

*Addressing Trends... Sharing Solutions*

THE WEB CONFERENCE SERIES FOR CORPORATE COUNSEL

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## How to Conduct an Internal Investigation

The Web Conference Series for  
Corporate Counsel

September 12, 2007

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## Addressing Trends... Sharing Solutions

- Today's summary in November *InsideCounsel*
- Advance copy for today's participants
- Visit [Foley.com/webconference](http://Foley.com/webconference) for a copy of the presentation and recording of the program

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## Today's Panelists

### Annie Goranson

Corporate Counsel, Symantec Corporation

- Focuses primarily on litigation matters and counseling internal clients on dispute resolution issues
- Formerly in private practice; assisted international and domestic clients in conducting internal investigations and responding to investigations by various government and regulatory authorities



## Today's Panelists

### Brian Chilton

Senior Counsel, Foley & Lardner LLP

- Member of the firm's White Collar Defense & Corporate Compliance group
- Former federal prosecutor; Has led investigations for the US government and companies worldwide
- Focuses on counseling corporations and conducting internal investigations regarding compliance with the FCPA and other federal criminal laws



## Today's Panelists

### Ivonne Mena King

Partner, Foley & Lardner LLP

- Member of the firm's White Collar Defense & Corporate Compliance and Securities Litigation, Enforcement and Regulation groups
- Represents clients in connection with compliance, litigation, internal and government investigation issues
- Focuses on FCPA and defends clients under investigation by SEC, DOJ and US Attorneys Office



## Today's Moderator

### Robert Vosper

Editor, *InsideCounsel*

- *InsideCounsel* is the leading publication exclusively for general counsel and other in-house counsel
- Editorial mission – be the business and management tool for the corporate legal department
- Dedicated to the exploration of the relationship between in-house counsel and the law firms that serve them



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## Live Meeting Poll

Polling Question #1

**How many internal investigations did your  
company conduct during the last complete fiscal  
year?**

- None
- Less than 5
- 6 to 10
- More than 10

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## Why Conduct an Internal Investigation?

- Element of an effective compliance program and fulfills board's duty to investigate
- Determine if federal/state liability before government or whistleblowers
- Identify and end improper/illegal practices
- Minimize criminal and civil exposure to extent possible
- Minimize sanctions
- Public relations

## How Issues Arise

- Hotline calls
- Company compliance audits (SOX)
- Employee allegations/whistleblowers
- Government audits
- Government investigations, subpoenas, search warrants
- Media reports
- Competitor complaints



## In-House Counsel's Role

- Preventing and detecting fraudulent activity
- Coordinating with others in the organization to reduce risk and ensure compliance
- Coordinating with IT

## In-House Counsel's Role

- Initial Notification and Communication Issues
  - D&O and other insurance carriers
  - Regulators
  - Public Relations – talking points
  - Internal employee communications
  - Relevant employees
  - Contractors and vendors

## Who Should Conduct?

- In-house Investigators
  - Non-lawyers
  - Lawyers
- Outside Counsel



## Who Should Conduct?

- Use in-house investigators when:
  - Allegations are relatively routine
  - Allegations involve relatively minor technical or reporting errors

## Who Should Conduct?

- Use outside counsel when:
  - Company suspects misconduct by high level officers or employees
  - Misconduct has been systematic or ongoing
  - Potential financial exposure is significant
  - Subject matter is likely to result in law enforcement activity or media coverage

## Who Should Conduct?

- Practice pointers for in-house investigators
  - Ensure that in-house counsel is not also acting in business advisory role or performing non-legal functions relevant to the investigation
  - Generally, senior officials should not attend witness interviews

## Who Should Conduct?

- Practice pointers for in-house investigators (cont.)
  - Mark all communications “privileged”
  - Keep investigation documents and materials (notes, memos, files, etc.) separate from other company business matters



## Live Meeting Poll

### Polling Question #2

**For all internal investigations conducted by your company that you are aware of, outside counsel has been retained to conduct the investigation:**

- Never
- Some, but rarely
- About half the time
- In most instances
- Almost always

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## Developing the Facts

- A critical part of any investigation
- Two key components
  - document collection, organization and review
  - witness interviews
- Eight steps to effectively collecting, organizing, and analyzing documents
- Consider privilege issues each step of the way

## Investigative Action Plan – Documents

- Step One: Define the mandate in letter to inside or outside counsel
- Step Two: Draft an investigative plan
- Step Three: Preserve documents

## Live Meeting Poll

Polling Question #3

**My company's electronic document retention policy regarding emails calls for the deletion of emails from all hard drives and servers:**

- Every 90 days or less
- Greater than every 90 days but less than yearly
- Annually
- Never
- I don't know what our policy is

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### Investigative Action Plan – Documents

- Step Four: Notify employees if government investigation
- Step Five: Start developing the facts through document gathering

## Live Meeting Poll

Polling Question #4

**My company has sufficient resources and personnel to assign someone from our IT department to assist in gathering and maintaining the electronic information**

- Yes, but they will still be expected to do their full-time duties
- Yes, and they will be permitted to adjust their full-time duties as needed
- No

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### Investigative Action Plan – Documents

- Step Six: Organize documents
- Step Seven: Review documents
- Step Eight: Prepare chronology

## Investigative Action Plan

- Conduct substantive witness interviews
  - Identify witnesses based on preliminary interviews and documents
- Prepare for witness interviews
  - Create witness outline
  - Compile key documents concerning witness
  - Generally, avoid sharing documents that witness may not have seen



## Investigative Action Plan – Current Employee Interviews

- Give and document “Upjohn warning”
  - Upjohn Co. v. United States, 449 U.S. 383 (1981)
- Notify employee that counsel represents the company, not the individual
- Explain that company holds the privilege
- Ask employee to keep interview discussions confidential to avoid waiving privilege
- Avoid giving legal advice to employee

## Investigative Action Plan – Interview Memoranda

- Generally, prepare formal interview memoranda
- Avoid taping interviews
- Recommend against including counsel's work product (i.e. mental impressions, conclusions, opinions)
- Attach documents referred to in interviews

## Investigative Action Plan – Former Employee Interviews

- Interview current employees first
- If key witnesses are former employees, interview after current employees
- Counsel should assume that they will have only one opportunity to interview former employees

## Strategic Considerations

- Avoiding prosecution
  - Prosecutors less likely to charge the corporation if:
    - Corporation timely and voluntarily discloses wrong doing
    - Corporation cooperates with the investigation – waives privilege
    - Corporation takes corrective action – disciplines wrongdoers
    - Corporation has effective compliance program

## Strategic Considerations

- Principles of Federal Prosecution of Business Organizations (the “McNulty Memorandum”)
  - In December 2006, DOJ revised guidelines governing federal prosecution of corporations
  - Judge Kaplan’s 2007 ruling in KPMG matter
  - Main purpose is to increase “emphasis on and scrutiny of the authenticity of a corporation’s cooperation”



## Strategic Considerations

- Evolving concept of cooperation
  - Includes providing witnesses, documents, and analysis when requested by government
  - Lying to private counsel conducting the internal investigation can result in criminal charges of Obstruction of Justice and False Statements
  - Cooperation may mean conditioning payment of attorney fees for individuals on their agreement to be interviewed by the prosecutors and more

## Strategic Considerations

- The Seabord Report
  - Issued by SEC on October 23, 2001
  - SEC considers the same types of factors:
    - Complete cooperation with SEC
    - Company hired outside counsel to conduct thorough investigation
    - Self-reporting of misconduct
    - Company produced details of internal investigation
    - Company did not invoke privilege
    - Employee wrongdoers terminated
    - Company strengthened internal controls

## Strategic Considerations

- Activities that impede a government investigation include:
  - Giving inappropriate instructions to employees
  - Delaying the production of records
  - Destroying records
- These activities could also lead to charges of obstruction of justice

## Live Meeting Poll

Polling Question #5

**With respect to disclosure of an investigation to the government, our company:**

- Has never done so
- Did so, and wishes we had not
- Did so, and felt that it helped in reaching a suitable solution with the government
- Did so, but did not think it made any difference with the government

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## Strategic Considerations

- Voluntary disclosure
  - Benefits
    - Government may decrease civil penalties
    - May decrease likelihood of criminal prosecution
    - Even if government prosecutes, disclosure is a mitigating factor

## Strategic Considerations

- Voluntary disclosure:
  - Risks
    - Alerts government to the problem
    - Expensive, requires resources, distracts from business
    - Requires the company to provide facts and analyze data for the government
    - Often requires privilege waiver
    - No guarantee of a favorable outcome

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**Thank you for your participation**

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