Conducting an Effective Internal Investigation –
One Chance to Get it Right

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Conducting an Effective Internal Investigation – One Chance to Get it Right

Cara Bradley –
Deputy General Counsel, Everbridge, Inc., Burlington, MA

Erik A. Christiansen –
Partner, Parsons Behle & Latimer, Salt Lake City, UT

D. Ross McGowan –
Partner, Borden Ladner Gervais, Vancouver, BC

Zain Raheel –
National Leader, Forensic & Integrity Services, Ernst & Young LLP, Toronto, ON

James Q. Walker –
Partner, Richards Kibbe & Orbe LLP, New York, NY

Gregory C. Yadley –
Partner, Shumaker, Loop & Kendrick, LLP, Tampa, FL
Introduction – The Risk

- Fraud or other illegal or improper activity spawns multiple legal issues
  - financial loss
  - possible criminal proceedings
  - civil recoveries
  - regulatory concerns
  - third party claims
  - reputational harm

- Corporate fraud risk arises in one of four major scenarios:
  - Internal perpetrator – fraud aimed internally (embezzlement);
  - Internal perpetrator – fraud aimed externally through use of the organization, (conspiracy, fraud on market);
  - external perpetrator – fraud aimed at the organization (chek scams, mortgage fraud, confidence schemes); and
  - external perpetrator – aimed externally through use of the organization (conspiracy, hacking, identity theft, price-fixing, fraud on market).
Why an Independent Internal Investigation?

• Corporations/entities should consider an independent internal investigation;
  – Internal investigation should be truly independent;
  – Otherwise, subject to collateral attack by regulators, shareholders and/or officers/directors.
  – Corporations need credibility with government, which requires independence.
• Advantages:
  – Uncovers true facts, which gives entity options.
  – Evidences cooperation and credibility to regulators;
  – May reveal no wrongdoing or minimal wrongdoing;
  – May create ability to be pro-active and solve problem;
  – May identify bad employees, directors or officers;
  – May help fulfill fiduciary duties to shareholders;
• Disadvantages:
  – May uncover bad conduct, even beyond that being investigated;
  – May implicate key directors or officers;
  – May give rise to a duty to act;
  – Regulators may expect results to be shared;
  – May implicate the corporation/entity;
  – May be used by bad officers or directors for nefarious purposes to impact corporate control (i.e., a corporate coup d'état);
  – May be used by plaintiffs to sue corporation/entity in civil suits like securities class actions.
An effective independent internal investigation and cooperation can gain the organization credit in government investigations.

Factors the government will favorably consider in evaluating the investigation:

1. Was it self-initiated;
2. Was it independent;
3. Was it prompt;
4. Was it thorough;
5. Was it fair;
6. Was it accurate enough to be relied upon by government;
7. Were key documents provided to government;
8. Were the results self reported;
9. Did the company identify and deliver evidence against the individual wrongdoers;
10. Did the entity take appropriate remedial and disciplinary action.
The Risk of Follow-On Lawsuits

- Disclosure of internal investigations often triggers securities class action lawsuits;
- Does the report of the internal investigation become discoverable?
- If it was given to SEC or other regulators, can be – limited confidentiality in disclosures to government (FOIA);
- This counsels in favor of deciding whether to do a written or oral report to the government.
Conducting an Effective Internal Investigation – One Chance to Get it Right

- Triggering Events
- Process
- The Investigation
- Relationships
- Forensic Perspective
- Scenarios
- Q&A
A range of events can cause a company to contemplate initiating an internal investigation of suspected misconduct at the company.

(a) Report from internal audit
(b) Whistleblower tip
(c) Auditor notification
(d) Civil lawsuit
(e) Investor or shareholder demand
(f) Call from a prosecutor or government investigator
(g) Government subpoena or information request
(h) Transaction due diligence
Start Smart - Preserve Evidence

- Do not spoilate evidence;
- Do not sanitize evidence;
- Do not alter evidence;
- Do not obstruct justice;
- Issue evidence preservation hold letter;
- Talk to all relevant custodians – take affirmative steps to preserve evidence;
- Talk to key employees and inform them of obligation to preserve evidence.
The Process - Initial Concerns

When the Govt. knocks, what should you do?
1. Retain outside counsel – independent or known?;
2. Decline or grant interviews? – (no obligation to speak to FBI or Police);
3. Preserve evidence – do not destroy anything;
4. Think if you’re a lawyer involved: who is the client?;
5. Consider conflicts – who needs separate counsel;
6. Consider benefits/risks of internal v. outside independent investigation;
7. Consider implications for insurance – notice to D&O or E&O carriers? Is there coverage for the investigation?
Typical Types of Govt. Investigations

- False Claims Act violations;
- Foreign Corrupt Practices Act violations;
- Tax investigations;
- Accounting irregularities;
- Securities fraud;
- Wire Fraud;
- GDPR;
- Business Opportunity disclosure violations;
- Antitrust;
- Embezzlement or theft;
- Ponzi schemes;
1. Mistake to speak with investigators without planning and consideration of all options first:
   - Decline immediate interview requests;
   - Immediately retain counsel;
   - Huge risk of false statements liability;

2. Some regulators require cooperation:
   - What is cooperation? Books, records? Interviews?
   - What if they show up unannounced and want answers?
     • Call counsel immediately.
Back to Basics – The Compliance Function

Core Requirements:
• Duty to Protect Interests of Your Organization
• Compliance and legal obligations – Your Organization and staff
• Culture Committed to Compliance – Going Beyond

Documenting the Investigation
• Purpose
• Facts and Action Plans vs. Opinion and Editorial Comment
• Conclusions Informed by Purpose

Legal Advice Privilege
• Triggering it, its purpose and what it’s not there to do
Managing Risk - First steps

• You’ve spotted multiple red flags, or you’ve discovered a large payment transaction that you never authorized. You need to investigate and you need to do it fast!
• When fraud is suspected or affirmed, immediate action must be taken to limit loss and maximize recovery.
• Time is against you, but you must also remain calm and in control of the situation at all times. There is no room for drama. Be smart, calm and careful.
• An internal decision making guide should be considered before a triggering event arises. The guide should include the critical steps to undertake and the pertinent questions to ask at each step.
• The following steps should be taken:
  – Determine the Investigation Team
  – Gather intelligence
  – Understand the problem & the risk
  – Preserve evidence in contemplation of civil or criminal proceedings
  – Trace the proceeds
  – Restrain and recover readily identifiable assets
  – Reporting
The Investigation Team

• At the moment you begin to gather intelligence and assess risk, you should be reaching out to those who will assist you. A team of internal and external players should be available and should be considered in advance as part of your routine overall risk management strategy. You need to determine key players before a fraud hits, not after the money has gone out the door.

• Your ideal team will have a broad skill set, depending upon the circumstances and size of the fraud. The following team members may be included:
  – Legal Counsel (Internal and External)
  – Internal Security
  – Forensic Accountants
  – Computer Forensics
  – Compliance or Regulatory Advisors
  – Senior Management
  – Credit Risk / CFO Function
  – Human Resources
  – Public Affairs
Information and Consideration – Thinking it through

Gathering intelligence:
• What information do you have?
• What information is missing?
• What documents will you need to see?
• Who needs to see the same information?
• Who holds this information or where might it be located?
• Who are the key employees with information? Is there someone close to the transaction that can explain the history and how it unfolded?
• Who do you need to call?

Understanding the problem & risk:
• Use the expertise of the investigation team to summarize what you know and what risks your organization may be facing. Consider this before determining your next steps.

Preserving the evidence collected.
• Does your investigative team have a leader? How are you managing the information obtained? Who has access to it?
Investigation Issues - Risks

In the hands of external parties, Audit and Investigation work may be construed (or misconstrued) in a way that is adverse to Your Organization's interests, creating legal risk:

- To show that Your Organization saw but failed to respond appropriately to a financial-crime risk
- To show that Your Organization considered an issue but wrongly concluded that it posed no financial-crime risk
- To show that Your Organization failed to consider evidence of a financial-crime risk
- Imagine that your work is being read by a third party whose interests are not aligned with Your Organization’s.
Witness Interviews and Related Concerns

• Overt v. Covert witness interviews: a good idea?
  – Is the element of surprise appropriate?
  – What about “drop-in” interviews?
  – Should witnesses be given warnings in a surprise interview? If so, what type?
  – Should witnesses be told whom the client is? What the scope of the investigation is? What their rights are?
  – What about whistleblowers?
    • Interview first?
    • Convince them to wait on reporting until after investigation is done? Risks? Obstruction?

• Coordination with the government?
  – Should the independent investigation being coordinated with the investigating agency?
  – Could such coordination convince the government to hold off and rely, initially, on internal investigation if shared?
  – Could seeking to coordinate cause the government to advise the corporation/entity to hold off until after government is done?
1. Things to consider:
   – Location of interview;
   – Sequence of interviews;
   – Exigent circumstances;
   – How to handle lying witness – confront or not;
   – Discussion of confidentiality of investigation;
   – Discussion of privilege issues and Upjohn warnings.

2. Memorialize the interview;
   – Have a witness with you
Retaining Outside Counsel

1. Think: (a) who is the client and (b) who needs separate counsel?
   - Corporation or entity?
   - Directors?
   - Officers?
   - Employee?
   - General counsel or other legal officers?
   - Venders?
   - Accountants?
Considerations in Retaining Counsel

Who might need separate counsel?

– Are there any conflicts among groups or individuals?
  • Assume that there are conflicts between corporation and D&Os;
  • Assume that there are conflicts between D&Os;

– Are there potential criminal ramifications?

– Civil lawyers mess up criminal liability more often than not.

What is scope of investigation? Are there other related areas to consider?

To whom should outside counsel report? General counsel? Board? Audit Committee?
Why Separate Counsel?

- Corporations/entities:
  - Regulators frequently do not want to punish entity or its owners;
  - Regulators will expect entity cooperation;
  - Regulators will work with entity to target bad D&Os or employees;
  - Entities more frequently face monetary risk – cooperation reduces risk;
  - Entities have fiduciary duties to shareholders to solve problems.

- Directors:
  - Interests may vary;
  - Audit Committee v. Board
  - Knowledge and involvement may vary;
  - Inside directors v. outside directors
  - Innocent v. involved directors.
  - Company may have incentive to cooperate against a director or officer.
  - Consider suspensions.

- Officers:
  - CEO and CFO in public companies have different obligations (i.e. certification of financials);
  - Innocent v. involved officers.
  - Company may have incentive to cooperate against officer.
  - Consider suspensions.

- Employees:
  - Company may have incentive to cooperate against employee
A Word about independence

1. Danger of in-house lawyer or compliance officer doing investigation: management may not be considered objective.
2. If an entity determines that an internal investigation is needed, don’t hire regular outside corporate or securities counsel;
3. Don’t hire the nephew or friend of an officer or director;
4. Don’t hire a friend of the auditors;
5. Hire a truly independent law firm and/or forensic auditor;
   1. Independence is needed for credibility;
   2. Credibility matters to regulators and law enforcement;
   3. Credibility matters to courts.
Attorney-Client/Work Product Privileges

• Independent investigating counsel typically hired by corporation or audit committee;
• Corporation is generally the client;
• Corporation holds the privilege;
• Officers, directors, employees not protected individually;
• Corporation has sole discretion to waive privilege;
• Best practice is to warn employees, officers and directors that there is no privilege protecting them.
• Should report be written or oral? What are advantages and disadvantages of both?
Experts

• Important to hire the right types of experts when doing an internal investigation:
  – Forensic auditors;
  – Computer forensic investigators;
Identify high risk transactions with data analytics

- We maintain a library of highly advanced data analytic tests, utilizing the Association of Certified Fraud Examiners' Fraud Tree, which allows us to custom design and execute targeted analytics tests based on the risk profile.
- These analytic tests are used to help identify potential high risk transactions such as: fictitious vendors, duplicate payments, travel & expense abuses, employee/vendor conflicts of interests, etc.

![Chart and Graph](image)
Perform payment and conflict of interest testing

- **Payment Tests**
  - Round dollar payments
  - Payments dated on a Saturday / Sunday / Holiday
  - Payee name in payments is different from the name in the vendor master
  - Invoice sequencing
  - Keyword searches based on a library of key terms
  - One-time vendors
  - Benford's law (distribution of the first digits analysis)
  - Duplicate payments or invoices

- **Conflict of Interest Tests**
  - Comparison of contact information between vendors and / or employees
    - The same address vendor to employee
    - The same telephone number vendor to employee
    - The same name vendor to employee
    - The same tax ID vendor to employee
Perform payroll and employee data testing

- Payment by company code / group
- Payments after Termination
  - Payment amount by employee
  - Days after termination by employee
- Employee Earning Code Analysis
  - Total hours by employee (e.g., standard vs. overtime hours)
- Comparison of contact information between employees
  - The same address
  - The same telephone number
  - Employees with substantially the same name but different employee numbers
Perform travel and expense testing

- Travel and Expenses Tests
  - Expenses Exceeding Policy Limit
  - Round Dollar Expenses
  - Approval Dates preceding Transaction Dates
  - Mileage or other Transportation on same day
  - Weekend Travel Transaction Dates
  - Gas without Car Rental
  - Potential Duplicate Expenditure

- Travel and Expenses Summaries
  - Total by employee
  - Total by expense type
  - Average expense by employee
  - Transaction trending over time
  - Vendor stratification
  - Word Map on T&E Descriptions
  - Expense by country
Identify high risk vendors with investigative due diligence

Overall third party risk management process

1. Gather information
   - Gather key information about your third parties from your employees and - if needed - directly from your third parties.

2. Triage
   - Determine triage category based on key data
   - Based on triage level and internal requirements, determine next steps

3. Diligence
   - Based on triage level, select appropriate level of diligence to be conducted
   - Compliance QuickScan Standard Enhanced

4. Review and approval
   - Document completion of required review steps, which can be specific to triage level and corresponding internal requirements
   - Route and document approval or rejection

5. On-going analysis
   - Perform ongoing analysis using data analytics and metrics
   - Rescreen third parties based on internal timeframe and/or as needed
Summarize results & flag high risk vendors
Monitor vendor due diligence on an on-going basis.
Other Experts

• Important to hire the right types of experts when doing an internal investigation:
  – Securities experts;
  – FCPA experts;
  – FCA experts;
  – GDPR experts.
A word about Foreign Corrupt Practices Act

- CEOs, CFOs, General Counsel, and Boards must be pro-active in insuring compliance with FCA in a global marketplace;
- Compliance is the soft spot in most companies;
- Compliance is most under-funded part of management;
- Compliance must be on-going;
- FCA risk is particularly high in Direct Selling companies;
- Global internal investigations of potential FCA violations are incredibly expensive;
- The *Siemens* case, where the company admitted to paying more than $800 million in bribes, is a good case study in cooperation, where the company paid $1.6 billion in criminal and civil restitution, but never plead guilty to paying bribes with the DOJ, and instead plead guilty to books and records violations and inadequate internal controls with the SEC, because of their internal investigation, self-disclosure and cooperation with the government.
- Companies often get non-prosecution or deferred prosecution agreements in exchange for cooperation, self-reporting, and throwing the bad Ds & Os under the bus.
Common Mistakes When The Government Knocks

1. Thinking that if you explain the issue, the issue will disappear;
2. Thinking you can manage the problem internally;
3. Not hiring counsel before talking to or considering talking to the government;
4. Retaining regular outside counsel who does not have experience in regulatory investigations;
5. Assuming that the civil agency (like S.E.C.) is not working behind the scenes with the DOJ or local agency is not working with the State Attorney General;
6. Not considering 5th Amendment rights in regulatory proceedings or civil lawsuits – once waived, the right also has been held to have been waived in related criminal proceedings;
   - I will warn civil litigants in depositions of their 5th amendment waiver problem;
7. Lying and thinking that it won’t be uncovered as a lie;
8. Altering or destroying evidence.
1. The government frequently wants a waiver of the privileges;
   - The government will claim it will consider waiver as cooperation;
   - The government’s key focus is whether key information has been disclosed;
   - They don’t want corporations/entities hiding key facts behind privileges;

2. Cooperation depends on voluntary disclose of key relevant facts;
   - Government claims that they do not want to invade privilege, but nonetheless, they want key relevant facts – how do you disclose without waiver of privilege?
   - There are risks of waiver – including risk of waiver of entire subject matter;
   - Facts must be carefully disclosed, with due consideration of impact on privileges.
Risks illustrated by U.S. v. Nicholas

- Outside counsel gave the government interview notes of company CFO William Ruehle;
- Ruehle did not consent;
- Ruehle was indicted;
- Ruehle filed a motion to suppress the notes on the grounds that he believed company counsel was his lawyer, and the notes were attorney-client privilege;
- Trial court agreed and said the counsel was wrong not to give warnings to Ruehle.
The 9th circuit reversed. Ruehle knew the notes would be discussed to the company’s auditors, and thus knew there was no privilege.

Lessons from Ruehle:

– Counsel has to be aware of conflicts between entities and witnesses;
– Counsel should advise known targets to retain separate counsel before interviewing;
– Counsel should warn the person about the fact that he lawyer represents the corporation and not the witness, and there is no privilege for the witness;
– Counsel should make it clear that they do not represent the witness.
In the criminal context, witnesses often have three choices if they are interviewed:
- 1. Lie;
- 2. Tap dance;
- 3. Tell the truth.

Lying is the worst option. It is an independent crime, which is often easy to prove. Tap dancing is often considered a lie.

The 100 lb. gorilla is when should a witness admit that they committed a crime. [Tell text message story here].
Why lying is bad

• It reduces opportunities for immunity and cooperation;
• It is a crime;
• The government has many resources – other cooperating witnesses, documents, wiretaps, surveillance, online subpoenas, access to financial records and tax returns, search warrants, confiscation of computers and phones, and a vast array of resources that they can use to catch you in a lie.
Refusal to Cooperate

• There are cases where it is in everyone’s best interest to simply refuse to cooperate;
• There are cases where the government is wrong on the facts, the law or both;
• There are cases where the government needs to be told they are wrong and a vigorous defense mounted;
• There are cases that should be taken to trial.
A word about pre-indictment

- Corporations and entities have best success cooperating with regulators and law enforcement, and most of the time, can avoid indictment (think Arthur Anderson);
- Criminal lawyers for individuals do their best work pre-indictment.
  - Immunity negotiations for testimony;
  - Pleas to reduced charges;
  - Shape the scope of charges and sentences;
- If you are going to wait for indictment and take a criminal case to trial, you should:
  - Have lots of resources;
  - Have a good shot at winning.
- The first person to cooperate often has the best result.
- Difficult to negotiate forms of immunity if you lied earlier, i.e., to SEC or FBI before you decide to tell the truth: why? You are changing your testimony and you look like a liar.
Comfort Craft ("CC") is a furniture manufacturer based in Ohio with plants and warehouses in the U.S. and Canada. CC recently hosted an SEC examiner from the SEC’s Office of Compliance Inspections and Examinations for several days. A week after her departure, the SEC examiner calls the CFO and states (1) CC’s revenue projections substantially surpass projections by its competitors, and (2) the Staff had difficulty reconciling reported warehouse inventory levels with monthly sales figures. The examiner requests a meeting to discuss these issues.
CC’s CFO is someone you have advised on small matters relating to CC. He calls you to discuss the conversation with the SEC examiner, mentions he has concerns about revenues reported in two regions, which have consistently exceeded targets, and asks whether you can look into the situation. He suggests that you report to him, adding it would be good to bring CC’s Audit Committee into the loop.
Hypothetical - Questions

• Who is the client? Who should be the client?
• How do you structure the reporting arrangement?
• What steps do you take to commence this inquiry?
• Do you contact the SEC examiner? When?
Hypothetical – More Facts

• You recommend reviewing emails of staff in the warehouse and distribution centers near Calgary, Alberta and Morgantown, West Virginia, and then following up with interviews of those staff and regional managers.
Hypothetical– Questions

• Will you interview the regional managers first or after interviewing staff?

• Any issues you should address prior to collecting data and conducting these interviews in the U.S. and Canada?

• How will you conduct these interviews? What will you say to witnesses?
Hypothetical – More Facts

• You interview a sales rep who works for the regional manager in Morgantown. She is willing to talk, but insists that as a whistleblower what she reports must be confidential and shared with nobody else. She asks whether she should have her own lawyer present. Before you respond, she begins explaining that her boss has been under incredible pressure to meet sales targets, and had an arrangement with the warehouse manager to report additional sales shipments each month and maintain a separate book of actual sales. She blames the CFO for putting unreasonable pressure on her boss.
Hypothetical – More Facts

• What should you advise the sales assistant with respect to her request to keep her interview confidential?

• How should you respond to her question about having a lawyer present?
Hypothetical – More Facts

• You retain a forensic accountant to assist with the investigation, and the accountant confirms that similarly false sales records have been generated in Morgantown and Calgary.
Hypothetical – More Facts

• When should you involve the forensic accountant?
• What steps should you take in connection with retaining the forensic accountant?
• What types of procedures could they perform in advance of the interviews?
Hypothetical – More Facts

• During the interview of the CEO, he confessed that they had hired an individual consultant to assist with negotiating and arranging deals with customers and foreign suppliers in Asia. He did not know much about the consultant but he came recommended from one of the board members who made it clear that he was “highly recommended” and that they did not need to ask any questions.
Hypothetical – More Facts

• You believe that this consultant should be investigated further. What additional procedures can be performed?
• What types of recommendations could be made to the company going forward with respect to new vendors?
Hypothetical – More Facts

• During the interview of the CFO, he explain that the high sales are also attributable to deposits they receive from foreign customers for equipment orders. The CFO explained that they have very little information about these customers and they are a special category of client that is part of a new initiative driven by the CEO. However they are happy because they are depositing large amounts at once. These deposits are being recorded as revenue upon receipt.
You believe the deposits from foreign investors should be investigated further. The Forensic Accountants flag that the foreign deposits may be an issue from a revenue recognition perspective and from a source of funds issue. What considerations should be made with respect to source of funds?
Hypothetical – More Facts

• You complete your investigation, prepare a report that you share with the full CC Board, management and CC’s outside auditor. You also share the most significant interview memos with the company’s outside auditor.
Hypothetical – More Facts

• Can plaintiffs in follow-on civil litigation against SS compel disclosure of the following in follow-on shareholder lawsuits?
  • Witness interview notes and memoranda?
  • The investigation report?

• Are there any considerations with respect to other regulatory agencies that should be discussed with your client?
Hypothetical – More Facts

• You meet with the SEC to report on your findings. During the meeting you share information about the people you interviewed, provide specific references to statements made by certain witnesses (including the Morgantown Sales Rep), and provide a binder of key documents, but you do not give the SEC interview memos or summaries or the written report.
Hypothetical – More Facts

• Can plaintiffs compel disclosure of the following in the civil lawsuits?
  – Attorney notes from the SEC meeting?
  – Copies of the documents shown to the SEC during the meeting?
Intelligent Systems (“IS”) is an equipment manufacturer based in Reno, Nevada, which sells computer equipment throughout the United States. The S.E.C. has requested documents from IS in an informal inquiry from IS concerning sales of equipment made by IS within the last week of each quarter just before earnings are reported for IS. IS has tasked the Audit Committee with conducting an internal investigation to run parallel to the document request. The Audit Committee has engaged you to investigate the recognition of revenue by the company and the sales recorded at quarter end over the last year. You have been retained by the Audit Committee, and the Audit Committee is your client. As part of your investigation, you ask to interview the CEO and CFO. The CEO and CFO have retained counsel. Counsel for the CEO and CFO grant the interview, but only in their presence.
(1) Counsel for the CEO and CFO ask you to keep the interview confidential, and to enter into an oral joint defense agreement. How should you respond?

(2) During the interview of the CEO and CFO, they confess that they call equipment dealers a couple of weeks before each quarter end and ask them to buy equipment on oral terms that do not match the purchase orders. The oral terms are that (a) the dealer does not have to pay for the equipment upon delivery; (b) can return it at anytime if it is not sold; and (c) if it is sold, the dealer can pay for the equipment at the time of the sale. The purchase orders, which are used for revenue recognition purposes, require all equipment to be paid for within 15 days of delivery and there are no returns.
Based on this interview, you believe that the CEO and CFO are engaged in illegal channel stuffing and improper revenue recognition, and that their actions are criminal.

You report the results of your interview to the Audit Committee. How should you make the report? What steps should you take in conjunction with the report? What steps do you recommend the Audit Committee take?
Instead of following your advice, the Audit Committee immediately terminates your services.

(1) What steps, if any, should you take?
(2) What steps, if any, can you take?
(3) What steps, if any, must you take?
(4) Should you prepare a written report? If so, for whom and where should it be distributed?
Best Practices Take-Aways

1. Self initiate internal investigations;
2. Hire truly independent counsel;
3. Hire right experts for case;
4. Self report to government if legal violations;
5. Give witnesses Upjohn warnings;
6. Throw the guilty under the bus;
7. Work well with the government;
8. Be honest and tell the truth;
9. Do not destroy or alter anything;
10. Do not hide things;
11. When in doubt, get separate counsel for involved players – they talk;
12. Take remedial measures.
Ross McGowan is a partner of Borden Ladner Gervais LLP and is National Chair of the firm's Fraud Law Practice Group.

- Litigation counsel and strategic advisor for many of Canada's banks and credit unions both at trial and appellate courts across Canada on: national and provincial class action defense matters dealing with investor claims arising from the collapse of some of Canada's most notorious Ponzi Schemes, and banking and bills of exchange issues.
- Litigation counsel and strategic advisor for numerous specialty insurers (fidelity, D & O, professional E & O) on a range of compliance obligations, policy design, coverage opinions, subrogated claims and defense matters.
- Advisor to organizations on anti-corruption and bribery policies, also providing investigation support, incident response and litigation counsel to organizations and boards facing crisis situations.
- Ross was admitted to the British Columbia bar in 1988. He is a graduate of the University of Toronto with a Bachelor of Laws in 1987. He received a Bachelor of Arts in Economics (cum laude) from the University of Saskatchewan in 1984 and previously attended the University of Victoria.
Zain in the National Leader - Managing Partner of the Canadian Forensic Integrity Services practice and the America’s Mining and Metals Sector Leader. Zain is focused on helping companies develop pragmatic Anti-Corruption Compliance programs through the development of a structure that engages people, develops processes and leverages technology.

He has specialized in the Mining and Metals sector but over the course of his career, Zain has led investigations within a wide variety of industries.

Prior to joining EY, Zain was a Senior Vice President at one of the world’s leading global banks and held the position of Anti-Bribery & Anti-Corruption Officer and was responsible for ensuring the financial institution’s compliance with anti-corruption legislation, including but not limited to, the Foreign Corrupt Practices Act (“FCPA”) and the U.K. Anti-Bribery Act.

Zain has also investigated matters involving fraud and suspicious circumstances and provided advice to clients on fraud limitation and loss prevention policies. He has conducted numerous assignments related to allegations of management and employee fraud, source and use of funds analysis and has consulted with clients in implementing practical and effective anti-corruption and anti-fraud controls. Through his career, Zain has interacted with various levels of government agencies including law enforcement departments.

Selected Experience

Anti-Corruption and Anti-Fraud Compliance Assessments – Conducted several anti-corruption and anti-fraud compliance assessments for mining companies with global assets, including investigative responses to allegations of violations of compliance policies (including whistleblower allegations) and development of appropriate remediation strategies.

Anti-Corruption Due Diligence – Successfully led an integrated anti-corruption due diligence team on behalf of a Canadian mining company that was in the process of divesting itself of high risk global assets in South America.

Anti-Corruption Compliance Investigation – Successfully investigated and restructured procurement processes to uncover kickback arrangements at international mine sites resulting in cost containment and transparent financial reporting.

Anti-Fraud Services – On behalf of companies within a number of industries, including the Mining, Financial Services, Hospitality and Media & Entertainment sectors, provided advisory services related to various components of the company’s anti-fraud program. Assignments covered assorted components of the Anti-Fraud cycle, which could include assessing and evaluating the preliminary Anti-Fraud Program, facilitating a scheme and scenario based fraud risk assessments and providing recommendations where warranted.
James Walker, Partner, Richards Kibbe & Orbe

James Walker concentrates in government investigations, complex commercial litigation, and professional liability. He has extensive experience representing audit committees and individuals in FCPA investigations.

Mr. Walker has been active in city and state bar associations. He chairs the New York County Lawyers’ Association Committee on Professional Ethics, serves on the New York State Bar Committees on Professional Ethics and Standards of Attorney Conduct, and has served on the New York City Bar’s Professional Discipline, Professional and Judicial Ethics, Professional Responsibility, and Securities Regulation Committees.

Mr. Walker is a frequent lecturer on legal ethics, preserving privilege in internal investigations, cybersecurity and cryptocurrencies.
Greg has extensive experience representing business entities of all sizes, including closely-held and family businesses and large and small public companies. He regularly represents these clients in financing transactions, mergers and acquisitions, contract negotiations and disputes, strategic planning, legal compliance and general corporate matters. Greg also has extensive experience in securities matters, including advising clients with regard to their private and public offerings of securities (including initial public offerings) and their ongoing disclosure obligations. Greg is an adjunct professor at the University of Florida Levin College of Law and the University of Warsaw Law School in Poland, a frequent lecturer and contributor to legal periodicals, a member of the U.S. Securities and Exchange Commission's Advisory Committee on Small and Emerging Businesses. He is Chair of the annual Federal Securities Institute. Greg served as the Chairman of the American Bar Association's Middle Market and Small Business Committee.

Greg formerly served as Branch Chief at the U.S. Securities and Exchange Commission and Assistant General Counsel for the Federal Home Loan Mortgage Corporation, both in Washington, D.C., prior to entering private practice in Tampa, Florida. He holds the highest rating assigned by Martindale-Hubbell. He is a member of the U.S. Supreme Court, Florida and District of Columbia Bars and a Fellow of the American Bar Association. Mr. Yadley is a graduate, cum laude, with Highest Honors in English from Dartmouth College and received his law degree, with Honors, from George Washington University.
One Chance To Get It Right – Conducting An Effective Internal Investigation

American Bar Association
Business Law Section
Middle Market and Small Business Committee
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James Q. Walker
Richards Kibbe & Orbe LLP
200 Liberty Street
New York, NY 10281
Hypothetical

Comfort Craft ("CC") is a furniture manufacturer based in Ohio with plants and warehouses in the U.S. and Canada. CC recently hosted an SEC examiner from the SEC’s Office of Compliance Inspections and Examinations for several days. A week after her departure, the SEC examiner calls the CFO and states (1) CC’s revenue projections substantially surpass projections by its competitors, and (2) the Staff had difficulty reconciling reported warehouse inventory levels with monthly sales figures. The examiner requests a meeting to discuss these issues.
Hypothetical

CC’s CFO is someone you have advised on small matters relating to CC. He calls you to discuss the conversation with the SEC examiner, mentions he has concerns about revenues reported in two regions, which have consistently exceeded targets, and asks whether you can look into the situation. He suggests that you report to him, adding it would be good to bring CC’s Audit Committee into the loop.
Hypothetical - Questions

1. Who is the client? Who should be the client?
2. How do you structure the reporting arrangement?
3. What steps do you take to commence this inquiry?
4. Do you contact the SEC examiner? When?
Hypothetical – More Facts

You recommend reviewing emails of staff in the warehouse and distribution centers near Calgary, Alberta and Morgantown, West Virginia, and then following up with interviews of those staff and regional managers.
Hypothetical– Questions

5. Will you interview the regional managers first or after interviewing staff?

6. Any issues you should address prior to collecting data and conducting these interviews in the U.S. and Canada?

7. How will you conduct these interviews? What will you say to witnesses?
You interview a sales rep who works for the regional manager in Morgantown. She is willing to talk, but insists that as a whistleblower what she reports must be confidential and shared with nobody else. She asks whether she should have her own lawyer present. Before you respond, she begins explaining that her boss has been under incredible pressure to meet sales targets, and had an arrangement with the warehouse manager to report additional sales shipments each month and maintain a separate book of actual sales. She blames the CFO for putting unreasonable pressure on her boss.
Hypothetical – More Facts

8. What should you advise the sales assistant with respect to her request to keep her interview confidential?

9. How should you respond to her question about having a lawyer present?
Hypothetical – More Facts

You retain a forensic accountant to assist with the investigation, and the accountant confirms that similarly false sales records have been generated in Morgantown and Calgary.
Hypothetical – More Facts

10. When should you involve the forensic accountant?
11. What steps should you take in connection with retaining the forensic accountant?
You complete your investigation, prepare a report that you share with the full CC Board, management and CC’s outside auditor. You also share the most significant interview memos with the company’s outside auditor.
Hypothetical – More Facts

12. Can plaintiffs in follow-on civil litigation against SS compel disclosure of the following in follow-on shareholder lawsuits?
   • Witness interview notes and memoranda?
   • The investigation report?
You meet with the SEC to report on your findings. During the meeting you share information about the people you interviewed, provide specific references to statements made by certain witnesses (including the Morgantown Sales Rep), and provide a binder of key documents, but you do not give the SEC interview memos or summaries or the written report.
13. Can plaintiffs compel disclosure of the following in the civil lawsuits?

- Attorney notes from the SEC meeting?
- Copies of the documents shown to the SEC during the meeting?