

# CONDUCTING AN INVESTIGATION: PROCESS AND PITFALLS

Internal Corporate Investigations of  
Employee Misconduct with Civil and Criminal Exposure

By: Steve Sumner

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**Employee Misconduct with Civil and Criminal Exposure**

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**I. Discussion Topic**

A. **WHY IS A GOOD, THOROUGH, CREDIBLE, INVESTIGATION IMPORTANT TO ACS?**

**II. Steve Sumner's Background**

- A. Licensed since 1975
- B. Primary expertise – trial lawyer (both criminal and civil)
- C. Private practice since 1975
- D. Has directed and coordinated investigations in major civil and criminal cases in both litigation and corporate internal matters his entire career.
- E. Relationship with ACS
  - 1. Has been representing ACS since the inception of the company in 1988.
    - a. Began representing Darwin Deason before ACS was formed.
    - b. First job for ACS – figure out a way to hire Bill Deckelman from EDS.
    - c. Since 1988, has directed and coordinated numerous, and all types of investigations for ACS.

**III. Approach to an Investigation:**

- A. All investigations could result in litigation
- B. Conduct investigation with an eye toward litigation
  - 1. Sensitive to Litigation Issues

- a. Privilege
- b. Work Product Doctrine
- c. Chain of Custody

IV. **Types of investigation:**

- A. Internal investigation only
  - 1. It's amazing how often "Internal Investigations Only" evolve into litigation.
- B. External investigation
  - 1. Investigating conduct of third parties
  - 2. There is always potential for litigation
- C. Litigation – investigation on behalf of either plaintiff or defendant in a litigation setting.
- D. Internal Investigation of Employee Misconduct where the Corporation has both Criminal and Civil Exposure:
  - 1. Key Exposure Test:
    - a. Has there been injury to a third party?
      - i. Client or Customer
      - ii. Government or Government Agency
      - iii. Individuals
      - iv. All of the above parties are potential complainants in a criminal prosecution or plaintiffs in civil lawsuits.
    - b. Why is the above test so critical? Because of the severity or the consequences of criminal and civil exposure.

- i. Indictment
- ii. Debarment
- iii. Monetary penalties under the False Claims Act
- iv. Publicity
- v. Diminished stock value
- vi. Protracted and costly civil litigation

V. **Today's discussion contemplates Investigation Type IV(D) above:**

- A. An internal investigation of employee misconduct with corporate civil and criminal exposure where there has been injury to both the government and client/customers.
- B. Our discussion will focus on the Type IV(D) Investigation because it will typically involve conduct with the greatest potential consequences to the corporation.

VI. **United States v. James Donnell, et al.**

- A. Case encompasses all ingredients of criminal and civil exposure.
- B. Facts:
  1. In early 2001, Bill Deckelman received a report of potential overbilling theft by an ACS business unit that was in the item processing business in Woodbury, Long Island, and Utica, New York. Further, that overbilling/overcharging had the potential to be in the millions of dollars and the victims were Federally regulated Banks and Savings and Loan Institutions on the East Coast.

2. Within 24 hours of Bill receiving the information, our law firm was retained to investigate the alleged misconduct.

C. Key Exposure Test Applied:

1. Third parties had been injured to the tune of possibly millions of dollars.
2. The injured parties were Banks and Savings and Loans institutions (both State and Federally regulated).
3. ACS's exposure was at the highest level since the injured parties were Federally regulated Institutions. Consequently, ACS was both criminally and civilly exposed.

VII. **Company's Initial Decision**

- A. Is this a matter that should be investigated internally vs. retaining outside counsel?

1. Pitfall

- a. By having in-house counsel investigate, there is always a risk of waiver of privileged communication and work product doctrine when the investigation is conducted by in-house counsel. The key test is to determine whether in-house counsel was acting as an attorney rather than a business advisor or "non legal" employee for the communication to be privileged. *U.S v. Lipshy*, 492 F. Supp. 35, 41-42 (N.D. Tex. 1979)



- b. When there is the potential that the internal investigation could result in a criminal law enforcement investigation, then in-house counsel has an inherent credibility problem and arguably a conflict of interest by the company using its own employees to investigate itself.
  - i. Remember, once a case is reported to law enforcement, everyone involved in the investigation becomes a potential witness.
  - ii. The report is now vulnerable to attack and the overall investigation findings are vulnerable to attack by the government and/or a defense attorney at trial. The reason is because in-house counsel is NOT an uninterested witness. He is employed by the company he is investigating.
  - iii. Remember the saying that “the lawyer who attempts to represent himself has a fool for a client.”
  - iv. When there is possible criminal exposure, in-house counsel should not deal directly with the government/law enforcement.
- c. The prudent and safest approach: Retain independent outside counsel to direct and coordinate the investigation as well as author the investigation report.

- d. This is not the type of investigation to be trying to cut costs. The stakes are too high!
- e. Outside counsel should work side-by-side with in-house counsel

VIII. Conducting the Internal Investigation:

A. Scope of Investigation?

- 1. An initial assessment has to be made of the scope of the investigation in terms of numbers of people with relevant knowledge who need to be interviewed, as well as relevant documents and exhibits that need to be analyzed and evaluated. Also, determine whether consultants need to be retained to assist in an audit/computation capacity.

B. People with Knowledge Who Need to Be Interviewed

- 1. Timeliness of Interviews:
  - a. ASAP – the sooner the interviews can be conducted, the better.
  - b. Memories are freshest
  - c. Witnesses have not been influenced by anyone and it is your best opportunity to get to the truth of the matter.
- 2. Prepare to Interview Witnesses
  - a. Although time is of the essence, prepare to interview witnesses by:
    - i. Interviewing or talking with the people who received the initial report.

- ii. Review relevant documents.
  - iii. Obtain and review personnel files.
- 3. Pitfalls:
  - a. It is a pitfall to attempt to cut costs in the area of interviewing witnesses.
  - b. *“Invest and spend on the front end of a case and save big bucks on the back end of the case.”*
  - c. Conduct in-person interviews v. telephone interviews.
    - i. The reason being, very simply, that the stakes are too high to try to cut costs by not conducting in-person interviews.
    - ii. Seeing people, judging their demeanor, observing their body language, and overall credibility, as well as developing a rapport with the witness, can only be done in person. Witness credibility cannot be fully assessed without an in person meeting.

C. Surreptitiously Taping Interviews?

- 1. In 1974, the American Bar Association concluded that attorneys should not “record any conversation whether by tapes or other electronic device...without the consent or prior knowledge of ALL parties to the conversation” because such conduct is deceitful. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 337 (1974).

2. Use of Private Investigators to surreptitiously tape conversations?
  - a. Because of the agency relationship between a private investigator and an attorney, it is still unethical conduct.
  - b. Dilemma for lawyers – The law gives citizens a right to protect themselves, in some states, by surreptitiously taping conversations if they are a consenting party to the conversation, but there are ethical constraints on lawyers, who are at very high risk, for surreptitiously taping conversations.
3. Solutions:
  - a. Have a witness present when interviewing witnesses and don't take ethical chances by surreptitiously taping conversations with witnesses.
  - b. All interviewers should take copious notes.
  - c. Even if surreptitious taping by lawyers and private investigators is unethical, it is still advisable to preserve the content of the interview by consensually taping the conversation. Consequently, after initially interviewing the witness, attempt to obtain a consensual audio or video taping in order to pin the witness down factually and preserve potential testimony.

D. How to Conduct Interviews – Pre-taping

1. Admonishments:
  - a. “We only represent the companies interest and not

the employees individually.”

i. Whether you have a legal duty to give this admonishment to the employee or not, you always should. We don't want to be accused of having tricked a witness into giving an interview.

b. Exposure Question:

i. The witness will invariably ask whether or not they have potential exposure and/or do they need a lawyer?

ii. Response is that we cannot advise them as to whether or not they need a lawyer and we cannot assess exposure.

We simply want to gather the facts.

2. Inquiry of witness:

a. Ask detailed questions

i. Can't just say “tell me everything you know”

ii. The witness needs to be asked detailed questions:

a. Who

b. Where

c. When

d. How

b. Chronological Order

- i. It is beneficial to the witness and the inquirer to proceed through the factual scenario in chronological order.

c. Hard Questions

- i. Don't beat around the bush or be afraid to ask the hard questions:
  - a. Did you do it?
  - b. Do you know who did certain acts?

4. Tell the Truth

- a. Make sure the witness understands that there are benefits for being truthful and consequences for not being truthful in the interview process.

5. Only obtain information and do not provide information to the witness through the framing of the questions.

- a. It is often important to develop a rapport with a witness, and it is common for witnesses to want to obtain information about the investigation, but information should not be disseminated back to the witnesses.

E. How to Conduct Interviews on Audio/Video Tape

1. After the witness has been thoroughly interviewed without taping, and has consented to give an audio or video statement, the following needs to be included in the taping process:

- a. Taping history – time, date, place of taping

- b. Acknowledgements
  - i. The witnesses consented to being audio/video taped.
  - ii. The witness is aware that the attorneys are representing only ACS and not the witnesses interests.
  - iii. There have been no promises of benefit offered.
  - iv. There have been no threats or coercion.
  - v. We have discussed potential criminal/civil exposure and the witness still wants to give a recorded statement.
  - vi. The witness has been told “to only tell the truth.”
- 2. Example of when lawyers could tape interviews
- 3. Two things to include in the interview are:
  - a. “Only want the truth”
  - b. “We have offered no money or benefits for testimony”
- 4. Review areas of inquiry
  - a. Point out, on tape, that we have reviewed the areas of inquiry in advance of taping and, state that we have already been visiting with the witness for a period of time prior to the taping.
  - b. Develop all the relevant points in your notes on tape and if there are any inconsistencies, point out to the witness, on tape, that there has been an inconsistency and have the witness say what is true and what is not true.
- 5. Ending inquiry

- a. Have we covered the entire scope of your knowledge?
- b. If you remember anything in the future, will you call one of us?

F. Ultimate Test Questions regarding Corporate Exposure:

- 1. How high was knowledge or participation of misconduct up the corporate ladder?
  - a. The reason this is a key test is because corporate liability and exposure is effected by determining the level of knowledge and participation up the corporate hierarchy.
    - i. Was there action or inaction by corporate employees?
- 2. The second part of the liability test is whether the misconduct was within the scope of employment.
  - a. Was the misconduct authorized or directed by a superior?
  - b. Can there be any basis for a claim that the misconduct was within the scope of employment?

G. Documents/Exhibits

- 1. Usually dealing with voluminous documents
- 2. Need to locate and assess availability
- 3. The government wants original documents. If the documents are needed for business purposes, an additional set of copies should be made. Bate stamping is preferable if we are cooperating with the government.



#### H. Computations or Calculations of Data

1. In determining injury and damages to injured parties, it is critically important to have accurate calculations and computations compiled as soon as possible.
2. In *Donnell*, we hired KPMG to work under the direction of ACS internal auditors, Mike Shaw and Maddie Lapp, to conduct an internal audit and make the calculations and determination of the amounts stolen.

#### I. Secrecy Admonishment

1. Everyone involved in the investigation needs to be admonished with regard to keeping the information confidential and secret.
2. The reason for confidentiality and secrecy is because of the possibility of the “race to report” before the victims/potential complaints or plaintiffs report the crime to law enforcement.

#### IX. Investigation Report

##### A. Written witness interview reports **MUST** be done!

1. Investigation 101 dictates that witness interviews be reduced to comprehensive written reports!
2. The interview is virtually worthless without a written report!

##### B. Report must be in factual detail with regard to who, when, where and how questions and answers.

##### C. Report the facts with very little conjecture, speculation, or conclusions.

##### D. Keep in Mind re: Report when Drafting:

1. The report will probably be shared with law enforcement, therefore, write the report anticipating that the government will possess the report.
2. The government will be required to tender the report to the defendants so the report needs to be drafted accordingly.
3. *Donnell* resulted in a jury trial. Consequently:
  - a. Both Rebecca Hamilton and I were potential witnesses because we had conducted the investigation and written the report. Everyone involved in the investigation becomes a potential witness and, in fact, Maddie Lapp testified.
  - b. Defendants did possess our Investigation Report which contained our Witness Interview Reports.
4. The same report will be a basis to analyze internal discipline and termination decisions. In *Donnell*, seven employees were terminated and three were indicted.

## X. Case Assessment and Evaluation

### A. Internal Evaluation of Employees' Conduct

1. Escalate?
  - a. Who with knowledge escalated, and who failed to escalate?
  - b. Who covered up?
  - c. From the lowest level of employment, employees with knowledge of misconduct must escalate and not deep six or cover up the information.

i. *Donnell* – Termination criteria:

a. Anyone with either knowledge or participation

b. Credit was given for reporting

B. Decision to Report to Law Enforcement:

1. “Self-reporting” – Report employee’s criminal conduct to law enforcement or not report?

a. Rationale, not been caught yet for over 2 years, maybe it will go away?

b. Or, comply with reporting responsibilities and self-reporting as dictated by the Thompson Memorandum and now under Sarbanes-Oxley.

c. After the witnesses have been interviewed, the documents have been gathered, and the computations have been compiled, an assessment as to reporting responsibilities has to be made. If there has been criminal conduct, there must be self-reporting.

d. There is a totally different dynamic after self-reporting vs. being caught when dealing with the government or with injured parties.

C. How to Self-Report

1. In the *Donnell* case, there was a simultaneous blitzing of reporting.

- a. Both state and federal regulatory agencies were notified in person by lawyers from law firms with either State or Federal regulatory expertise.
- b. The Justice Department was notified in person. Bill Deckelman and I presented our report and our findings to the Justice Department after electing to present the case to the Southern District of New York, rather than the Eastern District of New York. It was our belief and strategy that there would be less publicity generated by a Southern District case than an Eastern District case.
- c. All victims/potential complainants received a letter from Bill Deckelman explaining what had occurred internally and that they would be paid all their money back in full, plus interest.
- d. There were personal meetings with certain injured parties, i.e. Dime Bank, by Bill Deckelman and me.
- e. Hired a public relations firm to control any negative publicity. As it turned out, our strategy was correct and there was no publicity until the case went to trial.

XI. Effect of Self-Reporting:

- A. If you don't, could lose control of the case from a criminal prosecution stand point.
- B. Rapport with the government

1. You want to maintain a good rapport with the FBI and US Attorney. You do so by assisting the prosecution in every way. By gathering and providing documents and/or assisting in witness interviews, etc.
- C. Attorney/Client privilege is waived
1. Review entire investigation with government
  2. Provide reports and handnotes
- D. Why self-report?
1. Recognized defense and obligation
    - a. Thompson Memorandum
    - b. Sarbanes-Oxley
    - c. Donnell was pre-Thompson, but, upon review, we followed the steps subsequently dictated by the Thompson Memorandum.
  2. Much easier to develop a good rapport/good relationship with government:
    - a. Increase chances to be present during witness interviews of employees and agents. It is up to the government, we have no right to be present.
    - b. Donnell – Became good friends and worked with government during prosecution. We were allowed to be present when any ACS employee was interviewed both

before and during the trial preparation. To some extent, we were able to influence the government's press releases.

c. Relationships with members of the government are still paying dividends to ACS on other cases.

3. Credibility with the government

a. Self-reporting will help build future credibility with the government. Chances are improved that the government in the future will believe that ACS does the following:

i. "We investigate wrongdoing at ACS"

ii. "We self-report at ACS"

iii. "We pay back injured parties at ACS"

iv. "We terminate employees for wrongdoing at ACS"

v. "We assist in the prosecution of ACS employees who have engaged in wrongdoing"

E. Most Important Benefits of Self-Reporting:

1. Keeps ACS from being indicted

2. Prevents horribly damaging publicity

3. Prevents any debarment actions

4. Cuts off potential whistle blower or *qui tam* actions

XII. Conclusion

A. Answer to Discussion Question:

1. Why is good, thorough, credible investigation important to ACS?

a. Because ACS is provided value by investigation.

- b. *“Money spent on the front end of a case saves big money on the back end of a case.”*
- c. How much actual cost would ACS still be incurring if ACS had been “caught” in the *Donnell* case rather than to have self-reported?
  - i. There is no question the defendants in the *Donnell* case were middle managers and high enough on the corporate hierarchy to have bound ACS to criminal and civil liability.
  - iii. How much damage would have occurred to the company if the company had been indicted or debarred or had to defend *qui tam* actions?
  - iv. The above constitutes the “back end” of the case. The front end costs cannot be appreciated without projecting the value and costs of back end exposure of a case.
- d. The below computes to “Value” for ACS because of good, thorough, credible investigation:
  - i. *Donnell* example
    - a. ACS was not fined or indicted!
    - b. There were no state or federal regulatory sanctions or actions!
    - c. There were no civil lawsuits by banks or savings and loans!

d. There were no debarment proceedings!

e. No *qui tam* actions!

B. Why?

a. Because there are two components of every case – Cost and Value

b. Good, thorough, credible, investigation provides Value to the company  
and that's why it's important!