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## IN - HOUSE COUNSEL

# Avoid Common Errors During an Internal Investigation

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*Special to the Legal*

Presidential adviser and overall renaissance man John W. Gardner once said, “Life is the art of drawing without an eraser.” While this may be an accurate description of the human condition, in the corporate world there is little room for error for in-house counsel conducting or managing an internal investigation. How-to guides published by the Association of Corporate Counsel and the American Bar Association are useful in that they are designed to provide the reader with a 10,000-foot view of the investigative process. But they are hardly adequate to prevent someone with little or no experience in conducting and managing investigations from committing catastrophic errors, errors that may later be perceived as negligent at best or the obstruction of justice at worst.

With the benefit of 20 years of experience conducting and supervising investigations without an eraser, here are my top five most common errors to avoid during an internal investigation.

**1. Failing to conduct an investigation.** It is a generally accepted proposition that not every allegation of wrongdoing requires a full-blown investigation. A single unkind word or



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gesture from one employee to another is typically not grounds for launching a formal investigation, at least in the absence of a pattern of misconduct. However, in some situations commissioning an internal investigation is absolutely necessary. For example, in an employment context, “an employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer’s failure to investigate may allow a jury to impose liability on the employer,” as in *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2nd Cir. 2000), citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The same can be said for complaints of harassment based upon race, gender or other protected characteristics. Other situations in which internal investigations are commonplace are whistleblower complaints, allegations of wrongdoing that have attracted (or are likely to attract)

the attention of government regulators or investigators, matters that are the subject of civil litigation or likely to expose the company to significant liability, and allegations of wrongdoing committed by high managerial agents. Of all of these situations, the last one

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is often the most difficult one for corporate counsel to pull off and remain unscathed.

**2. Picking the wrong investigator.** This is the single biggest decision that in-house counsel must make after deciding that an investigation is necessary, and the one counsel can least afford to get wrong. When selecting an investigator, careful consideration should be given to relevant experience. Former prosecutors and government investigators with experience handling sophisticated white-collar and complex corporate investigations are usually solid picks. But personal presence is also

important. An internal investigation that involves upper management or requires a formal presentation to the board of directors requires an investigative lead with a certain degree of executive presence. On the other hand, for those companies at which the selection of high-priced counsel from the largest law firms is the default setting, retaining the biggest and most expensive name in town to run roughshod over your fellow employees may not be a wise career move. This is why it is critical for in-house counsel initiating an internal investigation to interview each and every member of the investigative team before inserting them inside the company to determine whether they are a good fit for the task at hand.

**3. Starting too late.** This error is all too common and bad for several reasons. First, in situations where an internal investigation is required, such as in the case of a harassment complaint, the law requires that the investigation be prompt. Perhaps the U.S. Court of Appeals for the Ninth Circuit said it best: “The most significant immediate measure an employer can take in response to a harassment complaint is to launch a prompt investigation to determine whether the complaint is justified,” as in *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001). Second, failure to begin an investigation promptly increases the risk that valuable evidence may be intentionally or unintentionally destroyed. This is most often the case with electronically-stored information. Indeed, the first order of business in any investigation is to preserve and copy electronic communications and other documents that may be relevant to the subject matter of the investigation before it disappears. There is nothing more frustrating (and more common) than starting an investigation by finding out that those important emails you wanted to review prior to conducting witness interviews have been purged. While

in some cases deleted electronic evidence can be recovered by experts, the process is rarely complete or economical. Third, when there is litigation or a government investigation that is ongoing or on the horizon, starting late out of the gate can put the company in a terrible position, forcing it to learn the facts along with the plaintiff or government.

**4. Conducting a sham investigation.** An investigation is supposed to be a search for the truth so that the company can make informed decisions. One sure way to frontload your investigation with the appearance of bias is to allow the alleged wrongdoer to have influence over the investigative process. Another is to cut off reasonable avenues of investigation without a credible reason. Still another is conducting what is billed to be an “independent” investigation using the company’s litigation counsel. This does not mean that in-house counsel must cede all control over the investigation to whims of an unfamiliar investigative team. What it does mean is that corporate counsel must expect that any investigator worth his salt is going to be reluctant to unconditionally stand behind the results of an investigation if the investigator believes that he is not in possession of the truth.

**5. Taking too long (and spending too much).** Internal investigations can be real cash cows for outside counsel. Two recent and well-publicized examples are the Penn State-Jerry Sandusky child sex-abuse investigation (\$8.1 million) and the New Jersey Bridgegate investigation (\$7.8 million). While most internal investigations don’t even begin to approach these sums, time delays and cost overruns are not uncommon when an investigation is not properly designed and managed from the outset. While in-house counsel should avoid micromanaging the investigation to avoid the appearance of a sham investigation, counsel should set clear

parameters on the subject matter to be investigated. When those parameters cannot be immediately determined, it is often helpful to task outside counsel with designing a preliminary assessment and corresponding budget in order to allow both parties to get their hands around the edges of the problem to be investigated and determine the most cost-effective course of action. Another effective technique is to require short, weekly conference calls with investigators to keep abreast of the latest developments and ensure that investigators stay on track.

An internal investigation can be a highly effective way to address allegations of employee misconduct, reduce legal liability, ensure compliance with statutory and regulatory requirements, and root out waste, fraud, or abuse within an organization. Indeed, a 2015 U.S. Department of Justice memorandum recently stressed the importance of a thorough internal investigation as a way for corporate executives to avoid or reduce their criminal liability for the unlawful acts of the corporation. But an internal investigation that is not designed or managed properly can do more harm than good. Corporate counsel would be well advised to work with experienced outside counsel when conducting an internal investigation in order to avoid these five costly mistakes before they can occur.

