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Roundtable: Part II – Corporate Internal Investigations: Later Stages

Part I of this roundtable was published in the September 2008 Issue of The Metropolitan Corporate Counsel. The participants are: **Lynn A. Neils**, Senior Counsel, Johnson & Johnson, and the following from the Firm of Sills Cummis & Gross P.C.: **Bruce I. Goldstein**, Member of the Firm; **Paula A. Tuffin**, Member of the Firm; and serving as Moderator, **Peter G. Verniero**, Co-Chair of the Firm's Corporate Internal Investigations and Business Crimes Practice Group and Chair of the Appellate Practice Group.

Verniero: This is a continuation of our panel discussion on corporate internal investigations. Previously, we discussed the early phases of such investigations, including when to retain outside counsel as well as the importance of preserving the record and maintaining a respectful dialogue with the government in the case of inquiries opened by government subpoena.

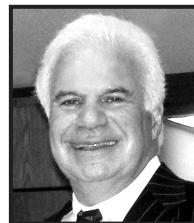
I'd now like to focus on witness interviews and document review.

Paula, do you transcribe or record interviews? Do you rely on notes? What do you say to an employee up front as the company lawyer? Have you looked at documents beforehand or do you conduct interviews first?

Tuffin: My preference is to look at some documents before we actually go in and speak to interviewees. The reason for that is that it helps you orient yourself to the structure of the company. If you're outside counsel and have been called to make an independent assessment and aren't familiar with the inner workings of the company, you need to quickly learn as much as you can and documents can be



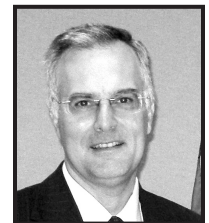
Lynn A.
Neils



Bruce I.
Goldstein



Paula A.
Tuffin



Peter G.
Verniero

an excellent first step. Before you speak to the first interviewee you should have done some due diligence on how the company operates and have at least a basic understanding of the corporate structure and where the interviewee fits within the hierarchy of the company and what his or her responsibilities are. Obviously, your understanding evolves over time as you talk to more and more people, but before you ask the first question you should have already read documents describing the business, the relevant policies and the organizational structure of the company. This will help you develop a sense of where this person fits into the fabric of the entity.

Goldstein: I don't think you can overstate Paula's emphasis on the significance of reviewing documentation before an interview takes place. An initial interview should, if at all possible, be an informed interview. The more educated that you are, the greater the likelihood that you will have a productive interview. Documentation is the name of the game, and if you have the opportunity to review relevant documentation and demonstrate that you have knowledge of the subject matter, you will bring a much greater dynamic to the interview. The last thing you want to do is to conduct an investi-

gation without having the critical documents in hand.

Verniero: I think for efficiency you generally can rely on in-house counsel to suggest the universe of documents and to identify the potential witnesses, provided that there is an understanding that if outside counsel comes up with other witnesses who aren't on the in-house list, then he or she can have access to those witnesses as well as documents you might identify as relevant.

Let's move on. You have received your documents and reviewed them. How about e-mails? Have you done word searches on e-mails?

Tuffin: In a perfect world, yes, that is something I would like to have done. These days, many of the most critical communications happen through e-mails. So you would not want to exclude electronic communication as a body of documents that you hadn't looked at prior to interviewing. Unfortunately, this is not always possible.

Neils: Right – the e-mails can actually be critical, but I don't know if you're always going to have the e-mails before you start the interviews. Unfortunately, sometimes you need to act quickly in these internal

If you have questions for any of the participants in this roundtable, please email them to the moderator at pverniero@sillscummis.com.

investigations. So you might have to go back a second time and image an individual's laptop because of what he or she might have stated in an interview. So, I agree with what everyone said here. It's, ideally, the best situation to have the documents before you do the initial interview, but as a practical matter you sometimes don't have all the documents at that juncture. You might have some. You might, in some cases, have none, and have to go in and just do an interview cold.

Goldstein: Doing the interview without any documentation is, however, far less desirable than having at least some of the relevant documents to help you and the witness focus on the subject of the interview.

Verniero: Let's say your company e-mail system saves e-mails for a 90-day period and then deletes them. Do you automatically suspend your deletion systems, and if so, is that company wide? Is that division wide? Is that just with key players? That's an issue, don't you think?

Neils: It is a significant issue. Outside counsel needs to raise that right away, and in-house counsel needs to raise it internally with whoever is actually handling it. Right, it is an issue, and you need to raise it as soon as possible.

Verniero: The whole area of e-discovery and the Sedona principles, which are a set of guidelines to govern these sorts of issues, need to be addressed. Given our time limit, we have to save those issues for another day. Moving on now, Paula, you've gotten some e-mails and some other documents, and you feel you're in a good position to begin interviewing. How do you start the interviews?

Tuffin: I start the interviews with a basic introduction of myself and anyone who happens to be with me in the room. I typically don't record the interview, but have a young associate, or possibly a paralegal, writing notes of what's said during the interview. And then from those notes we build memos that we then use as we work towards the final work product. After the introductions, I then explain, in the same way to each interviewee, the fact that our firm has been hired to represent the corporation and that the corporation has asked us to conduct an

investigation. Then I give a brief description of the investigation. How you describe this depends on the nature of the investigation. There are certain instances where you would not want to disclose too much about why you're doing the investigation because certain aspects can be confidential and, also, you don't want the information you give about the purpose of the talk to impact the information you get from the interviewee. Normally I will consult with in-house counsel on how to describe the investigation to the interviewees so that we are consistent with how we describe it.

Next, I make sure that the interviewee understands that we represent the company and that we do not represent that person. You do not want there to be any misunderstanding about that critical fact.

Verniero: Do you need to go to the audit committee and get a special resolution that directs employees to cooperate with the investigation? How do you handle that issue?

Tuffin: Well, it doesn't always require going to the audit committee. In reviewing the company policies, often there will be - depending on the size of the company and how the company governs itself internally - a provision in its policies that talks about cooperating fully in any investigations that might be going on.

Verniero: Lynn, as in-house counsel, do you want to sit in on these interviews?

Neils: Generally, I sit in on interviews in the internal investigations that I am supervising. But there are exceptions. If we have operating companies, they may have a lawyer sitting at the operating company that's more of a business lawyer. Because I'm not interfacing with the business at that operating company, I have no incentive to observe the interviews. Moreover, there might be situations in which I would not attend to avoid the perception that the investigation is less than objective in any regard.

Verniero: You don't want to create a chilling effect on the witness.

Neils: Right. I don't want the government to think that I had any chilling effect on the witnesses, that somehow they were not as open or candid as they would have been if I hadn't been in the interview.

Verniero: Paula, what do you do if, after your opening statement, the employee says: "I've thought about this and I don't want to discuss this with you without a lawyer present"?

Tuffin: At that point I'm going to see if there's anything that I can explain that might help the witness fully understand exactly my purpose for conducting the interview. And then if the witness doesn't want to speak at that point, we stop the interview and I call in-house counsel and tell him or her what's going on.

Verniero: How often in your experience, Bruce, has that happened, that the employee does not want to speak to you?

Goldstein: Most employees have been willing to talk to me. They understand that they have a corporate obligation to participate in an interview. But I make it very clear that I am interviewing them as corporate counsel and that I am not their lawyer and cannot give them legal advice. If they hesitate and ask whether they need counsel, my response is that I cannot give them legal advice but can postpone the interview to permit them to consult with counsel before the interview continues.

Neils: And I think it's particularly important to keep in mind that the government's current view appears to be that lying to counsel in this context could result in an obstruction of justice charge. Case law now suggests that lying to a lawyer conducting an internal investigation could result in an obstruction of justice charge.

Verniero: Anything else to add before we conclude?

Tuffin: Just in terms of the mechanics, one of the things we always like to do after going through our series of questions for witnesses is to try to elicit whether there are any particular documents that might support any of the things that the interviewees have said. So, you always leave the door open for them to call with any additional information that might be relevant to one of the questions in the future.

Verniero: Thank you, everybody, for an informative and interesting discussion.