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Leave The Sleuthing To The Experts

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The ancient Greeks, while exhorting their youth to “know thyself,” knew all too well that investigating your own motives and impulses was nigh impossible.

Today, officers and directors of our industries are confronted with a related issue. How do you investigate yourself?

When an employee or third party publicly accuses the organization of discrimination, financial irregularity or any abuse of power, it is clear that the company must attempt to determine the truth about itself. Common sense and legal defense strategy demands it.

However, if it is hard for one man to know himself, it is exponentially more difficult for a hierarchical entity to direct employees to determine the truth about its peers and subordinates.

If a company president is accused of sexually harassing his executive assistant, an internal investigation by the president’s subordinates may be instinctively distrusted as a whitewash.

Even minor discrepancies in the internal report can become significant because the investigator is an employee. This employee will become the primary witness in any ensuing case.

If she forgets a fact or cannot decipher her own notes or cannot give a sound logical basis for who was interrogated, who was not, what order of witness she chose and how she reached her ultimate conclusion, the company is creating new liability.

The reason is that the employee-investigator (typically a senior manager or HR professional) never enjoys the presumption of objectivity.

In addition, the employee-investigator’s own employment history, both before and during the investigation, becomes fair game for plaintiffs’ counsel to examine for hypocrisy. Her motives are imputed to the company.

Under principal-agent doctrines, the internal investigator can open the door to derivative claims of retaliation for a particularly rough interview of the claimant.

If the investigation or investigator is distrusted, the charge grows stronger. A final resolution that is trusted by the public, judiciary, employees and the company itself can prove elusive when a company fails to go outside, to a skilled and objective third-party investigator.

The mere act of bringing in an outsider to conduct the investigation connotes a seriousness of purpose. A tone is set. Legitimacy is injected into the process. Witnesses tend to reveal truth more freely to an outsider.

While the most cynical of employees or government agents may still choose to distrust the outside investigator, the overall perception of fairness will increase.

An outside party will have fewer qualms about reporting unbiased and clear truth to the decisionmakers. An outside party will have less reluctance to suggest an unpopular course of action or a new direction.

Even the Equal Employment Opportunity Commission has opined that an outside investigator is important where: objectivity and lack of bias is very important; the complaint involves a high-level manager; using an inside investigator would result in an abbreviated, less-thorough review; or conflicts of interest or prior relationships exist.

An outside investigator is almost always best when the issues involve accusations of corporate self-dealing or breaches of fiduciary duty, allegations of public employee theft or financial irregularities, sensitive harassment discrimination (religious, sexual, racial or other) complaints, molestation or assault issues, or abuse of power complaints.

The major advantages of the outside investigator are speed (specifically hired to do the project, the third-party works quickly, without distraction); expertise (many HR employees lack investigating experience and skills); being a good witness (experience and "conditioning" for this skill); confidentiality; impartiality (HR is never viewed as unaligned); and usually more information from witnesses ("I'll never have to see this person again").

Furthermore, if the outside investigator is an attorney, there is value in attorney-client privilege.

If unrelated issues emerge during an investigation, the attorney-investigator can reveal those, advise accordingly and keep the revelation private.

Also, near the end of the investigation, the outside attorney can be freer to discuss the significance and meaning of his findings.

A lawyer is more likely to recognize related legal issues if the results of the investigation must be shared with governmental entities like the Department of Justice.

Are there downsides?

One disadvantage of bringing in an outside investigator has been removed. In March of 2005, President Bush signed amendments to the Fair Credit Reporting Act of 1970 (Public Law 108-159) that excludes third-party investigators from the definition of "consumer reports."

Previously, it had been interpreted to require FCRA reporting, consent and process when third parties investigated employees.

The other is higher costs. Added costs from an outside investigator are not always justified; the more sensitive or consequential the issue, the more easily the fees can be justified.

If an issue is particularly sensitive or involves high monetary risk, the best way not to fool yourself is to retain a third-party investigator.

An outside party can get to the root of the problem, so that prudent decisions can be reached by the board or management, unencumbered by direct involvement.

A third-party investigator can more easily avoid fanning the flames of a scandal and eliminates the difficult task of having to investigate one's self.

--By Harry **Jones, Anderson & Jones** PLLC

Harry Jones is a shareholder in Anderson & Jones PLLC, a full-service law firm based in Dallas. He specializes in labor and employment law and has conducted dozens of both confidential and intensely public investigations.

When an employee or third party publicly accuses the organization of discrimination, financial irregularity or any abuse of power, a third-party investigator is often the best way for the company to investigate itself, says Harry Jones of Anderson & Jones PLLC.