dentons.com

DENTONS

Insights and Commentary from Dentons

The combination of Dentons US and McKenna Long & Aldridge offers our clients access to 1,100 lawyers and professionals in 21 US locations. Clients inside the US benefit from unrivaled access to markets around the world, and international clients benefit from increased strength and reach across the US.

This document was authored by representatives of McKenna Long & Aldridge prior to our combination's launch and continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

Investigations Checklist: Best Practices for Organizing and Conducting Attorney-Client Privileged Internal Investigations

Kevin McCall
Northrop Grumman Corporation

Bryan D. Daly
Sheppard Mullin Richter & Hampton LLP

Susan Mitchell *and*
David J. Ginsberg
McKenna Long & Aldridge LLP

G

Investigation Checklist: Best Practices for Organizing and Conducting Attorney-Client Privileged Internal Investigations

By
Kevin McCall, Northrop Grumman Corporation
Bryan D. Daly, Sheppard Mullin Richter & Hampton LLP
Susan Mitchell and David J. Ginsberg, McKenna Long & Aldridge LLP

Internal investigations are an increasingly common task in corporate life, often with serious implications. Investigations can be triggered by a variety of sources: (1) an internal openline call or other employee allegation; (2) an internal audit finding; (3) a complaint from a company team member or vendor; (4) a conflict of interest or other procurement integrity inquiry; (5) an IG or grand jury subpoena; (6) a search warrant; or (7) litigation filed by the Government or a third party. Whatever the source, the choices made when organizing and conducting the investigation will affect the integrity and reliability of the investigation results, and may impact management's ability to take appropriate action.[1]

I SUMMARY OF THE PROVISIONS OF THE FAR MANDATORY DISCLOSURE RULE

Since December 2008, the FAR Mandatory Disclosure Rule requirements have been a particular focus of internal investigations. The FAR Mandatory Disclosure Rule, published in the Federal Register on November 12, 2008, was entitled the "Contractor Business Ethics Compliance Program and Disclosure Requirements."[2] This "Program" is set forth in four sections of the FAR,[3] and sets forth the following requirements and consequences:[4]

- All contractors, even commercial item contractors and small businesses, must have a written code of conduct, and promote ethical conduct.
- For contracts awarded after December 12, 2008, that have a value exceeding $5M and ha period of performance of 120 days or more, contractors must implement an "internal control system" that, *inter alia,* assigns compliance program responsibilities at a

---

1 This article is not intended as legal advice, nor is there a single "correct" way to conduct an internal investigation.

2 73 Fed. Reg. 67064 (Nov. 12, 2008).

3 FAR 3.1003 ("Requirements"); FAR 9.406-2 ("Causes for Debarment"); FAR 9.407-2 ("Causes for Suspension"); and FAR 52.203-13 ("Contractor Code of Business Ethics and Conduct").

4 There are many nuances to the Mandatory Disclosure Rule, none of which are discussed in this article. The Mandatory Disclosure Rule comprises FAR 3.1003; 9.406-2; 9-407-2; and 52.203-13. An excellent source of information regarding the Rule is the "Guide to the Mandatory Disclosure Rule: Issues, Guidelines and Best Practices," published by the ABA Section of Public Contract Law. The Guide can be ordered at www.ababooks.com. Once at the site, insert "539-0276" in the box for the keyword or product code.

sufficiently high level and with sufficient resources to "ensure effectiveness;" periodically reviews company business practices and procedures; and periodically evaluates the effectiveness of the system.

- All contractors must "timely" disclose, in writing, "credible evidence" of (1) any violation of the civil False Claims Act, 31 U.S.C. §§3729 – 3733, and (2) any violation of Title 18 of the United States Code involving fraud, conflict of interest, bribery or the gratuity laws, in connection with the award, performance or closeout of a Government contract.

- The Rule provides for suspension or debarment for a "knowing failure" by a "principal" of a Government contractor to timely disclose credible evidence of a covered violation or a "significant overpayment." This requirement applies "until three years after final payment." The suspension and debarment provisions apply to contractors regardless of the size of the contract, and effectively require contractors to report violations that occurred before the effective date of the Rule.

II INVESTIGATIONS OF ALLEGED VIOLATIONS OF COMPANY BUSINESS CONDUCT STANDARDS

- Allegations of violations of Company internal business conduct standards generally trigger investigations for one of three reasons:
    - The allegations potentially could result in conduct reportable under the Mandatory Disclosure Rule.
    - The allegations could disclose a potential litigation risk for the Company.
    - It is important to protect the integrity of the business conduct standards by policing behavior inconsistent with those standards.
- Allegations may be reported to a manager; an ethics department representative; the law department; or through an openline.

III DEVELOPING THE INITIAL PROTOCOL FOR THE INVESTIGATION

- Potential subjects of internal investigations by the Company range from anonymous and vague openline allegations to complex Government investigations of possible civil fraud, criminal conduct, or parallel proceedings. Tasks to consider when developing the investigation protocol include the following:
    - Determine whether the investigation should be conducted under the attorney-client privilege.
    - Identify a charge number for employees to use for potentially unallowable time spent assisting in investigation activity.

- Depending on the allegations, the investigation may need to be started immediately, or you may have time to gather and review pertinent documents before conducting interviews.

- Evaluate the personnel resources needed for the investigation team. Consider the following:

  - The nature and scope of the alleged misconduct.

  - The source and credibility of the allegations.

  - The seniority of the employees allegedly involved in the misconduct.

  - The necessity for specialized investigative skills or subject matter experts, *e.g.*, engineering, IT, CAS, forensic accounting, quality assurance, security, HR, environmental health and safety, internal audit, or criminal defense experience.

  - How big your team needs to be to conduct a timely and adequate investigation.

- Consider the interpersonal skills of the team members:

  - Training and experience in conducting investigations.

  - Analytical skills.

  - Objectivity.

  - Sensitivity and demeanor.

  - Familiarity with Company policies and procedures.

- The more baseline information you have to start with, the better focused the investigation will be.

  - For example, if there is an alleged non-compliance with a specification,

    - it may be important for the interviewer to know something about the program/contract(s) potentially affected;

    - review the specification;

    - know something about the process/test/performance involved;

    - understand what organization is responsible for compliance and who the central players are; and

- what work or personal relationships there might be between the complainant, the accused, and potential witnesses.

- Be careful not to let your initial analysis distract you from consideration of other potential issues that may arise as the investigation progresses.

- Consider the risks associated with involving management in decisions about the appropriate scope of the investigation.

- Identify the potential legal issues that appear to be involved. Does this allegation relate to the type of conduct that potentially could be subject to a disclosure under the FAR Mandatory Disclosure Rule, the Sarbanes-Oxley Act, the Anti-Kickback Act, or other statutes? The potential subject of a criminal action? Parallel proceedings?

- Consider whether immediate action needs to be taken with respect to the allegations. Issues that may need to be addressed quickly include alleged ongoing failures to test; ongoing mischarging; manufacturing deficiencies or misconduct that potentially could result in adverse product impact; harassment or workplace violence; or issues relating to an employee-whistleblower.

    - For example, if necessary to protect the integrity of the investigation, it may be appropriate to suspend the accused pending the conclusion of the investigation.

    - Be aware of Wage and Hour issues for unpaid suspensions.

IV DEVELOPING THE INVESTIGATION PLAN

- Although it sometimes is difficult at the outset of an investigation to determine its ultimate path, developing a plan at the outset is a useful management tool. Consider the following:

    - Identify the goals and objectives of the investigation and how most efficiently to achieve them.

    - Consider how to accomplish those goals and objectives on a timely basis, with appropriate confidentiality and fairness to all participants.

    - Consider how best to ensure that the investigation results are thorough, accurate, and appropriately documented.

    - Consider how will you ensure compliance with both law and Company policies and procedures.

V CAPTURING THE RELEVANT DOCUMENTS

- Two principal components of the fact-gathering process are document review and analysis, and witness interviews. To the extent possible, identify and review the key relevant documents before conducting witness interviews. If time permits, this will provide a more focused understanding of the issues and make the witness interview process more efficient.

    - As a first step in document-intensive investigations, consider meeting with in-house personnel to identify possible sources of documents needed for the investigation, both hard-copy and electronic. On a multi-person investigation team, identify a member of the investigation team to be responsible for document preservation and collection efforts.

    - Before responsive documents are requested, establish a procedure for identifying and tracking documents.

    - Consider whether you need an outside vendor for the document management system.

    - Consider whether relevant documents may be in the hands of third parties, such as outside counsel, accountants, team members or suppliers.

    - Relevant documents may include things like employee emails, notes, and hard-copy documents; computer information, such as log-ins, hard drives, or badge-swipe records; or videotape records of arrivals/departures.

- Consider whether you need to issue a Do Not Destroy Notice (DND). A company's obligation to preserve documents is triggered when the Company reasonably can anticipate litigation, or reasonably should know that the evidence may be relevant to future litigation. To prepare the DND, consider the following:

    - The DND is a very big net; preservation obligations extend to a far larger population of documents than might a subpoena duces tecum.

    - Identify the group of individuals who might have documents regarding the facts underlying the investigation. In a complex investigation, identifying persons who potentially have relevant documents is inherently an iterative process; however, you can start with a core group of personnel and continue issuing DNDs as other document custodians are identified.

    - Consider whether the Company's preservation obligations might require deactivation of the email auto-deletion function during the pendency of the investigation; and determine whether back-up tapes and other archived information should be preserved.

- The DND should contain a brief summary of the alleged conduct that underlies the investigation. The DND should include specific direction on the subjects and date ranges of documents to be preserved.

- The DND should provide instructions for preserving electronic and hard-copy documents. Make sure the DND includes a point of contact for help in managing electronic or physical preservation.

- The DND should identify the appropriate charge number for complying with the notice and any related requests from the law department.

- The DND should provide contact information for the law department so that questions may be addressed quickly and efficiently.

VI PRELIMINARY STATEMENT TO THE WITNESS

- The White Collar Crime Committee of the ABA's Criminal Justice Section has drafted "Recommended Best Practices" for interactions between corporate counsel and employees, including the admonition to employee-witnesses that should be made prior to any substantive inquiry.[5]

- An admonition is essential, whether you are inside counsel or outside counsel.

- At a minimum, your statement should include the following concepts:

  - Make it clear that counsel represents the Company and not the employee, even if the witness is a member of management.

  - Clearly describe the purpose of the investigation, *i.e.*, to obtain factual information in order to provide the Company with legal advice.

  - Explain what the attorney-client privilege and work product concepts mean, in layman's terms and in a summary fashion.

  - Inform the employee that under certain circumstances, federal rules impose an obligation on the Company to inform the Government if the Company has discovered credible evidence of intentional or reckless conduct.

  - The Company may choose to disclose to anyone (the New York Times, the Government) any information obtained from the investigation.

---

[5] See "Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees," ABA WCCC Working Group, July 17, 2009. This can be found at http://new.abanet.org/sections/criminal justice/CR301000/Public Documents/ABAUpjohnTaskForceReport.pdf. A sample admonition is provided at page 3 of the Report.

- Make sure you give the employee an opportunity to ask questions about the process.
- The admonition given to the employee should be clearly memorialized in your interview memorandum.

VII CONDUCTING THE INTERVIEW

- Prepare an outline of questions, to the extent possible, to determine:
  - The date, location, and if relevant, time of each incident.
  - Exactly who was present, what was said or done.
  - Subsequent actions.
  - Documentation in the witness's possession or in possession of others.
  - In general, it is best to move from general to specific questions.
- Conduct the interview in a setting conducive to free discussion and an open dialogue.
- During the interview, make use of open-ended questions so that you do not inadvertently influence the witness's responses. Leading questions can unduly narrow the scope of inquiry, and cause you to miss important issues.
  - Do not ignore new claims or complaints that arise during the course of the interview.
- Evaluate the credibility of the witness:
  - The witness's demeanor.
  - The character and quality of the witness's story.
  - The opportunity and ability of the witness to perceive, observe or recall the event.
  - The existence or non-existence of bias, interest or other motive.
  - Inconsistent statements.
- If you are interviewing the complainant:
  - If the employee is a union member, remember that union-represented employees have *Weingarten* rights.
  - Check for notification and other obligations to the union regarding the investigation.

- The employee has the right to request a union representative if the interview might result in discipline.

- Make sure you assure the complainant that his or her allegations are taken seriously.

- Explain the process, including advising the complainant that you will limit disclosure of information to people who have a legitimate reason to know.

- Remind the complainant that his or her continuing cooperation is necessary to reach a conclusion.

- Assure the complainant, if appropriate, that the Company does not permit retaliation; and request that you be informed immediately if the complainant believes any retaliation or mistreatment occurs during or after the investigation.

- It is essential to have another member of the investigative team – a well-trained paralegal or junior lawyer – present to take notes. It is a mistake to have a note taker unfamiliar with the investigation process.

- Counsel should mark the notes, "attorney-client privileged material/attorney work product." Note that the inclusion of attorney impressions and opinions in interview notes affords them a higher degree of protection from discovery. A non-privileged, factual "white paper" later may be drafted, based upon the notes, and provided to the Government as part of your investigation response.

- Consider whether, under the particular circumstances of the investigation, you want formal, privileged witness interview memoranda prepared. If so, be sure to mark the memoranda with the appropriate caveat, such as:

  > "This memorandum contains attorney mental impressions and opinions concerning the credibility of the persons who were interviewed, as well as our assessments of the reasonable inferences to be drawn from our observations."

- Control distribution of notes or interview memoranda; distribution should be limited to in-house counsel and management, as directed by in-house counsel, on a need-to-know basis.

VIII INFORMING THE EMPLOYEE ABOUT POTENTIAL GOVERNMENT INVESTIGATOR CONTACT

- There are some investigations in which the Government is investigating the alleged misconduct at the same time as the Company. Employees should be aware of the possibility that a Government representative may contact them at home or at work.

- Counsel should inform employees that the Government may conduct interviews in the context of the investigation. Employees should be informed that they should be truthful during the Government interviews.

- Counsel may also want to remind employees that:

    - Employees may chose to speak with Government investigators, although they are not required to do so. This may be a particularly significant decision for the employee during a potentially criminal investigation.

    - Employees should be cautioned that anything they say to a Government representative is not "off the record," informal, or "just between them."

    - If the employee decides to speak with the Government representative, the employee is entitled to ask that the Government interview him or her at another time or place, including at the workplace. The employee also may request that Company counsel attend the interview as a Company representative, but not as counsel for the employee.

IX MAINTAINING A CHRONOLOGY

- The investigative team should maintain an ongoing chronology of the facts and issues as they develop. The chronology should include a timeline of key dates and events and it should reference supporting evidence, such as documents and interviews. A well-constructed chronology will aid in the preparation of an effective investigation report.

- Keep in mind that the chronology is work product and should be distributed only to counsel and necessary members of the investigative team.

- All team members should be advised to keep work product confidential.

X PREPARING THE INVESTIGATION REPORT

- There are a number of issues to consider in deciding whether to prepare an investigation report, including whether the allegations involve civil, criminal, or parallel proceedings. The report may assist inside counsel in preparing a presentation for management. The report also may assist management in determining what corrective action or preventive measures may be appropriate.

- If a formal report is prepared, it should include:

    (1) A legend that the report constitutes an attorney-client communication and attorney work product, with a further caveat such as the one quoted above in Section VII.

    (2) An executive summary.

    (3) An explanation of the origin of the investigation.

(4) A fulsome summary of the relevant facts, and any relevant, unknown factual issues.

(5) Application of the law to the facts.

(6) An analysis of the Company's and the subject employee's potential liability and/or disclosure obligations.

(7) Identification of any corrective action or preventive measures that have been taken, or that management should consider taking.

XI REPORTING TO MANAGEMENT

- Determine who appropriately should be/must be briefed.
- Consider whether a presentation is necessary.
- At a minimum, you need to discuss the investigation issues and findings with management.
- If management determines that it needs to take corrective action, management needs to have a plan for implementation and follow-up to ensure that all appropriate actions have been effectively implemented.

XII DEALING WITH THE GOVERNMENT

- Where the Government investigation has already begun:
    - The Company's internal investigation should stay a step ahead of the Government's investigation.
    - Define the scope of cooperation with the Government.
        - Production of documents and electronic data.
        - Make employees available to the Government after Company counsel has completed the employees' interviews.
        - Preserve privileges and proprietary data.
    - Develop strategy for dealing with the Government.
        - Help expedite or slow down the pace of the Government's investigation.
        - Be proactive and "front" problems or wait to react to Government allegations.

- Transparency vs. defensive entrenchment (or a combination of both approaches).

- Consider separate counsel for employees.
  - Indemnification of defense costs: mandatory or discretionary.
  - Benefit: separate counsel can better protect rights of employees and provide individual legal advice.
  - Downside: company counsel loses unfettered access to represented employees and defense costs increase.
  - A joint defense agreement should help to preserve confidential and privileged communications with represented employees.
- Determine how to deal with third parties and former employees.
  - Reaching out to third parties and former employees can be a valuable source of information for Company counsel.
  - However, there is a danger that such contacts could give rise to claims of retaliation, witness tampering or obstruction of justice.

- Where there is no existing Government investigation:
  - Evaluate the facts and law to determine if a mandatory disclosure is required.
    - FAR Mandatory Disclosure Rule.
    - Other legal bases, such as the Sarbanes-Oxley Act or the Anti-Kickback Act.
    - Administrative Agreements.
  - Consider voluntary disclosure.
  - Coordinate any disclosure with all relevant players – DoJ, DoD, contracting officers and other customer representatives.