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Seven Skills Of Highly Effective Legal Counsel In Conducting Internal Investigations

By

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I recently attended the Society of Corporate Ethics and Compliance (SCCE) 7th Annual Compliance & Ethics Institute in Chicago and presented a workshop on conducting effective internal investigations with my good friend Al Gagne, Director of Compliance and Ethics at Textron Systems Corporation. The number of general counsels and compliance officers present was impressive and the substantive discourse enlightening. More than anything else, however, was the notable emphasis on building a culture of compliance and ethics in our organizations, and in particular, the focus on conducting effective internal investigations as part of that process. I have learned to recognize the “mind blur” that occurs from information overload after attending a great seminar so I took the time to condense the critical information gleaned from this experience into a “white sheet” of seven essential skills of highly effective legal counsel in assisting those responsible for conducting internal investigations. Grab a chair and enjoy what I have to share with you from our workshop, and the Institute’s, participants.

1. **Managing or Oversight of Internal Investigations.** Experienced legal counsel, especially former federal prosecutors, are very adept at managing and overseeing corporate internal investigations. All investigations include essential elements that experienced counsel can assist a client in implementing. From recognizing the “triggers” for initiating an internal investigation, to identifying who should “lead” the investigation, and identifying and collecting evidence, experienced legal counsel has substantial value to offer clients performing these tasks. This fact is especially true for former federal prosecutors who are well versed in the “craft” of conducting investigations.
2. **Interviewing Witnesses.** There are essentially only two general types of evidence: witness testimony and documents. All corporate internal investigations will involve witness interviews which are necessary to develop the evidence and experienced legal counsel are adept at identifying which witnesses to interview, when and how to conduct the interviews, and in what particular order to conduct the interviews. The critical difference between the value of testimonial and documentary evidence is that the documents are (or should be) constant (i.e., they are what they are) whereas “witness testimony is fluid.” Understanding and developing this “fluid” evidence is essential and a valuable skill of experienced counsel.
3. **Evaluating Evidence for Intent.** Once you develop the evidence it must be evaluated for intent. There is a significant difference between an honest mistake and criminal conduct, and the difference is the person’s intent. This person’s level of intent, and the “collective intent” of everyone in the organization can give rise to administrative, civil or criminal liability, and again the difference is intent. The ability to effectively evaluate intent is the result of experienced judgment and critically valuable to clients conducting corporate internal investigations..

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4. **Interacting with the Government.** Most, but not all, corporate internal investigations (especially involving criminal conduct) will involve at least some interaction with federal and state law enforcement or regulatory authorities. The ability to effectively navigate this interaction and present a credible position on behalf of the client is essential to the successful resolution of any matter. Whether dealing with a prosecutor, agent, or regulatory authority, effective legal counsel possesses “gravitas” in this situation, their credibility, and composure under the pressure of the situation is required in order to achieve the client’s goals.

5. **Knowledge or Mastery of Substantive Law.** Most often legal analysis and advice involves the application of the law to the facts. Once you determine what happened, you must compare it to what is required and determine if a violation occurred. This task can be much more difficult amongst the myriad of federal and state regulations governing businesses today. Therefore, it is often necessary to seek the advice of an expert. That is the easy part because many times you may not recognize the need to consult an expert on a difficult issue. Experienced legal counsel can not only provide this expert advice, but are adept at identifying the very need to seek expert advice in the first place. Experienced counsel should always be involved and consulted when conducting corporate internal investigations that involve alleged misconduct with legal ramifications.

6. **Developing & Implementing Corrective Action Plans.** Once the organization confirms the existence of misconduct, it is critical to develop and implement a corrective action plan. Experienced counsel can assist the client in identifying a particular vulnerability in its organizational structure and processes based on its compliance analysis and identification of regulatory noncompliance patterns and trends. Similar in function to crime analysis, this risk assessment function is critical to the improvement of the organization’s structure and processes, and ability to effectively detect and deter misconduct. Experienced legal counsel can provide the client valuable advice in developing and implementing corrective action plans. Former federal prosecutors, in particular, are experienced in conducting crime analysis and this experience is particularly useful in conducting regulatory compliance analysis in organizations.

7. **Counseling Clients Regarding Risk of Exposure & Organizational Liability.** The dual goal of any corporate internal investigation is to not only “detect and deter” misconduct as part of the organization’s compliance and ethics program through the determination of the existence of misconduct but to also evaluate this misconduct and determine the potential exposure and risk of liability to the organization, if any. This evaluation may include the need to voluntarily disclose the problem to the appropriate authorities and ways to mitigate the exposure. Quite simply, there is no one area more dependent on the input of experienced legal counsel than evaluating the organization’s risk of exposure and potential liability.

The SCCE’s Annual Institute provides a unique opportunity for internal and external counsel, and compliance and ethics officers, to come together and share their knowledge and ideas in an interactive forum. I enjoyed the ability to co-present a workshop at the Institute on conducting effective internal investigations and both sharing with, and learning from, the participants in the workshop as well as the Institute. Based on this experience, I have condensed some of the highlights into a “white sheet” of seven essential skills of highly effective legal counsel to share with you.

Latour “LT” Lafferty is the Firm’s White Collar Crime, Government Investigations and Regulatory Compliance Practice Leader and a former federal prosecutor. LT was recently named as one of Florida Trend’s 2008 Legal Elite in white collar crime and frequently speaks and presents work shops on conducting corporate internal investigations. Please contact LT Lafferty at Llafferty@fowlerwhite.com or 813.222.1106 to discuss how he can help you with your white collar crime, government investigations and regulatory compliance issues.

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