and its interests segregated, maintained and pursued. Indeed, actions of individuals instrumental in commissioning the investigation may be part of the inquiry. The potential conflicts resulting from this dynamic are manifest and must be managed to ensure the integrity of the review.

For these reasons, the first action is to identify the client and the person or persons who are permitted to speak for the client with regard to the investigation. Often, because the internal inquiry may directly or implicitly criticize the actions of current management, good practice compels that the oversight of the investigation be vested with an outside director/trustee or a special committee of the Board of Directors/Trustees. This practice helps ensure that the inquiry is not tainted by apparent or actual influence by those who are being investigated. Once defined, these details should be documented in an engagement letter specific to the inquiry.

What is your mandate and scope?

The mandate and scope of an investigation must be defined. Misalignment between the client's expectation and the work contemplated by the investigative team can lead to material problems. Some investigations can be discrete undertakings, yet, as a result of mismanaged expectations, balloon beyond reasonable scale and cost. Other investigations, such as those involving allegations of sexual abuse, may require special considerations for privacy and victim protection. Considerable additional damage can be caused when an investigation fails to properly balance important considerations such as protecting victims while still attempting to get to the truth. The client must set the tone and the rules for what prevails when the search for the truth threatens other constituencies or threatens to cause harm to important cultural values. To paraphrase Hippocrates, on the way to doing something good, do no harm.

With the goal of doing no harm, it is helpful when the client articulates at the beginning of the engagement—as best as it can subject to learning more information as the investigation unfolds—what it wants investigated and what special considerations should prevail. This should include important information such as subject matter, time period, functional area, types of conduct, relevant individuals, documents, data and other evidence. Also, the client may wish to detail things that should be excluded from investigation. With this information, the investigative team should build a work plan and budget to address the mandate and scope identified. This exercise should quickly reveal any disconnects between the client and the investigative team concerning the invasiveness, disruption, cost and other collateral consequences resulting from the investigation. Further, the client should provide instructions on any special circumstance—such as the handling of victims—and how the investigation should yield to these important special circumstances. If the scope needs to be adjusted as the investigation proceeds, communicate that to the client and modify the work plan accordingly. In short—get aligned and stay aligned.

Who are the intended recipients of the report of investigation?

Is the report of investigation an internal confidential document not intended for disclosure and subject to privilege protections? Is the report intended for use with regulators, courts, customers or the public? Is there a possibility of a criminal proceeding, and the attendant prospect of a waiver of the attorney-client and work product privileges as a condition of a negotiated resolution?[2] All of these are relevant considerations for the logistics of the investigation.

As a practical matter, all investigations start as a privileged undertaking. Care must be taken to mark the report and all drafts with appropriate legends (i.e., "Confidential," "Attorney Client Privilege," "Attorney Work Product Prepared in Anticipation of Litigation"). If some form of disclosure is contemplated, or reasonably anticipated, it is essential that the investigative team not include in the report any confidential or privileged information that must be protected, as there would likely be a reasonable argument for waiver in that circumstance.

Often the client simply does not know as the investigation is unfolding how the report will be used. In such circumstances, it is a best practice to treat it and all drafts as confidential as well as to maintain all of the formalities of the applicable privileges. It is the client's privilege to waive. In certain circumstances, the client may determine that it needs to disclose the report or use it with regulators, courts or others. In such situations, it is critical for counsel to determine the scope of the waiver under applicable law. Because the client's decision needs to be informed by the scope of the waiver, this determination ideally should be made early, before the report is drafted, to guide discussions about disclosure. For example, a "subject matter" waiver may expose the client to the disclosure of other privileged information beyond the report of investigation. Similarly, if less than a "subject matter" waiver is permissible in the relevant jurisdiction, a clear writing from the client concerning the scope of

2 See infra at ___, "Individual Accountability for Corporate Wrongdoing," Sally Quillian Yates, Deputy Attorney General (Sept. 9, 2015) for further discussion of this issue.

the waiver should accompany the disclosure. Finally, if the risk of subject matter waiver is significant, the client may consider appropriate redactions to preserve claims of privilege. Of note, and as discussed more fully below, clients and counsel dealing with the government should not assume that selective waiver will be upheld.

If the report is intended for a third party and not the client, is the investigation team independent?

Not all internal investigations are the same. Some are prepared with the intent for use with third parties, such as regulators or courts, that will scrutinize whether the investigation was performed with sufficient safeguards of independence to bolster its credibility and reliability. Where the review and acceptance by a third party is essential, the efficacy of the investigation is only as good as its independence. Even a brilliantly executed investigation may be worthless in the eyes of these third parties if serious questions arise about the team's independence. A critical threshold issue—and one that often needs to be reexamined during the life of the project—is whether the investigation team is sufficiently independent of the client and the issues being investigated.

The contemplated benefit of the investigation for use with third parties is to get an unvarnished report of what actually occurred, the actual or potential consequences, and the suggested remedial or mitigating actions. Investigators acting out of a real or perceived conflict may diminish or erode the impact of the report. Recipients of the report who believe that its conclusions and recommendations were improperly influenced by those who might be impacted by the report may dismiss it out of hand. This is particularly problematic if the intended recipients of the report are regulators, courts or other constituencies who may question the integrity of the report.

An ongoing business relationship with the client, work performed or advice given concerning the subject being investigated, or a previously existing reporting relationship to someone at the client who is being investigated, are common examples of circumstances that can undermine a claim of independence. In such a situation, the perception of a conflict may be as damaging as an actual conflict. When such circumstances exist, or arise during the project, the investigation team must examine whether it can perform the independent investigation.

Who has the ability to edit the report before it is finalized?

Determining who will have the right to review and propose edits before the report of investigation is finalized is another important matter to consider. This is very closely related to the questions regarding defining who the client is and how the independence of the investigation can be assured. While there can be material benefits to having various constituencies, such as directors, trustees, and officers reviewing the report for accuracy, completeness and consistency with corporate values and norms, such further review may compromise the independence of the report and, therefore, its efficacy with the target audience. Depending on the scope of the investigation and the circumstances under which it arose, it may be necessary, and prudent, to restrict review and editing of the final report to a small group of decision-makers for the client. For example, if an entity is performing a new investigation because a prior one was viewed as being manipulated by the board of directors or management, to avoid the same pitfalls the new investigators should run a process that insulates the report from such repeated criticism.

Best practices require that review of the report by those whose conduct is implicated, including the direct actors as well as officers, directors, trustees, consultants, or lawyers who may have been on watch at the time of the offending conduct, should not be part of the review and finalization process except to confirm facts. Similarly, best practices suggest that those who have a direct or material stake in the report because they were victims or whistleblowers should also be managed carefully through the review and finalization process. The investigation team may believe it is necessary or advisable to have victims or whistleblowers review portions of the final report to ensure accuracy or that privacy has been protected, but input from those parties into the conclusions or recommendations can be problematic and impugn the independence of the report. Tread carefully into these turbulent areas with clear boundaries as to what is permissible and what is not.

Will the investigation require special procedures for dealing with "victims"?

Investigations often require interviewing victims of improper conduct or whistleblowers who purport to be witnesses to unlawful or improper conduct. Both categories present unique issues for the client's consideration.

With regard to victims of improper conduct—such as sexual assault—the client may want the investigation team to take special precautions during the interview process and in the final report and work papers. For example, private schools that have reported the results of investigations about past sexual assaults by faculty and administration have been accused after the fact of being insensitive to the privacy concerns of victims

and to the additional harm to the victims caused by the report of investigation. To avoid such criticisms, the use of pseudonyms to anonymize victims is a well-developed convention to protect privacy yet also report the information learned during the investigation. Unfortunately, it is not always possible to fully protect a victim by simply using a pseudonym. Other facts revealed may allow certain readers to deduce the identity of the victim(s). In such circumstances, the rehabilitation and goodwill expected from the investigative report can be diminished or overshadowed by the re-victimization of those originally harmed. Forethought, planning and clear direction from the client should help avoid such a circumstance.

Will the investigation involve interviewing and/or investigating "whistleblowers"?

Similarly, whistleblowers—individuals who disclose suspicions of unlawful, unethical or prohibited corporate conduct—present special circumstances in an internal investigation. Special handling is essential in light of the protections that a whistleblower may have. A patchwork of federal[3] and state[4] laws provide protections to bonafide whistleblowers. While there are clear differences between and among these statutes, one common principle is there can be no retaliation against whistleblowers for disclosing offending conduct. Investigators must be knowledgeable about these protections and conduct the investigation in ways that do not erode or impair these protections.

It is common during an investigation to learn that there are independent bases to take a job action against the whistleblower, unrelated to his/her disclosures. In some circumstances, the whistleblower's disclosures are nothing more than a cynical attempt to thwart an impending job action. In other circumstances, the whistleblower participated or contributed to the offending activity being investigated. Because of these complicating dynamics, the whistleblower often will have retained counsel who wants to participate in any interview with her/his whistleblower-client.[5] The protections afforded whistleblowers make

3 Federal statutes with whistleblower provisions include: Affordable Care Act (ACA), Section 1558 29 U.S.C. 218C; Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651; Clean Air Act (CAA), 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.A. § 5567; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087; Energy Reorganization Act (ERA), 42 U.S.C. § 5851; FDA Food Safety Modernization Act (FSMA), § 402, 21 U.S.C. 399d; Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109; Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367; International Safe Container Act (ISCA), 46 U.S.C. § 80507; Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171; National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142; Occupational Safety and Health Act (OSH Act), Section 11(c), 29 U.S.C. § 660; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i); Sarbanes-Oxley Act (SOX), 18 U.S.C.A. § 1514A; Seaman's Protection Act (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281, 46 U.S.C. § 2114; Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105; Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121.

4 See generally, Richard A. Leiter and William S. Hein & Co., Inc., 50 STATE STATUTORY SURVEYS: EMPLOYMENT: EMPLOYEE PROTECTION, "Whistleblower Statutes," which contains the following compendium of state statutes: ALABAMA, ALA.CODE § 25-5-11.1 (1975), ALA.CODE § 25-8-57 (1975), ALA.CODE § 36-26A-1 (1975); ALASKA, ALASKA STAT. ANN. § 39.90.100 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.088 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.089 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.095 (West, Westlaw through 2017 Legis. Sess.); ARIZONA, ARIZ. REV. STAT. ANN. § 38-531 (2011), ARIZ. REV. STAT. ANN. § 23-425 (West, Westlaw through 2017 Legis. Sess.), ARIZ. REV. STAT. ANN. § 23-418 (West, Westlaw through 2017 Legis. Sess.); ARKANSAS, ARK. CODE ANN. § 16-123-107 (West, Westlaw through 2017 Legis. Sess.), ARK. CODE ANN. § 16-123-108 (West, Westlaw through 2017 Legis. Sess.); CALIFORNIA, CAL. LAB. CODE § 1102.5 (West 2016); COLORADO, COLO. REV. STAT. ANN. § 24-50.5-101 (West 2016), COLO. REV. STAT. ANN. § 24-114-101 (West, Westlaw through 2017 Legis. Sess.); CONNECTICUT, CONN. GEN. STAT. ANN. § 4-61dd (West 2015), CONN. GEN. STAT. ANN. § 31-51m (West 2014); DELAWARE, DEL. CODE ANN. tit. 29, § 5115 (West, Westlaw through 2017 Legis. Sess.), DEL. CODE ANN. tit. 19, § 1701 (West, Westlaw through 2017 Legis. Sess.); DISTRICT OF COLUMBIA, D.C. CODE § 1-615.51 (West, Westlaw through 2017 Legis. Sess.); FLORIDA, FLA. STAT. ANN § 112.3187 (West 2002); GEORGIA, GA. CODE ANN. § 45-1-4 (West 2012); HAWAII, HAW. REV. STAT. § 378-61 (West, Westlaw through 2017 Act 34); IDAHO, IDAHO CODE ANN § 6-2101(West, Westlaw through 64th Reg. Sess.); ILLINOIS, 740 ILL. COMP. STAT. 174/10 (2004), 20 ILL. COMP. STAT. 415/19c.1 (West, Westlaw through 2017 Reg. Sess.); INDIANA, IND. CODE ANN. 4-15-10-4 (West 2012), IND. CODE ANN. 36-1-8-8 (West, Westlaw through 2017 Reg. Sess.), IND. CODE ANN. 22-5-3-3 (West 2016); IOWA, IOWA CODE ANN. § 70A.28 (West 2013), IOWA CODE ANN. § 70A.29 (West, Westlaw through 2017 Reg. Sess.); KANSAS, KAN. STAT. ANN. § 75-2973 (West, Westlaw through 2017 Reg. Sess.); KENTUCKY, KY. REV. STAT. ANN. § 61.101 (West, Westlaw through 2017 Reg. Sess.) KY. REV. STAT. ANN. § 338.121 (West 2010), KY. REV. STAT. ANN. § 338.991 (West 2010); LOUISIANA, LA. REV. STAT. ANN. § 30:2027 (West, Westlaw through 2017 First Extra. Sess.), LA. REV. STAT. ANN. § 42:1169 (2014); MAINE, ME. REV. Stat. Ann. tit. 26 § 831 (West, Westlaw through 2017 Reg. Sess.); MARYLAND, MD. CODE. ANN., STATE PERS. & PENS. § 5-301(West, Westlaw through 2017 Reg. Sess.), MD. CODE. ANN., STATE FIN. & PROC. § 11-301 (West, Westlaw through 2017 Reg. Sess.); MASSACHUSETTS, MASS. GEN. LAWS ANN. ch. 149 §185 (West, Westlaw through 2017 Ann. Sess.); MICHIGAN, MICH. COMP. LAWS. ANN. §15.361 (West, Westlaw through 2017 Reg. Sess.); MINNESOTA, MINN. STAT. ANN. § 181.931 (West 2013); MISSISSIPPI, MISS. CODE ANN. § 25-9-171 (West, Westlaw through 2017 Reg. Sess.); MISSOURI, MO. ANN. STAT. §105.055 (West 2010), MO. ANN. STAT. § 287.780 (West 2010); MONTANA, MONT. CODE ANN. § 39-2-901(West, Westlaw through Sept. 2016 amendments); NEBRASKA, NEB. REV. STAT. ANN. § 81-2701 (West, Westlaw through 2017 Reg. Sess.), NEB. REV. STAT. ANN. § 48-1114 (West, Westlaw through 2017 Reg. Sess.); NEVADA, NEV. REV. STAT. ANN. § 281.611(West, Westlaw through 2017 Reg. Sess.), NEV. REV. STAT. ANN. § 618.445 (West, 2013); NEW HAMPSHIRE, N.H. REV. STAT. ANN. § 98-E:1 (2008), N.H. REV. STAT. ANN. § 275-E:1 (2012); NEW JERSEY, N.J. STAT. ANN. § 34:19-1 (West, Westlaw through 2017 Legis. Sess.); NEW MEXICO, N.M. STAT. ANN. § 50-9-25 (West, Westlaw through 2017 Legis. Sess.); NEW YORK, N.Y. LAB. LAW § 740 (McKinney 2006), N.Y. CIV. SERV. § 75-b (McKinney 2015); NORTH CAROLINA, N.C. GEN. STAT. ANN. § 126-84 (West, Westlaw through 2017 Reg. Sess.), N.C. GEN. STAT. ANN. § 95-240 (West, Westlaw through 2017 Reg. Sess.); NORTH DAKOTA, N.D. CENT. CODE ANN. § 34-11.1-04 (West, Westlaw through 2017 Reg. Sess.), N.D. CENT. CODE ANN. § 34-11.1-07 (West, Westlaw through 2017 Reg. Sess.), N.D. CENT. CODE ANN. § 34-11.1-08 (West, Westlaw through 2017 Reg. Sess.); OHIO, OHIO. REV. CODE ANN. § 4113.52 (West, Westlaw through 2017 Reg. Sess.), OHIO. REV. CODE ANN. § 124.341 (West 2013); OKLAHOMA, OKLA. STAT. ANN. tit. 74§ 840-2.5 (West, Westlaw through 2017 Reg. Sess.), OKLA. STAT. ANN. tit. 40 § 417 (West, Westlaw through 2017 Reg. Sess.); OREGON, OR. REV. STAT. ANN. § 659A.200 (West, Westlaw through 2017 Reg. Sess.), OR. REV. STAT. ANN. § 654.062 (West, Westlaw through 2017 Reg. Sess.), OR. REV. STAT. ANN. § 659A.199 (West, Westlaw through 2017 Reg. Sess.); PENNSYLVANIA, 43 PA. CONS. STAT. § 1421 (West, Westlaw through 2017 Reg. Sess.); RHODE ISLAND, R.I. GEN. LAWS ANN. § 28-50-1 (West, Westlaw through 2017 Reg. Sess.); SOUTH CAROLINA, S.C. CODE ANN. § 8-27-10 (2015), S.C. CODE ANN. § 41-15-510 (West, Westlaw through 2017 Act No. 36), S.C. CODE ANN. § 41-15-520 (2012); SOUTH DAKOTA, S.D. CODIFIED LAWS § 20-13-26 (West, Westlaw through 2017 Reg. Sess.), S.D. CODIFIED LAWS § 60-11-17.1 (West, Westlaw through 2017 Reg. Sess.), S.D. CODIFIED LAWS § 60-12-21(West, Westlaw through 2017 Reg. Sess.); TENNESSEE, TENN. CODE ANN. § 50-1-304 (West 2014), TENN. CODE ANN. § 50-3-106 (West 2008), TENN. CODE ANN. § 50-3-409 (West 2008), TENN. CODE ANN. § 8-50-116 (West, Westlaw through 2017 Reg. Sess.); TEXAS, TEX. GOV'T CODE ANN. § 554.001 (West, Westlaw through 2017 Reg. Sess.), TEX. LAB. CODE ANN. § 21.055 (West, Westlaw through 2017 Reg. Sess.); UTAH, UTAH CODE ANN. § 67-21-1 (West, Westlaw through 2017 Gen. Sess.); VERMONT, VT. STAT. ANN. tit. 21§ 231 (West, Westlaw through 2017-2018 VT. Gen. Assembly), VT. STAT. ANN. tit. 3§ 973 (West, Westlaw through 2017-2018 VT. Gen. Assembly); VIRGINIA, VA. CODE ANN. § 40.1-51.2:1 (West, Westlaw through 2017 Reg. Sess.), VA. CODE ANN. § 40.1-51.2:2 (West, Westlaw through 2017 Reg. Sess.); WASHINGTON, WASH. REV. CODE ANN. § 42.40.010 (West, Westlaw through 2017 Reg. Sess.), WASH. REV. CODE ANN. § 49.60.210 (West 2011); WEST VIRGINIA, W. VA. CODE ANN. § 6C-1-1 (West, Westlaw through 2017 Reg. Sess.), W. VA. CODE ANN. § 21-3A-13 (West, Westlaw through 2017 Reg. Sess.); WISCONSIN, WIS. STAT. ANN. § 230.80 (West 2015); WYOMING, WYO. STAT. ANN. § 27-11-109(e) (West, Westlaw through 2017 Gen. Sess.), WYO. STAT. ANN. § 9-11-103 (West, Westlaw through 2017 Gen. Sess.).

5 On the duty to cooperate, see Merkel v. Scovill, Inc., 787 F.2d 174, 179 (6th Cir.1986) (reversing a finding by the district court that the plaintiff's non-participation in the investigation was "protected activity," holding that "discrimination against an employee for lack of participation or nonparticipation in an investigation would not be a violation of the ADEA."); Thomas v. Norbar, Inc., 822 F.2d 1089 (holding that since there was no evidence that plaintiff's supervisors had pressured him to lie or give information regarding matters about which he had no knowledge, his refusal to participate in the investigation was not protected activity.); City of Hollywood v. Witt, 939 So. 2d 315, 317 (Fla. Dist. Ct. App. 2006) (holding that the verdict on the whistle-blower claim could not stand because "the existence of reasons for termination, apart from any alleged whistle-blowing, constitutes a defense that is expressly recognized by the whistle-blower act.") On no right to counsel, see In re Carroll, 339 N.J. Super. 429, 440, 772 A.2d 45, 52 (App. Div. 2001). (Holding that "the Sixth Amendment right to counsel does not extend to internal investigations); Williams v. Pima Cty.,791 P.2d 1053 (Ct. App. 1989).(Holding

it more challenging, but not impossible, to get to the truth of the allegations and for the investigators to make appropriate remedial action recommendations, including termination of the whistleblower, if the protections have not been appropriately implicated.[6] All of these issues require careful management and particular attention to the governing law.

While the whistleblower has certain rights, the investigation team has a mandate that must be fulfilled. When confronted with these dynamics, it is important to understand the governing law and whether the whistleblower protections have been validly implicated, to disaggregate and isolate the issues investigated into those that may receive protection and those that do not, and to make specific recommendations to the client regarding these different buckets of protected and unprotected conduct.

Establishing the privilege: Upjohn warnings

The ability of an entity to conduct and preserve as privileged an internal investigation rests on certain requirements recognized by the United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981)[7]. The Court recognized that an organization's attorney client privilege where: (a) the communication was made by an entity's employee, (b) to counsel for the entity acting as such, (c) at the direction of corporate superiors, (d) in order to secure legal advice from counsel, (e) concerning matters within the score of the employee's duties and (f) the employee was aware that the purpose of the questioning was so that the entity could obtain legal advice. Id. at 390-91.[8]

From these principles have sprung standard warnings for witness interviews, called Upjohn warnings or sometimes "corporate Miranda warnings," designed to ensure that the elements of the attorney-client privilege are established for the benefit of the corporation, not the individual witness. The essential information that the entity's counsel must convey includes instructing the witness that: (1) the attorney represents the entity alone and not the individual (unless a joint representation is expressly contemplated, in which case such representation should be carefully delineated); (2) the attorney is investigating facts for the purpose of providing legal advice to the entity; (3) the communication is protected by the attorney-client privilege, and that the privilege belongs to the entity alone, and not to the witness (unless a joint representation is expressly contemplated, which, again, should be carefully considered and delineated); (4) the entity may choose to waive the privilege and disclose the substance of the communication to third parties, including the government; and (5) the communication is confidential and must be kept that way by the witness and not disclosed to third parties except counsel.[9] Care should be taken to make sure that the investigation and the associated privilege belongs to the entity.[10]

Regarding confidentiality, which is distinct from privilege, counsel should be aware of limitations applicable to witness interactions. Counsel can ask a witness to keep an interview discussion confidential, and can explain the purpose and importance of doing so (including preservation of the privilege), but cannot instruct the witness that he or she is forbidden from discussing the matter, especially concerning any communications or potential communications with the government. Nor will written confidentiality agreements be enforceable if they unreasonably restrict the employee's ability to report information to the government.

that the right to counsel under the Sixth Amendment applied only to criminal proceedings, and did not confer right to counsel upon an officer being interrogated by sheriff's department during internal affairs investigation).

6 On whistleblower protections see Somers v. Digital Realty Trust Inc., 850 F.3d 1045, 1048 (9th Cir. 2017)(citing 15 U.S.C.A. § 78u-6). ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—(i) in providing information to the Commission in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."); Grisham v. United States, 103 F.3d 24, 26 (5th Cir. 1997). See 5 U.S.C. § 2302(b)(8). ("The Whistleblower Protection Act was enacted in 1989 to increase protections for whistleblowers by prohibiting adverse employment actions taken because a federal employee discloses information that the employee reasonably believes evidences a violation of any law or actions that pose a substantial and specific danger to public health or safety). On requirements for a whistleblower protection claim see Willis v. Dep't of Agric., 141 F.3d 1139, 1144 (Fed. Cir. 1998). (regardless of whether the adverse personnel action is taken in retaliation for a protected disclosure, or is a result of the disclosure, the whistleblower need only demonstrate that the protected disclosure was one of the factors that affected the personnel action); Hickson v. Vescom Corp., 2014 ME 27, ¶ 17, 87 A.3d 704; "To prevail on a [WPA] claim, an employee must show that (1) he engaged in activity protected by the WPA; (2) he experienced an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse employment action." See Also Galouch v. Dep't of Prof'l & Fin. Regulation, 2015 ME 44, ¶ 12, 114 A.3d 988, 992; See Also Miller v. City of Millville, 2014 WL 10122644 (N.J.Super.L.), 6.("In order to establish a prima facie case of retaliation under CEPA, the plaintiff must demonstrate the following elements: 1. he reasonably believed illegal conduct was occurring; 2. he disclosed or threatened to disclose the activity to a supervisor or public body; 3. retaliatory employment action was taken against him; and 4. a causal connection exists between the whistle-blowing and the adverse employment action."); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 444 (Minn. 1983)

7 In an earlier case, Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court recognized and defined the contours of the attorney work product doctrine, which protects against disclosure of work product prepared by or for counsel in anticipation of litigation.

8 Upjohn articulates that protections available under federal law. While many states have adopted the principles of Upjohn, others have not. The investigation team must consult the potentially applicable state law on this privilege issue and conduct the interviews accordingly.

9 Courts are split on the issue of whether the Upjohn privilege extends to former employees. A number of courts have held that Upjohn applies to communications with former employees so long as the communication relates to the former employee's conduct and knowledge gained during employment. See, e.g., Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005); Peralta v. Cendant Corp., 190 F.R.D. 38, 41-42 (D. Conn. 1999); see also In re Allen, 106 F.3d 582, 605-06 (4th Cir. 1997) (holding Upjohn applies with equal force to former employees). However, not all courts have agreed. See, e.g., Clark Equip. Co. v. Lift Parts Mfg. Co., No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457, 1985 WL 2917, at *5 (N.D. Ill. Oct. 1, 1985) (holding former employees are not the "client," and that "post-employment communications with former employees are not within the scope of the attorney-client privilege"), Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188 (Wash. 2016).

10 Individual claims of ownership of a corporate privilege are often analyzed under the so called Bevill factors which include: (1) the employee sought legal advice from the company's counsel; (2) in an individual rather than a representative capacity; (3) the attorney, aware of the potential conflict of interest gave the advice sought; (4) the conversation was confidential; and (5) the substance of the conversation did not involve corporate matters. In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 125 (3rd Cir. 1986). Tailoring Upjohn warnings to ensure that the witness cannot establish the Bevill factors may be appropriate in certain situations.

When an internal investigation can be undertaken for many different purposes, the availability of the privilege turns on the purpose. Many courts apply a "primary purpose test" to determine if the primary purpose of the investigation was to provide legal advice or to prepare for litigation. If so, the attorney client privilege and work product doctrine protect attorney notes, memoranda and other materials generated during the investigation.[11] If the primary purpose of the investigation was not to seek legal advice or prepare for potential litigation, however, the privilege and the work product doctrine may not apply.

Practitioners differ on whether Upjohn warnings should be provided orally or in writing and, if in writing, whether the witness should sign an acknowledgment. Some fear that overly formal warnings will chill candor from the witness. Others contend that oral warnings present proof problems if later challenged. This is a judgment call that must be made in each situation. At a minimum, counsel who elect to forgo the written acknowledgment should document in the memorandum and notes summarizing the interview that the witness received the warnings and confirmed his or her understanding. Privilege challenges from individuals who have close working associations with outside counsel are a common occurrence. In such situations, the individual often associates the outside counsel as representing her/his interests because in past circumstances there has been complete alignment between the individual and the entity. This can lead to confusion on the part of the individual that, if viewed by a court as reasonable, can put the privilege at risk. Where such a situation exists, thought should be given as to whether there is utility and net benefit for written warnings and a signed acknowledgement.

Where joint representation is contemplated, a conflict may arise between the entity and the individual regarding the waiver of the attorney-client privilege. This issue should be addressed in an engagement letter providing the entity with the sole authority to waive the privilege. If the individual is not comfortable with such a delegation, the ability to undertake a joint representation should be revisited.

Ethical requirements for dealing with witnesses

Two important ethical rules govern the investigator's conduct with regard to witnesses. Model Rule of Professional Conduct 1.13(f) details what a lawyer needs to do when dealing with an entity's directors, officers, employees, members, shareholders and other constituencies that have interests adverse to the client.[12] Specifically, in this situation, further care is required for counsel to identify that she/he represents the entity alone. This elevates one of the important aspects of Upjohn warnings to the level of an ethical violation if omitted.

Model Rule 4.3 details what an attorney must do when dealing on behalf of a client with a witness who is not represented.[13] These are particularly tricky situations because the witness often has legitimate questions about the purpose of the investigation and whether it creates jeopardy for the witness, which can risk confusion about the attorney's role vis à vis the individual. The investigating team needs to be careful not to provide legal advice to the witness. For example, if the witness asks if she/he needs representation, the investigator should not answer this question with anything other than "I cannot advise you on that question as I represent the entity and not you." It also may be appropriate to remind witnesses of their ability to consult with their own legal counsel. It is also important to communicate with the client, upfront and later as needed, regarding whether there are any witnesses for whom the client wants to provide individual counsel. Clients can pay for the costs of an employee's counsel if they so choose (or if a relevant policy, such as a director and officer liability policy, requires indemnification). Paying for counsel does not give the client any ability to direct the representation or the employee's decisions, however.

Protecting notes of witness interviews and related work product

The mental impressions, strategy and analysis of any attorney formulated during an interview of a witness are generally protected from disclosure. Facts learned from a witness, without more, are generally not protectable. As a consequence, when making notes of witness interviews, it is important that the investigator mark the work product as "Attorney Work Product". Additionally, noting that a summary or set of notes is prepared in anticipation of litigation, and for the purpose of providing legal advice to the client, is prudent. It is helpful to make sure that notes are not a running transcript of the witnesses' answers to questions, but are rather imbued with counsel's mental impressions. Work product with these features often receives protection from disclosure where mere transcripts of a witness' answers do not.

11 See In re Kellogg Brown & Root Inc., 756 F.3d 754 (D.C. Cir. 2014) and In re GM LLC Ignition Switch Litig., 80 F.Supp.3d 521 (S.D.N.Y. 2015).

12 Rule 1.13(f), Organization as Client, states:
In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

13 Rule 4.3, Dealing With Unrepresented Person, states:
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Recording interviews and creating transcripts

Recordings are seldom protected because, unlike notes, the questions and answers simply do not convey the mental impressions, strategy and analysis of counsel that would warrant opinion work product protection.[14] It is highly probable, therefore, that disclosure of recordings or transcripts may be compelled.[15] Whether such disclosure creates issues for the client is a fact-specific inquiry. Thought should be given to this issue upfront, and the implications of disclosure discussed, before recordings or transcripts of witness interviews are generated.

Other considerations may weigh against recording interviews. There is no uniform rule regarding whether counsel must inform the witness of the recording before it begins and obtain the witness's consent to record. Rather, the legality of one-party recording is an issue that must be examined on a state-by-state basis. In jurisdictions where consent must be obtained, counsel may determine that seeking consent would chill witness candor to the detriment of the interview(s), and may elect to proceed without recording.

Compelling witness participation

Employees of public or private entities are usually required to cooperate with internal investigations as a responsibility of employment. Review of the entity's policies and procedures regarding what employees are required to do, as terms of their employment, is a useful first step. Those unwilling to be interviewed may be subject to some form of progressive discipline or job action.[16] The specter of such actions is usually sufficient to secure participation.

Former employees present a different issue. Unless there are contractual requirements that survive the employee's separation from the entity, participation in an internal investigation by a departed employee is entirely voluntary. Participation can often be secured when the witness is informed that some manner of formal process may issue from the government or a potential party to litigation. Often the witness wants to know what those processes will entail and what she/he may be asked to do. When providing this information, it remains important that the entity's counsel not provide legal advice, as prohibited by the Model Rule of Professional Responsibility 4.3, and that counsel clearly define its role as counsel to the entity. Counsel also must assess whether Upjohn warnings apply. Additionally, it is prudent to recognize that former employees do not have the same job-related motivations as current employees, and may not heed counsel's request not to discuss the content of the interview.

Witness' access to counsel during the interview

Internal investigations involving private entities ordinarily do not implicate a witness' right to have counsel participate in the interview. Nevertheless, there may be special circumstances—including interviews of victims or whistleblowers—where the client may permit such participation. These are fact-specific determinations made to enhance the efficacy of the investigation. It may be that a witness simply will not cooperate at the level necessary without her/his counsel in the room. The net benefit of getting better cooperation and candor may outweigh the anticipated downsides of participation by the witness' counsel.

When permitting counsel to participate, it is often helpful to set ground rules. Among other things, counsel is there to observe and not participate in the questions and answers. It is not a deposition, there is no right to object and the counsel cannot behave is a way that disrupts the investigation. Further, the counsel needs to agree to maintain the process as confidential.

Work papers and drafts of the report of investigation

All work papers and drafts of the report should be labeled as "Confidential Attorney-Client Communications and Attorney Work Product," and also as drafts. The materials should be treated and maintained as confidential and should be shared only on a "need to know basis." Disclosure should be limited to members of the investigative team or certain select decision makers of the client. Counsel also should be mindful that disclosure of drafts to third parties may waive privilege protections. By maintaining strict formalities, the chances of sustaining the privileges and protections through challenges are increased. Conversely, lack of diligence on these issues puts the protections at risk of waiver, which, as discussed above, can vary in scope.

Circulation and control of the final report of investigation to maintain privilege

If the client wants to maintain privilege of the final report of investigation, strict precautions must be used to limit circulation. Counsel should consider issuing individually

14 In re Kellogg Brown & Root, Inc., 796 F.3d 137, 148-50 (D.C. Cir. 2015) (holding that fact work product is subject to disclosure on a showing of "substantial need" and "undue hardship" but opinion work product is subject to heightened protection); Fed. R. Civ. P. 23(b)(3(B) (if a court orders disclosure of work product, "it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of counsel, which constitutes opinion work product).

15 See e.g., United States v. Nobles, 422 U.S. 225 (1975) (affirming the trial court's finding that an investigator's report containing statements by a witness were not protected by, inter alia, the work product doctrine).

16 There often are differences in what actions private entities can take over employees versus public entities. These differences may drive the strategy and tactics employed to secure participation.

numbered reports to specifically identified decision makers at the client. Express written warnings should accompany the circulation of the report and should detail the consequences of circulating the report beyond the defined audience. Presenting the report through a secure read-only platform that limits the reader's ability to copy or forward the report may be useful to control circulation to only the intended audience.

Disclosure of report of investigation and implications on privilege

If the client wants to disclose the report to a third party, careful consideration of the scope of the waiver is important. To the extent permitted by law, the investigative team should help to narrow the breadth of the waiver as much as possible. Detailing what is intended to be waived versus what is not may prove helpful if a third-party later moves to compel more information on the basis of partial waiver.

A client considering disclosing some, but not all, of its investigation report should consider that not all jurisdictions recognize selective waiver. Moreover, disclosure of some or all of the report in one proceeding can have an unintended adverse effect in a future or parallel proceeding in which it may be sought, such as a shareholder derivative suit. Care and consideration must be given to the potential effects of even limited waiver of privileged material.

Waiver of privileges through use of information in proceedings

In addition to disclosure of the actual work product, the use of information obtained through an internal investigation in defense of regulatory or civil claims can result in waiver of associated privileges. Once the material is put at issue and used for offensive purposes, courts are reluctant to maintain privilege protections. The simple reality is that privilege cannot be used both as a sword for offensive purposes and a shield to protect against disclosure. Selective disclosure seldom stands when challenged. Accordingly, if the client needs to use the information obtained during the investigation to defend against regulatory or civil claims, it should do so knowing that the privileges associated with the gathering of this information will likely be waived. This could have a direct effect in future actions, such as shareholder derivative suits, and in parallel proceedings.

Voluntary waiver of privilege to earn cooperation credit

In recent years, the United States Department of Justice ("DOJ") has put increased focus on individual accountability for corporate wrongdoing. In September 2015, the DOJ issued the so-called "Yates Memorandum," which detailed new policies and practices for dealing with the prosecutions of corporations. The memorandum emphasizes that "fighting corporate fraud and other misconduct is a top priority" of the DOJ and details "six key steps to strengthen [DOJ's] pursuit of corporate wrongdoing." These steps include: (1) to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals, as well as the company, and evaluate whether to bring suit against an individual as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

In the wake of the Yates Memorandum, cooperation credit for timely, diligent, thorough, proactive and speedy internal investigations now turns on the complete disclosure of facts learned about individuals responsible for the misconduct. Unlike past policy, the Yates Memorandum calls for disclosure of "all relevant facts" relating to individual misconduct. No longer can a corporation lean on the diffuse nature of corporate responsibility. Further, settling the corporate wrongdoing will not occur unless there is a "clear plan" to resolve cases against individuals. Taken together, this has put tremendous pressure on entities to waive privileges associated with the internal investigation in order to do a fulsome disclosure about individual malfeasance necessary to earn cooperation credit as part of the case resolution.

As a practical matter, such a disclosure pits the interests of the corporation to reach a resolution against the individuals responsible for the misconduct. In essence, the corporation is incented to root out corporate wrongdoing at the individual level and help deliver the facts supporting the individual misconduct to the DOJ. Such a dynamic often creates material conflicts between the corporation and the individuals responsible for the misconduct.

The Yates Memorandum's "all-or-nothing" approach to cooperation credit, and its mandate that the DOJ resolve corporate matters only after articulating a plan to pursue individuals, arguably dissuades corporations from cooperating in investigations. Practically, prolonged investigative effort means that corporations face longer periods of bad press, and that press is less likely to be remediated by acknowledgement of the corporation's cooperation. This complicates internal investigations, with entities and individuals fearing liability potentially assuming recalcitrant or defensive postures earlier on.

Joint defense/common interest agreements and protecting privilege

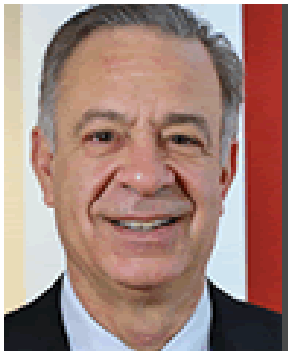
Practitioners have long used so-called joint defense or common interest agreements to share information gathered between and among counsel for the client and individuals involved in the investigation. This is a useful tool for protecting privilege when interests are aligned. When it becomes evident that interests are not aligned, the client must have a method for exiting the agreement and using its information in an unfettered way.[17]

The Yates Memorandum adds some complexion to this well-used practice. The mandated factual disclosures associated with earning cooperation credit may create tension or limitations on the nature and extend of an agreement that can be entered with counsel for individuals. Certainly, agreements with counsel for individuals responsible for the misconduct presents real issues and may impair the ability to secure cooperation credit. Care must be taken to ensure that benefits associated with such an agreement are not out-weighed by the impacts on cooperation benefits.

Conclusion

Internal investigations require careful planning, foresight and execution to avoid many and varied traps. Attention to the threshold issues, care in preserving the applicable privileges and thoughtful analysis as to when the client may need to waive these privileges to secure appropriate benefits in various proceedings are key drivers for success.

17 The nature and extent to which these joint defense/common interest agreements provide protection may be an issue of state law.



JOSEPH J. ORTEGO
Partner
NIXON PEABODY (New York, NY)

212.940.3045 | jortego@nixonpeabody.com

Joseph Ortego serves as the vice-chair of Nixon Peabody's litigation department, chair of NP Trial®, an international team of the firm's most successful and experienced trial lawyers, and chair of the firm's Aviation practice. Representing major private and public corporations and their executives, he has tried over 100 cases to verdict in both federal and state courts throughout the country and has successfully represented clients before arbitration tribunals around the world.

Joseph is also Nixon Peabody's chief diversity officer, overseeing the firm's strategy to attract, retain and promote talented people with exceptional ability from a broad range of backgrounds. He is also past Chairman of the ABOTA National Trial Academy.

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Recognition
- Joe was selected by his peers for inclusion in The Best Lawyers in America© 2019 in the field of Product Liability Litigation - Defendants. Joe has been listed in Best Lawyers since 2012.
- Joe is also recognized by The Legal 500 United States 2018 editorial in the areas of Dispute resolution - Product liability, mass tort and class action: Toxic tort - Defense, and Industry focus - Transport: aviation and air travel litigation; by Benchmark Litigation as a New York local litigation star; and by Martindale-Hubbell Peer Review Ratings in its highest category, AV Preeminent.\
- Additionally, Joe is recognized by New York Metro Super Lawyers, LMG Life Sciences as a "Life Sciences Star" and Who's Who Legal in Life Sciences. In the New York Metro Super Lawyers' 2015 and 2017 edition, Joe was amongst the top 100 lawyers.

Education
- Boston University School of Law, J.D.
- Syracuse University, B.A., with honors