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Roundtable: Part I – Corporate Internal Investigations: Early Stages

Participating in this roundtable 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**, Of Counsel to 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: Today we are going to discuss the early stages of corporate internal investigations from the perspective of both in-house counsel and outside counsel. Let's start with our in-house colleague. How and when do investigations begin?

Neils: One of the ways you can learn of misconduct that would result in an internal investigation would be through the audit process. Large companies do periodic reviews, and things come up in those internal audits. You could also learn of alleged misconduct through regulatory or other governmental subpoenas.

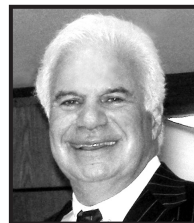
Verniero: When do you make the decision to retain outside counsel?

Neils: It will depend on the nature of the allegation. If it's something where the company is actually the victim, for example, I wouldn't necessarily feel, as a former prosecutor myself, the need to engage outside counsel. If, however, the company is a subject or a target of an investigation, I would likely get outside counsel on board quickly for purposes of ensuring that the investigation is independent.

Verniero: Now, Bruce, you're sitting in



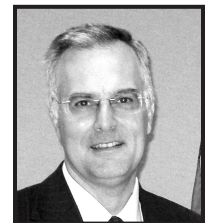
Lynn A.
Neils



Bruce I.
Goldstein



Paula A.
Tuffin



Peter G.
Verniero

your office and Lynn gives you a call and says that she has this allegation of wrongdoing and she thinks it's appropriate for outside counsel to be retained. What are the first steps that you are going to take?

Goldstein: I think the first thing I need to know is the nature of the problem. That requires an in-depth conversation with in-house counsel so that you're educated. Then I would develop a work plan.

Verniero: Paula, do you need to have a conversation with Lynn about who the client is or does everyone know it's the corporation and no one else?

Tuffin: The answer to that question should never be taken for granted. So, at the very outset you would want to make it clear to Lynn that during the interviews required of employees in the company, you're going to explain that our representation is of the corporation, not the employee as an individual. I would also explain that the attorney-client privilege belongs to the corporation, as the corporation alone will decide whether or not it's going to waive that privilege or exercise it.

Verniero: I would add that one of the steps I would take is to get a sense of

what the record is likely to be in this investigation, particularly the number of documents. Whether, for example, there's electronically stored information. I would want to take steps early on and have our internal record clearly show that we took steps early on to preserve the record.

Neils: I think that's exactly right. Document retention and gathering often have caused problems in the past. Problems pertaining to documents can create criminal and civil liability even when the underlying actions amount to nothing.

Verniero: Now, Lynn, you indicated earlier that, given certain allegations, it is sometimes necessary to demonstrate that an investigation is being conducted by an independent outside lawyer. Is there a rule of thumb on what makes outside counsel independent? Must it be a law firm that has never done work for you?

Neils: That would depend on the nature of the allegations. If it's a government investigation and we've received a subpoena, it may make sense not to use your regular corporate counsel.

Goldstein: The skill sets that are neces-

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

sary to be an effective litigator are similar to the skills one needs to conduct an effective internal investigation. In both exercises the goal is to ferret out the critical facts which are the focus of the investigation. You bring in outside counsel to have an independent perspective, but at the same time it's invaluable to have somebody from the inside pointing you in the right direction, informing you about who you are going to be interviewing, giving you the background and information that you require so that you can make progress.

Tuffin: Yes. It's been my experience in the internal investigations that I've been involved with recently, that having someone with that expertise on the inside who shares their knowledge with outside counsel, really does cut down on the costs and the amount of time we, as outside counsel, spend trying to figure out who has the particular information necessary to respond to the inquiry.

Verniero: So to recap: Lynn has decided to go outside. She's called Bruce, and outside counsel has made recommendations for initial steps. When, if at all, does the audit committee get involved with an investigation?

Neils: I think again, it depends. If, for example, the allegations involve upper management of the company, then you probably need to make the audit committee aware of it as soon as possible.

Goldstein: It requires the exercise of informed judgment, knowing the organizational structure and the nature of its regulatory environment and in a sense putting yourselves in the shoes of an audit committee member.

Verniero: Once the audit committee is involved, it's involved for the duration and essentially becomes the client or the overseer of the investigation. I think, in most cases, it should formalize its involvement by a resolution, by some definite entry in the minutes of the audit committee to indicate that it has been informed of the allegations, that outside counsel is in place, and it will expect, and it will in fact receive, periodic updates. But at the same time it probably doesn't change the basic components of what you need to do with an investigation. It certainly changes the corporate governance of it, but my sense is that in terms of the other things

we've been talking about – preserving the record, making sure you have a litigation hold in place, all of that remains the same.

Neils: I agree with that.

Goldstein: The investigative process is all about integrity: the integrity of the records we review, the integrity of the security process we use to review the records, the integrity of each of the individuals conducting the investigation. It's all about doing an honest, forthright, incisive investigation of the subject matter or the review.

Verniero: Now, while outside and in-house counsel are designing a work plan to review a particular allegation that is the subject of a government subpoena, when do you interface with the government? Who makes that call? Do you pick up the phone, Paula, as outside counsel? Does general counsel pick up the phone to the assistant prosecutor, and when does that dialogue begin?

Tuffin: That's an interesting question. The answer changes depending on the circumstance. If it's a subpoena that comes to the in-house lawyer, chances are that that lawyer has already had some initial contact with the assistant prosecutor or investigator who sent the inquiry. It depends on the nature of those communications and the nature of the inquiry whether or not the in-house lawyer will continue contact.

Verniero: Bruce, how do you feel about that?

Goldstein: Well, I think it's a decision that has to be made by both in-house and outside counsel. I think that one of the virtues of having outside counsel participate is that outside counsel has had prior experiences with the prosecutors and is the appropriate person to initiate the call. From my experience, I have been the one to call prosecutor's offices when the decision is made. But I've never made that decision in a vacuum, and I can't imagine doing that without speaking with general counsel first.

Neils: Well, I think it depends also on the types of subpoenas. Big companies get subpoenas all the time and often the company is not the subject or the target of that investigation. In those instances I might not even have outside counsel. I may not even hire outside counsel. I may handle it

entirely in-house.

Verniero: Whether it's an in-house lawyer or outside counsel, whether it's an informal fact-gathering or something more serious, I would try to establish a dialogue and open a line of communication with the government to see what the case is all about. And sometimes the line deputies will be able to tell you things and sometimes they won't. But I don't think it's at all a bad idea to ask, what's going on here? In fact, I think that shows that you're serious and treat this matter respectfully, and that you want to get to the bottom of it.

Goldstein: When I was a federal prosecutor I always picked up the phone and made a phone call and encouraged conversation with the lawyer representing the outside party, and, as a result of that experience, I've always done it in private practice because the telephone is a wonderful instrument that should be used to open up lines of communication.

Neils: On the subpoena is listed the prosecutor and the agent. You're more likely to get the information from the agent than you are the prosecutor. So you might want to try reaching out to the agent first, but if you need an extension, then obviously you're going to contact the prosecutor.

Verniero: One of my take-aways from this discussion is how many things you have to do early on in the investigation. An investigation that is not thoughtful in the beginning could have bad consequences midway and toward the end.

Tuffin: I certainly agree. And I would just like to underscore that by saying that what I think consistently makes an effective investigation possible is honest and open communication between the in-house lawyer and the outside counsel.

Goldstein: In today's legal environment, one has to assume that any serious investigative report that counsel prepares may someday be disclosed to a party whose interests are adverse to yours.

Neils: I think it is very important to have a good relationship with the in-house lawyer who's in charge of the investigation.

Verniero: Thank you for everyone's thoughts. This has been an interesting discussion.