



COUNSEL TO GREAT COMPANIES

Alaska Bar Association, Employment Law Section

Ethics Considerations in Internal Investigations

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The Initial Inquiry

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The purpose of the initial inquiry is to determine if there is sufficient information to warrant an investigation.

The Initial Inquiry

Caution: the dividing line is somewhat arbitrary

Inquiry

- Consult with general counsel
- Discrete review of applicable documents, law or policy
- Limited interviews



Investigation

- Substantive interview with subject
- Interview of witnesses where subject will learn of inquiry



The Investigation

Overview of Steps for Handling Complaint

- Take the complaint
- Develop interim measures
- Identify investigator or responsible department
- Conduct the investigation (interviews, document review)
- Write the report
- Make the decision
- Close-out the investigation
- Follow up on lingering issues (retaliation, other allegations)

Identify the Investigator & the Client

In-House Counsel Investigator

- Most familiar with corporate structure, organization, people
- Greater confidence with company lawyers
- More cost efficient

Outside Counsel Investigator

- Maintain attorney-client privilege
- Objective outsider
- But, carefully consider existing relationship with outside firm and whether the appearance of objectivity will be undermined.

ABA Model Rule 1.7, Conflict of Interest, Current Client

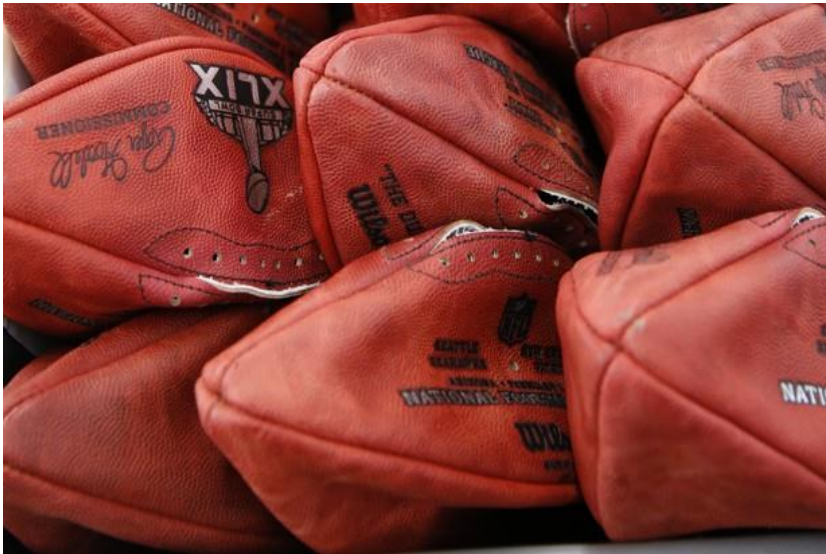
A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Cautionary Tale - Enron



Enron's longtime outside counsel, Vinson & Elkins, were asked to investigate allegations of wrongdoing. Enron was VE's marquee client, and VE was Enron's primary outside counsel. VE's independence and impartiality were seriously questioned in the ensuing litigation and agency investigations.

Cautionary Tale – “Deflategate”



The NFL hired lawyer Ted Wells to conduct an investigation of allegations that Patriots QB, Tom Brady, was involved in deflating footballs. In an order vacating Brady’s suspension, the Dist. Ct called to question the “independence” of the Wells investigation. The court also noted that the was edited by the NFL’s General Counsel, and that Wells’ firm, Paul Weiss, represented the NFL at arbitration before the League Commissioner.



The Investigation Plan

The Investigation Plan

- Define the scope
 - Contact list
 - Background information
 - Allegations list
- Outline of proof
 - List of witnesses and documents for each allegation
 - Interview sequence
 - Chronology of events/organizational chart
 - Logistics

The Investigation Scope

Vinson & Elkins were asked to investigate allegations of wrongdoing in re to the company's accounting principles, but were told to accept the conclusions of the accountants --- forensic accountants were not authorized. Enron limited the scope of VE's investigation and the firm agreed to the limited scope.



Conducting the Interview

Preparing for the Interview

- Create an outline
- Review documentation
- Where will the interview be conducted
- Layout of the room



Phases of the Interview

- Introduction
- Establishing rapport
- Questioning for information
- Summarization for accuracy
- Closing



Active Listening

General Questions:

- Can you tell me what happened?

Direct examination style questions:

- Who?
- What?
- Where?
- How?
- When?

Cross-examination style questions:

- Confronts and tests the witnesses' answers.

Upjohn Advisements

- We represent the company, and not any individual employees, and are seeking information in order to provide legal advice and representation to the company.
- This conversation is confidential and protected by the attorney-client privilege. However, that privilege belongs exclusively to the company.
- In order to protect this privilege and maintain the integrity of the investigation, we ask that you not share this conversation with other employees.
- If you wish to share information with the authorities, the company will not stop you, although we would hope that you would share any concerns you have with the company before doing so.

Upjohn Advisements

- No retaliation for speaking with us today.
- We have conducted extensive investigation/preparation prior to this interview and have spoken with many people. We will ask you a number of questions – many of which we believe we know the answer to. But we need to get information from you, and we can't substitute our own knowledge for yours.
- The fundamental expectation today is honesty, which is expected of you as a company employee.

Ensuring Accuracy in Interview

- Notes
- Written statement prepared by investigator that interviewee signs
- Sworn statement
- Recording





Drafting the Investigation Report



The Report

- Introduction
- Executive summary
- Investigative process
- Facts/Findings
- Analysis
- Conclusion

The Report

Introduction

- How was the investigation initiated?
- What are you investigating?
- Other issues or allegations?
- Mitigating or aggravating factors?

The Report



- Subjects of the investigation
- Summarize the allegations
- Summarize findings
- Summarize analysis
- Summarize conclusion

The Report – Investigative Process



- Who did you interview?
- When did you interview?
- How did you interview?
- Documents or evidence reviewed?

The Report – Findings



- Generally, present in chronological order.
- Should tell a story.
- Assume reader is neither an idiot nor a genius.
- Have you included all facts that will be addressed in analysis?

The Report – Analysis

I

Issue

R

Rule

A

Analysis

C

Conclusion

The Report – Conclusion



- Should have a conclusion for each allegation
- Clearly state if portions of allegation were substantiated, but others were not
- Recommendations for remedial or corrective action

