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INTERNAL INVESTIGATIONS SPECIAL COMMITTEES

Given the strict regulatory environment and close scrutiny surrounding corporate activity, companies often form special committees to conduct independent internal investigations into potential misconduct. Understanding the key issues and best practices involved in this process is essential for companies and their counsel to avoid the pitfalls that threaten the effectiveness of these committee-run investigations.

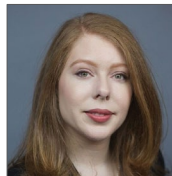


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In recent years, companies increasingly have been undertaking internal investigations in an effort to uncover and remediate corporate wrongdoing. Some internal investigations are handled by the company's board of directors, if a majority of the board is comprised of independent directors, while others are carried out by the audit committee (see *Box, Audit Committee Investigations*) or other existing board committee. In many cases, however, the board creates a special committee of independent board members specifically to conduct the investigation.

Typically, a special committee is used to investigate large matters where the board of directors is concerned about the company's ability to conduct an independent investigation (for example, because the allegations implicate the company's senior management). Common scenarios include where:

- The company has made a significant accounting restatement.
- A government agency is investigating the company.
- The company's internal or outside auditors have raised an issue of actual or potential misconduct or inadequate internal controls.
- The company suspects potential antitrust violations and is considering applying for amnesty under the Department of Justice's (DOJ's) Leniency Program for antitrust violations (for more information, search [Leniency Program for Antitrust Violations](#) on Practical Law).
- A whistleblower has made serious allegations against a member of management or the board of directors.
- The board plausibly suspects personal misconduct involving senior management.
- Plaintiffs have filed or threatened to file a derivative action against the directors and officers for breach of fiduciary duty (these threats are usually referred to as shareholder demands and are often a prelude to commencing litigation) (for more information, search [Shareholder Derivative Litigation: Special Litigation Committees](#) on Practical Law).

This article highlights key issues surrounding an internal investigation conducted by a special committee of independent directors, including:

- The considerations involved in forming the committee.
- The committee's retention of independent legal counsel, experts, and other advisors.
- The roles and responsibilities of the committee and its counsel in conducting the investigation.
- The committee's report on its findings and conclusions at the end of the investigation.
- The disciplinary and remedial actions that the committee might recommend or employ.

The work of a special committee and its counsel is challenging. It requires good judgment, a willingness to make tough decisions, constant vigilance to preserve the committee's independence and privilege, and trust between the committee and its counsel. This article provides guidance on best practices. However, each investigation is different so judgments about the applicability of these practices will need to be made

throughout an investigation to independently and thoroughly conduct the investigation based on the facts and circumstances encountered.

FORMING THE COMMITTEE

Important issues for the company and its counsel to address in forming a special committee include:

- The selection of the committee members and size of the committee.
- The independence of the committee.
- The compensation of the committee members.
- The scope of the committee's authority.

SELECTION OF COMMITTEE MEMBERS

The selection of committee members plays a critical role in the effectiveness of the investigation. The company's in-house counsel generally assists the board of directors in making decisions about the composition of the committee where in-house counsel's conduct is not at issue.

The committee should be comprised of at least two independent directors (see below *Independence of the Committee*), however, three is preferable. Where the committee consists of three or more independent directors, the board of directors generally appoints one director as the chairperson.

If the board of directors currently does not have enough independent directors to serve on the committee, it may add new independent directors to the board. In doing so, the board should ensure it complies with the company's bylaws and all applicable state corporate laws. The expectation should be that any newly added directors are permanent and will remain on the board after the investigation concludes.

Some factors the board of directors should consider in selecting the committee members include the candidate's:

- Availability and interest to serve given the significant time commitment involved in overseeing and conducting the investigation.
- Expertise in the subject matter of the investigation.
- Previous board committee experience.
- Judgment.
- Ability to:
 - work collaboratively;
 - act decisively; and
 - perform in a deposition or at trial.

INDEPENDENCE OF THE COMMITTEE

In forming the committee, the board of directors must assess whether there are any conflicts of interest that might undermine the independence of the committee members or create an appearance of lack of independence. Selecting committee members who are not independent can:

- Lead to the loss of protections under the business judgment rule (for more information, search [Criminal and Civil Liability for Corporations, Officers, and Directors](#) on Practical Law).

AUDIT COMMITTEE INVESTIGATIONS

A board of directors often tasks the company's audit committee with overseeing internal investigations, particularly for investigations of Foreign Corrupt Practices Act (FCPA) violations, because the audit committee:

- Has specialized knowledge.
- Already exists.
- Is comprised of independent directors.

The best practices that should be employed in the context of an audit committee investigation are similar to those that apply in a special committee investigation.

An audit committee also may undertake an investigation on its own initiative where consistent with its existing charter after discovering potential misconduct in the course of its regular responsibilities, for example, from:

- **An employee's anonymous report.** Section 301 of the Sarbanes-Oxley Act of 2002 (SOX) requires audit committees of public companies to establish procedures for employees to anonymously report potential accounting or financial fraud (15 U.S.C. § 78j-1(m)(4)).
- **The company's outside auditors.** Section 10A(b)(1)(B) of the Securities Exchange Act of 1934 requires outside auditors to "inform the appropriate level of the management of the issuer and assure that the audit

committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts."

- **An internal auditor.** Public companies generally have an internal audit function to provide management and the audit committee with ongoing assessments of the company's risk management and internal control processes (see Section 303A.07, NYSE Listed Company Manual).

SOX Section 301 authorizes audit committees to engage and pay independent counsel and other experts to help carry out their duties. The audit committee's counsel must advise the audit committee that disclosing any information about its investigation to the company's outside auditors could waive the committee's attorney-client privilege or work product protection, depending on the jurisdiction. If it intends to disclose the information to outside auditors, the audit committee should consider entering into a confidentiality agreement to help decrease the chance that a court finds a waiver of the attorney-client privilege or work product protection.



Search [Audit Committee Role and Responsibilities Toolkit](#) for a collection of resources addressing the governance standards for and duties of an audit committee.

- Nullify the value of the committee's work.
- Decrease the likelihood of reaching a favorable settlement with the government.

Common conflicts of interest include where a person was:

- Directly involved in the alleged misconduct.
- Not directly involved in the alleged misconduct but could potentially be held liable due to the person's position with the company.

Members of management generally do not serve on the special committee where the investigation concerns an entity's or a person's misconduct. Additionally, it is preferable that the committee not include any members of the compensation committee.

To establish the independence of the committee, the best practice is to populate the committee with board members (possibly including new board members) who are "above reproach" (see, for example, *Booth Family Tr. v. Jeffries*, 640 F.3d 134, 143 (6th Cir. 2011)). The board of directors should assume there will be litigation over the committee's independence, and review all associations a director has with:

- Conflicted directors.
- Any individuals who are potential targets of the investigation.

The typical basis for a conflict is a person's potential involvement in the conduct the committee is investigating. Many potential conflicts of interest, however, are difficult to identify. Recent court decisions show that judges are willing to find conflicts of interest in a wide range of relationships, for example:

- A director and her husband's co-ownership of a private plane with the company's controlling shareholder, which showed an "extremely close, personal bond" between the families (*Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016)).
- A mutually beneficial ongoing business relationship between a director and the controlling shareholder (*Sandys*, 152 A.3d at 134).
- The company's, committee members', and alleged wrongdoers' significant ties to the same university, which were "so substantial that they cause[d] reasonable doubt" about the committee's independence (*In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 930-35, 942-48 (Del. Ch. 2003)).



- A director's 50-year friendship with the company's chairman (*Del. Cty. Empls. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022-23 (Del. 2015)).

Although not determinative, the board of directors also should assess whether a proposed committee member is independent under any relevant stock exchange rules (see, for example, *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 59-61 (Del. Ch. 2015)).

receive greater compensation than other members of the committee, particularly where the chairperson takes on a heavier workload.

Overall, compensation should generally be in line with the compensation paid to chairpersons or members of other standing committees. If the investigation takes longer than expected, the board of directors can amend the committee's compensation during or preferably after the completion of the investigation.

After the committee retains independent counsel, the committee and its counsel should reevaluate the independence of the committee members.

After the committee retains independent counsel (see below *Legal Counsel*), the committee and its counsel should reevaluate the independence of the committee members. Further, to maintain the independence of the committee throughout the investigation, the committee should:

- Mandate that management and in-house counsel have no involvement in the decision-making for the investigation.
- Where feasible and depending on the nature of the allegations, limit committee members' contact with any officers under investigation.
- Discourage committee members from casually discussing the investigation with directors not on the committee, including during board of directors meetings, except for updates on the progress or status of the investigation generally.
- Encourage committee members to consult with committee counsel before any interaction with non-committee members.

COMPENSATION OF COMMITTEE MEMBERS

In addition to receiving compensation for serving on the board of directors, committee members typically also receive compensation for serving on the committee if a material amount of work is required. Particularly where there is a lack of precedent, a board of directors can, where the expense is justified, engage a compensation consultant to advise on what other companies typically pay committee members in similar situations.

To avoid the perception that the board of directors is influencing the committee's decision, the board should try to set the compensation before the committee begins its work or, where the workload is uncertain, after the work is completed. If the committee has a chairperson, the chairperson may

AUTHORITY OF THE COMMITTEE

The independent board members should determine a committee's authority to conduct an internal investigation. Assuming a majority of the board is independent, the independent board members should pass a resolution memorializing the committee's authority. The resolution should state:

- The reasons for the investigation.
- A description of the scope of what the committee will investigate.
- That the board of directors is delegating the investigation to either:
 - an existing committee; or
 - a new committee established as part of the resolution.
- Whether the committee will:
 - make final decisions on the issues; or
 - report its recommendations to the board of directors, which retains final decision-making power.

To maintain independence, where the board of directors will make the final decisions following the committee's investigation, the resolution also should state that the committee's findings and recommendations are not subject to the board's approval.

If the board of directors is comprised of a majority of independent directors, and the independence of those directors is clear, the board generally will retain decision-making authority. However, factors that might weigh in favor of the committee having decision-making authority include:

- The seriousness of the issues raised.
- The need for special expertise in dealing with the issues.

- The learning curve and time commitment necessary to properly evaluate the issues.

The board of directors also should provide the committee with the authority to:

- Direct the company to implement a litigation hold for all relevant employees or business units (for more information, search [Implementing a Litigation Hold](#) on Practical Law).
- Obtain documents.
- Interview any current employee.
- Request any former employee to sit for an interview.
- Retain, at the company's expense, experts and advisors, including independent legal counsel (see below *Retaining Advisors*).

This delegation allows the committee to direct the investigation without the board of directors' day-to-day review of the committee's actions.

If the committee's scope of authority needs to be revised due to additional allegations or newly discovered information, the committee can request that the board of directors expand its authority.

RETAINING ADVISORS

The committee should be authorized to retain its own independent legal counsel, experts, and other advisors to provide advice and guidance on issues related to the investigation. The need for outside experts is a judgment call for the committee to make with committee counsel's advice. Experts are often expensive and, if they are unnecessary, the temptation to hire experts should be resisted. On the other hand, if expertise is needed, declining to hire experts is unwise.

LEGAL COUNSEL

The committee should retain its own counsel to:

- Provide advice on how to conduct the investigation.
- Conduct certain parts of the investigation that the committee delegates to counsel.

Committee counsel should represent only the committee and not the company or the full board of directors.

Beyond the typical review of relevant skills and experience, the committee should ensure that its selected counsel does not have any conflicts of interest. Specifically, committee counsel should be independent from:

- The board of directors.
- The company's management.
- Any individual who is a potential target of the investigation.

Further, committee counsel should not be the company's regular outside counsel.

Committee counsel's retention letter should state:

- The potential misconduct to investigate.
- The scope of the inquiry.
- That counsel will advise the committee of its legal rights and obligations.

The committee can later expand the scope of counsel's engagement. However, the committee, not committee counsel, must control the overall investigation (see below *Committee Versus Committee Counsel*).

EXPERTS AND OTHER ADVISORS

Similar to committee counsel, any experts or other advisors the committee retains must be independent from:

- The board of directors.
- The company's management.
- Any individual who is a potential target of the investigation.

The committee and committee counsel must not select experts or advisors who the company uses regularly. It is preferable that the experts and advisors have not previously performed any material recent work for the company. (See, for example, *Kahn v. Tremont Corp.*, 694 A.2d 422, 426, 429-30 (Del. 1997).)

Committees typically engage the following experts and advisors:

- Forensic accountants.
- Economists.
- Subject matter experts with specialized industry-specific knowledge.

The engagement agreement with any selected expert or advisor should describe:

- The scope of the engagement.
- The tasks that the expert or advisor will perform.

CONDUCTING THE INVESTIGATION

In conducting an internal investigation, it is critical for the committee and committee counsel to understand:

- Their separate roles and responsibilities.
- How to perform document collection and review.
- How to conduct witness interviews.
- Best practices for maintaining the attorney-client privilege and work product protection throughout the investigation.





COMMITTEE VERSUS COMMITTEE COUNSEL

The committee (and not its counsel) directs the investigation. In this role, the committee should:

- **Set the agenda and determine the timing and number of committee meetings.** The committee should meet regularly with committee counsel. A committee typically holds monthly meetings, however, the pace of an investigation ultimately dictates the frequency of the meetings. The committee may schedule special meetings and generally can adjust the schedule when necessary.
- **Provide ongoing input to committee counsel.** The committee should communicate regularly with committee counsel to control the focus and scope of the investigation. This might include making suggestions for committee counsel to evaluate and provide feedback. However, the committee should remain fully engaged in the investigation and must not relinquish its decision-making responsibilities to committee counsel.

While the committee can play an active role in the investigation, it should direct committee counsel to carry out the committee's instructions to maintain the attorney-client privilege and work product protection. The committee also must retain both the reality and appearance of being in charge and engaged to demonstrate its independence.

Committee counsel should always maintain independence from company counsel. However, committee counsel might be able to find areas where it is efficient to cooperate with company counsel without compromising independence (see *Box, Common Interest and Joint Defense Agreements*).

Typically, committee counsel's primary responsibilities are to:

- **Provide the committee with guidance on how to conduct the investigation.** This includes advising on:
 - best practices;
 - lines of inquiry;
 - how to implement the committee's directives;
 - document collection and review; and
 - how to interview witnesses.
- **Conduct the parts of the investigation that the committee delegates to committee counsel.** This generally consists of a substantial amount of the day-to-day work but not the ultimate decision-making. Without a mandate from the committee, committee counsel should not aim to investigate any and all potential wrongdoing at the company. However, committee counsel should report to the committee any potential misconduct it discovers that is outside the scope of the investigation.
- **Regularly update the committee on the investigation's current status, key documents, and any important developments.** This includes providing the committee with information on key documents and interviews, as well as any other information or materials the committee requests. Committee counsel can keep the committee informed through:
 - in-person meetings;
 - conference calls;

- emails; and
- memoranda.

- **Draft the committee meeting minutes.** Committee counsel should be responsible for drafting the meeting minutes and should discourage committee members from taking unnecessary notes during the meetings.

In drafting the meeting minutes, committee counsel should:

- Assume the minutes are not privileged. The committee or the company may decide to disclose the minutes to, for example, a government agency or plaintiff's counsel.
- Identify the meeting date, location, and attendees, and indicate that the committee approved the previous meeting's minutes.
- Describe the topics discussed generally and avoid going into detail. For example, counsel can include:
 - general descriptions of past and future activities (such as noting that committee counsel outlined the schedule of upcoming interviews); and
 - an updated tentative schedule for completion of pending work.
- Avoid providing interim conclusions about the investigation.
- Show that the investigation is reasonable.
- Reflect that the committee, not committee counsel, is controlling the investigation.

DOCUMENT COLLECTION AND REVIEW

Document collection and review are critical to reconstructing past events and assisting committee counsel in further fact-finding during witness interviews. In handling document collection and review, committee counsel should try to avoid duplicating the full document review process that company counsel has already performed, while maintaining the independence of the committee's review. This means that committee counsel should:

- Review the process that company counsel used, including the process for locating and selecting documents.
- Determine whether the process that company counsel used was appropriate.
- Point to any search results or documents from company counsel's review process that committee counsel wants to review or wants the committee to review.
- Identify and recommend to the committee any additional:
 - searches for the committee to authorize; and
 - information for the committee to obtain.

In other words, committee counsel should provide the committee with its assessment of what efforts do not need to be duplicated and what additional searches or review are needed. The committee will then direct committee counsel on how to proceed.

WITNESS INTERVIEWS

Committee counsel typically conduct most, if not all, witness interviews. The committee members can participate in any of these interviews, though if they do so, it usually is only for

COMMON INTEREST AND JOINT DEFENSE AGREEMENTS

As part of its strategy for sharing and obtaining information, the committee and committee counsel can enter into a joint defense agreement with:

- Company counsel on behalf of the company.
- Counsel for individual employees.

Common interest and joint defense agreements are useful because they allow parties with similar legal interests who are involved in an investigation or a legal proceeding to share information with each other without waiving the attorney-client privilege or work product protection. Entering into this type of agreement, for example, allows company counsel and committee counsel to avoid duplicative work wherever possible with a reduced risk of waiving the attorney-client privilege or work product protection. It also might be the only viable method to exchange information without waiving privilege.

However, these agreements can jeopardize a company's ability to obtain cooperation credit from the government. A joint defense agreement between the committee and an employee might preclude the company from disclosing information provided by the employee to the DOJ, which conflicts with the DOJ's requirement that companies must disclose all relevant facts about corporate misconduct and the individuals responsible to receive cooperation credit. Accordingly, despite the DOJ's statements that a company's participation in a joint defense agreement does not render it ineligible to receive cooperation credit, the

agreement with the employee could result in the company being prevented from receiving cooperation credit.

The joint defense privilege or common interest doctrine is more easily waived than the attorney-client privilege or work product protection. For example, the joint defense privilege is generally waived if a party to the joint defense agreement becomes an adversary. There is also a risk of waiver for all parties if one party to the joint defense agreement waives the privilege, such as where an employee withdraws from the agreement and agrees to cooperate with the government's investigation of the company. The terms of common interest and joint defense agreements vary on these issues and counsel must carefully consider them before entering into an agreement.

The DOJ often views joint defense agreements with employees involved in the misconduct unfavorably and therefore may provide fewer or no accommodations to a company that is precluded from disclosing information due to these agreements. As a result, the committee and committee counsel should evaluate thoroughly whether to enter into a joint defense agreement with an employee.



Search [Criminal and Civil Liability for Corporations, Officers, and Directors](#) for more on cooperation credit, including the guidance for receiving cooperation credit set out in the Filip Memo and the Yates Memo.

Search [Joint Defense and Confidentiality Agreement](#) for a sample agreement, with explanatory notes and drafting tips.

important witnesses. The committee and committee counsel should request that the company keep them apprised of any impending changes to the employment status of relevant witnesses so they can schedule an interview while the employee is still available.

To maintain the attorney-client privilege and work product protection for witness interviews (see below *Maintaining the Attorney-Client Privilege and Work Product Protection*), committee counsel must:

- Be present at and memorialize any witness interview attended or led by the committee members (for more information, search [Internal Investigations: Witness Interview Memorandum](#) on Practical Law). Committee members should not take notes during the interview.
- Advise committee members that if they discuss the contents of a witness interview with anyone other than committee counsel or other committee members, they risk waiving the attorney-client privilege and work product protection.

- At the beginning of every interview, provide the interviewee with an *Upjohn* warning informing the interviewee that:
 - the board of directors has authorized the committee to conduct an internal investigation into potential misconduct;
 - the committee is investigating the facts and circumstances surrounding the potential misconduct;
 - the committee retained counsel to assist it in its investigation;
 - committee counsel represents only the committee and not the company or the interviewee;
 - the interview is being conducted to assist counsel in gathering facts concerning the investigation to provide legal advice to the committee;
 - the interview is subject to the attorney-client privilege, but the privilege belongs to and is controlled solely by the committee;
 - information discussed in the interview must remain confidential to maintain the attorney-client privilege and, therefore, counsel requests that the interviewee not share



CONDUCTING INTERNAL INVESTIGATIONS: SEC AND DOJ INVESTIGATIONS TOOLKIT

The Conducting Internal Investigations: SEC and DOJ Investigations Toolkit available on Practical Law offers a collection of resources to help counsel and companies prepare for and conduct an effective internal investigation. It features a range of resources, including:

- [Whistleblower Protections Under Sarbanes-Oxley and the Dodd-Frank Act](#)
- [Practical Tips for Preserving ESI](#)
- [Internal Investigations: US Privilege and Work Product Protection](#)
- [Mapping an FCPA Strategy: Internal Investigations and Enforcement Proceedings](#)
- [Ethical Issues for In-House Counsel](#)
- [Letter to Employee Requesting Participation in Internal Investigation](#)
- [Internal Investigations: Investigation Report](#)
- [Internal Investigations Flowchart](#)
- [Conducting an Internal Investigation Checklist](#)
- [Handling a Government Investigation of a Senior Executive Checklist](#)
- [Best Practices for Employee Discipline Checklist](#)
- [Internal Investigations: Witness Interview Memorandum](#)

the contents of the interview with anyone except for the interviewee's attorney; and

- the committee may decide to waive the privilege in the future and disclose to a third party, including the government or regulators, certain information the interviewee provides.

A witness should be allowed to ask questions about the *Upjohn* warning to ensure that the witness understands and is willing to proceed.



Search [Attorney-Client Privilege: Identifying the Attorney and the Client](#) for more on the *Upjohn* test, set out by the US Supreme Court in *Upjohn Co. v. United States*, for determining the applicability of the attorney-client privilege over communications between attorneys and company employees.

MAINTAINING THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

Maintaining the attorney-client privilege and work product protection is critically important to the success of an internal investigation (unless there is a conscious decision to waive privilege). Committee counsel's legal advice to the committee is protected by the attorney-client privilege, and the documents committee counsel creates in the course of the investigation are protected by the work product protection.

To protect against an inadvertent waiver, the committee and committee counsel should:

- As explained above, provide *Upjohn* warnings at all witness interviews and instruct witnesses to keep the discussions confidential.

- Ensure that any non-attorneys involved in the investigation (other than committee members) work at the direction of designated attorneys.
- Include legends on documents and communications indicating that they are protected by the attorney-client privilege or work product protection where applicable.
- In multinational investigations, become familiar with the privilege rules of other relevant jurisdictions and never assume that communications that would be privileged in the US are protected under a foreign jurisdiction's rules.
- Request that committee members review any of the company's public statements about the investigation before the company issues them.
- Wall off the legal department from the investigation if it has exposure for the potential misconduct under investigation.
- Avoid disclosing any documents or other information about the investigation (including the contents of witness interviews, committee meetings, and interim or final investigation reports) to individuals outside the committee, and ensure the committee members are aware that they risk waiving the attorney-client privilege and work product protection if they disclose these materials.

However, the board of directors may require the committee to provide it with interim reports about the investigation, particularly during a lengthy investigation. Given that any information the committee provides to the board of directors might later be disclosed in litigation or voluntarily provided to the government, and because interim conclusions often change over the course of an investigation, the committee should limit providing interim reports to situations where there is a specific reason to do so (for example, where new

developments require the board of directors to expand the committee's scope of authority or where the information the committee's investigation uncovers requires the board to take an immediate action).



Search [Internal Investigations: US Privilege and Work Product Protection](#) for more on ensuring the proper creation and maintenance of the attorney-client privilege and work product protection over communications made or documents created during an internal investigation.

Search [Attorney-Client Privilege and Work Product Doctrine Toolkit](#) for a collection of resources to help counsel navigate the attorney-client privilege and work product protection in federal litigation.



Search [Internal Investigations: Investigation Report](#) for a sample investigation report prepared after the completion of an internal investigation, with explanatory notes and drafting tips.

THE COMMITTEE'S FINDINGS AND CONCLUSIONS

At the conclusion of the investigation, the committee, with or without its counsel, should provide an oral or a written final report of its findings and conclusions to at least the independent members of the board of directors. The committee must decide whether non-independent board members may be present for the report, which is highly dependent on the specific facts and circumstances of the matter at issue, including why those board members are not independent. Where the board has delegated to the committee only the authority to make a recommendation, the full board, ideally with non-independent directors recused, makes the ultimate decision about whether to adopt the committee's findings.

The committee may in some cases provide two reports, one from committee counsel and a second from the committee. Committee counsel's report should detail the work it performed, its legal conclusions, and its legal advice. By contrast, the committee's report should set out its findings and committee counsel's legal conclusions, but should not provide a detailed recitation of facts or any of committee counsel's legal advice on how to proceed.

The committee, with committee counsel's advice and guidance, must decide whether to provide the final report in written or oral form. The advantages of a written report are that it:

- Is easy to understand.
- Contains carefully crafted themes.
- Conveys the results of the investigation consistently.
- Reduces the likelihood that the recipient will misstate, misconstrue, or misremember the investigation's findings.
- Shows, in instances where the committee and committee counsel identified wrongdoing, that the company undertook an internal investigation and has begun to implement remedial measures.

Where the board has delegated to the committee only the authority to make a recommendation, the full board, ideally with non-independent directors recused, makes the ultimate decision about whether to adopt the committee's findings.

The final report should:

- Explain the investigatory process, including:
 - the document review and collection process;
 - some selected key documents (in certain circumstances); and
 - the number of witnesses interviewed.
- Contain the key facts the committee uncovered.
- Provide committee counsel's legal analysis of the committee's findings and advice going forward.

- Could persuade the government that criminal or civil proceedings are unnecessary because:
 - there was no misconduct; or
 - any misconduct has been sufficiently addressed or remediated and is unlikely to reoccur.
- Could be helpful evidence in defending against a shareholder derivative action.



The disadvantages of a written report are that it:

- Is difficult to keep confidential.
- Jeopardizes the attorney-client privilege and work product protection.
- Is potentially discoverable by government agencies or private litigants and could be used as:
 - a roadmap to bring an action against the company; or
 - an admission under Federal Rule of Evidence 801(d)(2).
- Could be used in an employee action against the company for libel (for more information on libel, search [Defamation Basics](#) on Practical Law or see page 58 in this issue).

A middle option is to provide the decision-making body with a PowerPoint presentation so it can follow the main points in an oral presentation. This has become a frequently used option in recent years.

DISCIPLINARY AND REMEDIAL ACTIONS

The committee's investigation might find that certain employees engaged in misconduct. Depending on the committee's authority, it can either recommend or implement disciplinary action against the implicated employees and other remedial actions, such as:

- Enacting new compliance procedures.
- Improving internal controls.
- Promoting ethical behavior and awareness of policies.
- Hiring new personnel.
- Compensating injured parties.
- Suing the employees that engaged in the misconduct.
- Terminating the employees that engaged in the misconduct.

If the government or regulators are unaware of the misconduct, the committee, depending on its authority, must decide whether to report the misconduct or recommend that the company self-report the misconduct. Voluntary disclosure might be advantageous, particularly where extensive misconduct occurred or the company qualifies for leniency under the DOJ's leniency program for antitrust violations. In some instances, particularly in regulated industries, the law may require a company to self-report certain misconduct.

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