KEY FACTORS IN CONDUCTING AN EFFECTIVE INTERNAL INVESTIGATION

JAY G. MARTIN
Vice President, Chief Compliance Officer,
and Senior Deputy General Counsel Baker Hughes Incorporated

State Bar of Texas
28th ANNUAL ADVANCED
OIL, GAS AND ENERGY RESOURCES LAW COURSE
September 16-17, 2010
Houston

CHAPTER 21
JAY G. MARTIN
RESUME
SHORT FORM

JAY G. MARTIN is the Vice President, Chief Compliance Officer and the Senior Deputy General Counsel for Baker Hughes Incorporated (“BHI”). Prior to joining BHI, Mr. Martin was a Shareholder at Winstead Sechrest & Minick P.C., a Partner at Phelps Dunbar and Andrews & Kurth, and the Assistant General Counsel of Mobil Oil Corporation’s Worldwide Exploration and Production Division in Fairfax, Virginia. Mr. Martin has also served as General Counsel of Mobil Natural Gas, Inc. in Houston, Texas. Mr. Martin holds JD, MPA and BBA degrees from Southern Methodist University in Dallas, Texas.

While in private practice, Mr. Martin was engaged in a wide variety of domestic and international energy transactions, and regulatory matters for natural gas exploration and producing companies, oil field service companies, marketers, pipelines and refiners. Mr. Martin’s practice involved such diverse matters as participating in generic federal and state restructuring proceedings in the natural gas and electric industries, drafting virtually every type of domestic and international oil and gas agreement, working on mergers and acquisitions, asset acquisitions and divestitures, handling a significant number of energy lending transactions including but not limited to mezzanine and conventional production based financings and work-out situations, and advising clients on a wide variety of natural gas marketing and processing matters. Mr. Martin also regularly handled problems for clients arising under the Foreign Corrupt Practices Act, the U.S. Economic Sanctions Laws and Arab Boycott Regulation. In addition, Mr. Martin developed broad experience in crisis management, designed corporate compliance programs for clients, and conducted many types of internal investigations for clients.
TABLE OF CONTENTS

FIRST STEP: DETERMINE WHETHER AN INVESTIGATION IS NECESSARY AND WHEN TO CONDUCT IT .................................................................................................................. 1

SECOND STEP: DETERMINE WHETHER TO CONDUCT THE INVESTIGATION THROUGH IN-HOUSE OR OUTSIDE COUNSEL ................................................................. 1
  A. Considerations for Selecting In-House Counsel ...................................................................................... 1
  B. Considerations for Selecting Outside Counsel ...................................................................................... 1
  C. Determine Whether to Hire Consultants .............................................................................................. 2

THIRD STEP: DETERMINE TO WHOM INVESTIGATORS WILL REPORT AND CLEARLY INFORM THE INVESTIGATORS WHEN THEY ARE RETAINED ........................................................................ 2

FOURTH STEP: ESTABLISH AND PRESERVE THE ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PROTECTION ........................................................................ 3

FIFTH STEP: INITIATE THE DOCUMENT REVIEW PROCESS AND CAREFULLY MONITOR IT .......... 3

SIXTH STEP: ENSURE COMPANY ACCESS TO EMPLOYEE INFORMATION .................................................. 3

SEVENTH STEP: CONDUCT EMPLOYEE INTERVIEWS .................................................................................... 4

EIGHTH STEP: DETERMINE WHETHER TO RETAIN AND PAY FOR INDIVIDUAL COUNSEL FOR EMPLOYEES ........................................................................................................ 4

NINTH STEP: CONSIDER WHETHER TO ENTER INTO A JOINT DEFENSE AGREEMENT ......................... 4

TENTH STEP: PREPARE A FINAL REPORT AND DETERMINE HOW TO PRESENT IT ........................................... 5

ELEVENTH STEP: DETERMINE WHETHER TO REPORT THE CONDUCT TO THE GOVERNMENT ............... 5

TWELTH STEP: DETERMINE WHAT CORRECTIVE ACTION TO TAKE AGAINST THE WRONGDOERS AND WHETHER TO TAKE IT .................................................................................. 6

THIRTEENTH AND FINAL STEP: CONSIDER IMPLEMENTING STRONGER CONTROLS OR COMPANY POLICIES .......................................................................................................................... 6
KEY FACTORS IN CONDUCTING AN EFFECTIVE INTERNAL INVESTIGATION

This checklist provides guidelines for corporate counsel to follow in the course of planning and executing an internal investigation. However, it should be emphasized that every internal investigation is unique and requires significant judgment calls, including:

- When to conduct an investigation.
- Who should conduct the investigation.
- The scope of the investigation.
- How the investigation is to be conducted procedurally.
- What action should be taken at the conclusion of the investigation.

FIRST STEP: DETERMINE WHETHER AN INVESTIGATION IS NECESSARY AND WHEN TO CONDUCT IT

- An internal investigation should generally be conducted in response to any of the following:
  - action or credible allegations of wrongdoing committed by the company or its agents;
  - a lawsuit against the company or one of its agents; or
  - government investigations or enforcement actions.

- Investigations should start as soon as a triggering event occurs to allow for a thorough inquiry and prevent further exposure to damages. However, in deciding the timing of the investigation, companies should also consider the availability of:
  - witnesses;
  - documents and relevant information; and
  - qualified investigators.

SECOND STEP: DETERMINE WHETHER TO CONDUCT THE INVESTIGATION THROUGH IN-HOUSE OR OUTSIDE COUNSEL

- Investigations should be conducted through counsel to establish and preserve a claim of privilege over the company’s process in evaluating critical facts.

A. Considerations for Selecting In-House Counsel

- In-house counsel must be protected by, and be able to maintain, the attorney-client privilege and work product protection. Consider whether the in-house legal department:
  - played a role in the underlying activity at issue in the investigation; or
  - has a role in the company that may cause the attorney-client privilege or work product protection to be lost. Often the lines between business advice and legal advice are blurred.

- In-house counsel must be able to conduct a completely objective, competent and timely investigation.
- In-house counsel must be familiar with the applicable laws, and have the skills and investigative experience to conduct the investigation in a thorough and credible fashion.

B. Considerations for Selecting Outside Counsel

- Retaining outside counsel may give the investigation greater credibility, which can be especially helpful when dealing with the government, boards of directors or senior management.
Outside counsel may provide a greater certainty that the investigation will be privileged because the line between business and legal advice may be less blurred and there is a perception if not a reality of more independence.

It may be more likely that the practices will be followed if outside counsel is retained because outside counsel often specializes in conducting internal investigation.

C. Determine Whether to Hire Consultants

Consider hiring outside consultants, including:

- forensic accountants, who can provide a better understanding of the company’s books and records and be able to detect irregularities that may indicate a problem;
- e-discovery consultants, who can provide technical expertise and support in managing and reviewing electronic data; and
- subject matter consultants, who can be helpful in identifying issues in complex industries.

The benefits of hiring outside consultants generally also include an increased likelihood of:

- detecting potential problems; and
- discovering a basis for potential defenses.

If consultants are hired, they should:

- be hired by counsel;
- work at the direction of counsel;
- report directly to counsel; and
- maintain their work papers consistent with the attorney work product doctrine.

THIRD STEP: DETERMINE TO WHOM INVESTIGATORS WILL REPORT AND CLEARLY INFORM THE INVESTIGATORS WHEN THEY ARE RETAINED

When retaining outside counsel or investigators, immediately inform them who the client is and to whom they must report.

Consider designating one of the following to supervise the investigation and receive the investigator’s reports:

- general counsel or another in-house counsel;
- the audit committee of the board of directors; or
- another special committee of the board of directors formed for this purpose.

Benefits of removing the reporting function from the management of the company include:

- giving further credibility to the objectivity of the investigation; and
- reducing the risk of any apparent conflict in conducting the investigation.

Throughout the investigation, investigators must keep the designated department or committee for reporting apprised of:

- the investigation plan;
- the scope of the investigation; and
- all relevant developments.
FOURTH STEP: ESTABLISH AND PRESERVE THE ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PROTECTION

- Communications with counsel, written or oral, are privileged if they are:
  - confidential; and
  - for the purpose of obtaining legal advice.

- Increase the likelihood that information collected during an investigation remains privileged by:
  - communicating to everyone involved in the investigation that their conversations and correspondence with counsel are privileged;
  - clearly marking all privileged and work product-protected documents created during the process as “Attorney-Client Privileged Communication” or “Attorney Work Product”;
  - carefully handling all documents that are created and collected; and
  - restricting anyone outside the attorney-client relationship from having access to this information.

- Communications must be made in confidence and not disseminated beyond those persons who need to know their contents.

- Give Upjohn warnings at the start of all employee interviews and discussions to ensure the employee understands that:
  - the attorney represents the company and not the individual;
  - the conversation is protected by the attorney-client privilege;
  - the attorney-client privilege belongs to the company and not the individual;
  - only the company can waive the attorney-client privilege; and
  - there is a real possibility the company may choose to waive the attorney-client privilege.

- Be aware that some courts may not extend the privilege to counsel’s communications with former employees regarding facts that occurred during their employment at the company.

- Waiving the privilege for certain issues may be in the company’s best interest but that should be the company’s deliberate decision and not an inadvertent waiver.

FIFTH STEP: INITIATE THE DOCUMENT REVIEW PROCESS AND CAREFULLY MONITOR IT

- Start the document review process as soon as the company becomes aware of credible allegations of wrongful conduct.
- Consider imaging hard drives and collecting documents before notifying employees to avoid opportunities, or even the appearance of opportunities, for document destruction. If hard drives are imaged, put a plan in place to get information while allowing employees to continue working.
- Preserve information by sending all employees a “document hold” communication.
- Coordinate with the IT department to secure potentially relevant files and retain e-discovery consultants, if necessary.
- Establish a document processing system and code all documents to aid their use by investigators (coding should reflect subject matter, custodian and other relevant information).
- Use follow-up interviews with relevant employees to discuss and monitor their document identification and preservation, as well as inquiring into other relevant information.

SIXTH STEP: ENSURE COMPANY ACCESS TO EMPLOYEE INFORMATION

- Inform all employees in advance that the company’s computer systems and the information stored on them belong to the company.
- Do not provide assurances to employees that personal e-mails or documents will not be reviewed by the company. This could bolster an otherwise weak claim of invasion of privacy.
- Have good cause to conduct the search and conduct it in a reasonable manner.
Check with local counsel in the appropriate jurisdiction, especially foreign jurisdictions, to ensure that local laws do not give employees rights to privacy that may interfere with the investigation.

**SEVENTH STEP: CONDUCT EMPLOYEE INTERVIEWS**

- Develop a list of employees who should be interviewed. Consider the order of the interviews as well as the location.
- Have two people attend each interview. Typically, this includes an attorney to conduct the interview and an attorney or paralegal to take accurate notes.
- Remember to give Upjohn warnings at the start of all employee interviews.
- Make a verbatim notation at the top of the interview notes of the Upjohn instruction that was given to allow future confirmation of precisely what was told to the employee.
- Take accurate, but not necessarily verbatim, notes of the rest of the interview. The more the notes look like a transcript and less like the mental impressions of the person taking the notes, the more likely a court may find the notes are not protected by attorney work product.

**EIGHTH STEP: DETERMINE WHETHER TO RETAIN AND PAY FOR INDIVIDUAL COUNSEL FOR EMPLOYEES**

- An employee should have separate individual counsel if either:
  - the employee has a potential for individual liability; or
  - an actual or potential conflict of interest exists between the company and the individual.

- Although a company can recommend particular attorneys to an employee or executive, the employee or executive must understand that the choice of attorney is entirely their own.
- If a company decides to retain counsel for the employee, the company must determine if it has to pay for the employee’s individual counsel. The company should review:
  - the company policy;
  - all agreements between the company and the employee; and
  - the local laws.

- Companies typically pay for an employee’s individual counsel if the employee was working in the scope of employment when the issue under investigation arose.
- If the company pays or an employee’s individual counsel company counsel should decide at the outset whether the fees and expenses are:
  - indemnified or paid tip front;
  - paid despite a finding of guilt; and
  - reimbursed for an appeal.

- The company must understand that even if it is paying for an employee’s legal fees, the employee is the client, and therefore the individual’s counsel must do what is in the employee’s best interest.

**NINTH STEP: CONSIDER WHETHER TO ENTER INTO A JOINT DEFENSE AGREEMENT**

- If both the company and its executives are under investigation, consider that a joint defense agreement:
  - helps both the company and the individuals avoid working at cross purposes;
  - provides the company with access to an executive’s knowledge that could help the company prepare a better defense; but
  - limits the company’s ability to reveal information it obtained as part of the agreement to a third party without the executive’s permission. This is a factor if there is a potential for a future privilege waiver (such as cooperating with the government).
If a joint defense agreement is entered into, consider whether to memorialize the agreement in writing or whether an oral agreement will suffice. A written agreement ensures less confusion regarding the terms of the agreement.

If the joint defense agreement is terminated:

- ensure that the parties understand that no joint privilege remains by having the termination in writing;
- require parties to return privileged documents, if applicable; and
- remind parties that the communications and shared information obtained during the life of the joint defense must continue to be confidential unless all parties agree to a waiver.

**TENTH STEP: PREPARE A FINAL REPORT AND DETERMINE HOW TO PRESENT IT**

- The final report should contain:
  - a summary of the issues raised;
  - the relevant facts;
  - the methodology used;
  - the scope of the investigation;
  - applicable law;
  - its findings; and
  - any recommendations.

- When reporting the findings to the designated committee or in-house counsel, consider whether to provide written copies of the report or to give the report orally. It is common for the report to be written and provided to the designated committee or in-house counsel, often with copies of the report not leaving the room. However, as an inadvertent waiver of the attorney-client privilege is always a possibility, some investigators prefer to give the report orally.

- In determining whether or not to provide hard copies of the final report to the designated committee or in-house counsel, consider that:
  - written reports reduce the potential for debate over what was reported, but provide a guide for government investigators or private plaintiffs if a waiver occurs;
  - oral reports encourage an open discussion, but the finality of the report may be in question; and
  - oral reports do not guarantee, if a waiver occurs, that the information will remain confidential (discovery regarding the oral report could occur through conducting interviews or depositions of the individuals receiving and giving the report).

**ELEVENTH STEP: DETERMINE WHETHER TO REPORT THE CONDUCT TO THE GOVERNMENT**

- Reporting the discovered misconduct to the government may be required by law, especially in regulated industries. Consult with local counsel or counsel familiar with the company’s industry.

- Consider that self-reporting is generally looked favorably by regulators in considering any consequences for the company.

- If reporting the misconduct to the government is discretionary, the company should:
  - discuss the decision with the board of directors and possibly outside counsel having experience in these matters;
  - make the decision promptly after learning the results of an internal investigation;
  - have a plan in place to remediate the behavior; and
  - improve any faulty internal controls discovered during the investigation.
TWELTH STEP: DETERMINE WHAT CORRECTIVE ACTION TO TAKE AGAINST THE WRONGDOERS AND WHETHER TO TAKE IT

- Review the company’s policies for guidance on determining whether to take corrective action.
- Consider that enforcement of company policies helps ensure future compliance, while overlooking illegal or improper behavior may:
  - send the message that compliance is not taken seriously;
  - increase the risk of future problems; and
  - impact how the government determines its course of action.

- At the conclusion of the investigation, be sure to obtain all relevant information from company employees, as well as a commitment to provide additional resources in the future, in the event that there is a government investigation.

THIRTEENTH AND FINAL STEP: CONSIDER IMPLEMENTING STRONGER CONTROLS OR COMPANY POLICIES

- Strengthen company policies if stronger controls would have prevented the behavior at issue.
- Promote increased awareness of the regulations and prohibited behavior through improved employee training.
- Emphasize that the “tone from the top” is one that encourages ethical behavior and compliance with laws and regulations affecting the company’s industry.