

CORPORATE COUNSEL

Making Internal Investigations Effective, Fair to Employees

From the Experts

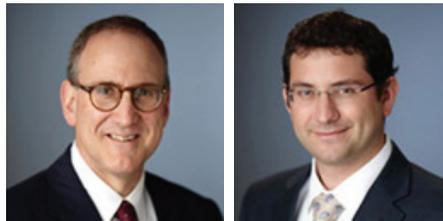
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A recent, thoughtful law review article by professors Ellen Podgor and Bruce Green, “Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents,” 93 B. U. L. Rev. 275 (2013), explains that the law governing corporate internal investigations permits—indeed, incentivizes— in-house counsel to promote the interests of the company at the expense of its employees. The authors argue that the law should be changed to make internal investigations more fair to employees.

Practitioners can draw important lessons from Green and Podgor’s critique of the law of internal investigations. Within the law as it now stands, in-house counsel can take steps to promote the fairness and effectiveness of internal investigations, while providing a vigorous representation of the company.

A DIFFICULT POSITION

Internal investigations often put in-house counsel in a difficult position. While company lawyers are normally advisors to employees, an internal investigation changes counsel’s role in an important way: During investigations, in-house lawyers represent the company, not



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employees. Unlike other situations in which employees seek the advice of in-house counsel, in investigations employees may find their motives and actions questioned—and may wonder why their trusted advisor is not on their side.

The relationship between in-house counsel and employees is further complicated by the risk of corporate criminal liability. Under the U.S. Department of Justice’s Principles of Federal Prosecution of Business Organizations, the company’s “cooperation”—which includes the company’s willingness to disclose evidence of wrongdoing to the government—could be critical to avoiding indictment. To avoid the possibly severe consequences of an indictment, the best course for the company may be to find evidence of wrongdoing by employees, secure admissions from them, and then disclose the

evidence to the government in exchange for “cooperation” credit.

FAVORING THE COMPANY OVER EMPLOYEES

Podgor and Green explain that the law of attorney-client privilege does not adequately account for potential adversity between the company and its employees during an internal investigation. That body of law is unfairly skewed in favor of giving the company, not individual employees, control over privileged communications. In the authors’ view, the relationship between in-house counsel and employees during an internal investigation is not straightforward and can easily be misunderstood by employees. Yet the law resolves all ambiguity in favor of corporate control over the privilege, which can have dire consequences for employees.

For example, while it is common for company counsel to give an Upjohn warning to employees, stating that counsel represents only the company and that information gathered may be disclosed by the company, the warning may not be given or may be given unclearly. In such cases, employees are often denied protection of the privilege un-

der a test weighted heavily in favor of a company's exclusive control over the privilege.

Podgor and Green propose leveling the playing field between the company and its employees by imposing a "duty of good faith and fair dealing" on the company, which would require in-house counsel to treat employees fairly during investigations. Although the authors provide a powerful argument for changing the law, they do not explain why in-house counsel should act in the way they recommend given the existing state of the law.

THE COMPANY'S INTEREST IN FAIRNESS

Putting aside the existence of a corporate "duty of good faith and fair dealing," companies have important practical reasons to be mindful of employee interests in internal investigations. Most importantly, treating employees fairly puts corporate counsel in a better position to obtain an accurate and nuanced understanding of the facts. An effective internal investigation needs to uncover all the facts, not just incriminating ones. A complete understanding of exculpatory facts, mitigating circumstances, and weaknesses of potential claims against the company, in addition to inculpatory evidence, will help counsel negotiate more effectively with the government and often limit the scope of a potential government investigation.

PRACTICAL ADVICE

Here are some practical steps in-house counsel can take to facilitate both effective internal investigations and the even-handed treatment of employees.

- Absent exigent circumstances, in-house counsel should permit, and often encourage, employees to prepare for investigative interviews. If employees are given the opportunity to review relevant documents, including inculpatory evidence, before interviews, their responses will be better informed and well-considered. Interviewing unprepared employees can become a "gotcha" exercise, in which incorrect recollections are mistaken for genuine leads or, conversely, evidence of wrongdoing. Unprepared interviews can create a record of possible obstruction that may need to be disclosed to the government before it can be determined whether the particular statements were intentionally false.

- In-house counsel should not discourage employees from retaining their own counsel, and in many instances should recommend counsel whose fees are paid by the company. Providing employees with separate counsel commonly facilitates their preparation for interviews and helps bring out useful facts. To save costs, counsel should consider retaining "pool counsel" for similarly situated employees or adopting other arrangements to monitor spending

- Counsel's report of the findings of an internal investigation, especially a written report, should sometimes be descriptive of the facts rather than make ultimate judgments that foreclose defenses available to the company or employees. For example, if an employee's intent is unclear, the report can describe the employee's mental state in terms of what she saw and heard—withholding ultimate judgment on the employee's intent because the facts permit more than one reasonable inference. Also, it

may be quite helpful to share sections of a draft report with employees to increase accuracy and promote procedural fairness.

CONCLUSION

The Podgor and Green article explores the structural advantages that corporations have over employees and how this can lead to unfairness in internal investigations. No doubt many companies already conduct investigations in a manner that fully respects the interests of employees. But tensions between the interests of the company and its employees will arise, and in-house counsel need not wait for the law to change to be sure to treat employees fairly. In many cases, the effective representation of the company is reason enough.

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