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Session 804

Corporate Investigations

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INTERNAL CORPORATE INVESTIGATIONS

I. The Scope Of An Investigation May Be Related To Its Genesis And Purpose

- A. Some investigations are reactive, responding to a government inquiry or private lawsuit.
- B. Others may be wholly or partially proactive, consisting of an investigation taken in addition to, or independently of, an enforcement action or private litigation.
- C. An investigation will generally have multiple purposes.
 - 1. To learn the facts for internal action, e.g., employee discipline or improved procedures.
 - 2. To learn the facts for purpose of advising the company.
 - 3. To learn the facts for purpose of representation in litigation or other proceedings.
 - a. Such representation may be defensive; or
 - b. It may be offensive, including litigation against former employees or business partners.

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4. The genesis and purpose of an investigation will obviously affect its scope and be relevant in determining who should conduct it, the scope of the attorney-client privilege, to whom it shall be reported, etc.

II. The First Big Question: Whether An Investigation?

A. A policy of "don't ask, don't tell" may be superficially attractive, but is often an ill advised policy.

B. There are strong reasons to expose wrongdoing.

1. It may be costing the company money.
2. The company may be civilly and criminally liable for employee conduct.
3. Prosecutorial charging guidelines may reward voluntary disclosure and cooperation.
4. As may sentencing guidelines.

III. The Next Big Question: Who Is To Investigate?

A. There are many reasons to select corporate counsel.

1. Investigation may involve legal analysis and advice.
2. Often counsel are the most skilled at factual investigation.
3. Direction of the investigation by counsel may result in protection of attorney-client and work product privileges.
4. But maintenance of the privilege is not automatic.

a. When is work directed by an attorney undertaken in anticipation of litigation?

b. When is an attorney providing business as opposed to legal advice?

5. Inside v. outside counsel

a. Inside counsel may have certain advantages

- i. Cost
- ii. Familiarity with company and personalities
- iii. Confidence of management.

b. Outside counsel may have other advantages

- i. May be perceived to have greater independence.
- ii. May avoid the perception of individual employees that counsel represents them, as distinct from, or in addition to, the company

6. Special considerations in government investigations.

- a. Potential for search warrant.
- b. Potential for ex parte contacts.
- c. Danger of advising employees not to talk.

IV. How To Conduct The Investigation

A. Gather documents first.

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- B. Be aware of dangers presented by electronic documents.
- C. Conduct interviews.
 - 1. Importance of getting to witnesses first.
 - 2. Best to start with lower level employees and work upward.
 - 3. Importance of warnings.
 - a. Clarify who the lawyer represents.
 - b. Clarify ownership of the privilege.
 - c. Consider further warnings.
 - i. Right to counsel.
 - ii. Privilege against self-incrimination.
 - d. Special considerations regarding former employees
 - i. "Ex parte" communications.
 - ii. Ownership of privilege.
 - iii. Propriety of direction against cooperation.
 - e. Potential pitfalls
 - i. Subornation of perjury:
 - 1) Obvious misconduct includes instructing witnesses to lie.
 - 2) But some courts have upheld prosecutions for facilitating perjury through "willful blindness."
 - ii. Misprision of felony
 - 1) During the course of an internal investigation, counsel may become aware of a crime previously committed. If so, counsel should be sensitive to the federal misprision of felony statute, 18 U.S.C. § 4. The essential elements of 18 U.S.C. § 4 are as follows (i) the principal committed and completed the felony alleged; (ii) the defendant had full knowledge of that fact; (iii) the defendant failed to notify the authorities; and (iv) the defendant took an affirmative step to conceal the crime.
 - 2) Mere silence, without some affirmative act of concealment, does not constitute misprision of felony.
 - 3) But beware of:
 - a) Sponsorship of false testimony under circumstances where one might be accused of "willful blindness."
 - b) Destruction of documentary evidence.
 - iii. Witness tampering.
 - 1) It is a crime to "engage . . . in misleading conduct toward another person," with the intent to "influence, delay, or prevent" a witness' testimony, or to "cause or induce any person" to "withhold" testimony or documents.
 - 2) "Misleading conduct" is defined in 18 U.S.C. § 1515(3) as follows: "(a) knowingly making a false statement; (b) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; (c) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity; (d) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or (e) knowingly using a trick, scheme, or device with intent to mislead."
 - 3) Harassment is also prohibited.

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