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BNA Insights

Corp. Counsel Best Practices for Working with Investigators

BY TERRY F. LENZNER

Welcome to the era of global business, accelerated mergers and acquisitions, higher standards for sound management and a lower tolerance for irregularities – otherwise known as, a day in the life of corporate counsel. The roles and responsibilities of corporate counsel today are more urgent, more visible and more scrutinized than ever before. Corporate counsels are stretched thin to meet the multiple daily demands of their jobs; running day-to-day operations of their businesses is only the beginning.

Accordingly, there are times when extra support, a new perspective and a differently trained set of professionals are needed to step in and support the corporate counsel team. Whether it is to help verify the accuracy of information and reliability of data in order to endorse an investment or acquisition, to vet senior officials who may be hired by the company, or to ensure that the company is meeting regulatory and compliance standards and man-

dates, the services of an investigative firm may be exceedingly useful.

I have led Investigative Group International, Inc. (IGI) for 30 years, and although the kinds of cases and business reasons for retaining a firm like mine may evolve over time, the questions I receive from corporate counsel seeking our services have been remarkably consistent. It regularly comes as a surprise – and a relief – that the relationship between corporate counsels and their investigative firm is a collaborative partnership, with the investigators working side-by-side with their clients to achieve the agreed upon objectives. The investigators' methods and activities are transparent to the client, with corporate counsel always in control of the priorities and the processes of the investigation.

When investigative support is needed, there are some simple best practices that corporate counsel should follow to ensure a collaborative, productive and successful relationship with an investigative firm.

Particularly when challenging situations arise in which corporate counsel is forced to ask the tough questions of their colleagues and superiors, the support of an investigative firm is extremely useful.

Determining a Need

In-house counsel can benefit from the scrupulous examination that a private investigative firm can provide because an outside investigator is free of the biases and assumptions that often influence those who are too close to the many subjects of inquiry. Investigative firms have the experience and perspective to see and understand key relationships and investigative leads, and can provide an independent third-party view and expertise that is not distorted by existing perceptions. Particularly when challenging situations arise in which corporate counsel is forced to ask the tough questions of their colleagues and superiors, the support of an investigative firm is extremely useful.

Terry Lenzner has served as a federal and Watergate prosecutor and law firm partner. He is the founder of Investigative Group International, Inc. ("IGI"), one of the world's most renowned investigative firms. His autobiography, THE INVESTIGATOR: FIFTY YEARS OF UNCOVERING THE TRUTH, was published this fall by Blue Rider Press, a member of Penguin Group (USA).

Getting Started

Once the corporate counsel has determined a need for an outside investigative firm, it is important to find the right firm. To be open to all possibilities that an inquiry will discover, look for an investigative firm that can provide specialists in various fields, and whose team includes former prosecutors and government investigators who will assure the highest standards are followed.

An investigative firm should employ a team of highly trained, sophisticated professionals who operate with the highest ethical standards, have impeccable records and bring a variety of investigative expertise relevant to the corporate counsels' challenge. For example, many investigators are former prosecutors or government investigators; some are specialists with expertise such as forensic accounting, intelligence analysis, public relations and crisis management, and investigative journalism. Although most corporate counsel challenges would not require this full breadth of specialists, the diverse viewpoints that an investigative firm can provide offer various avenues for in-depth analysis of any situation. Because each specialist is trained to observe situations differently, this diversity can deliver better analysis of and solutions to complex problems than most in-house counsels are prepared to provide on their own.

In the initial inquiry, ask if the investigative firm has had experiences with cases of a similar nature. Although every case is different, counsels should gauge the scope and costs of hiring an investigator, and should be interested in the investigative firm's prior experiences in addressing the challenges and issues that counsels currently are facing.

A Collaborative Partnership

How an investigative firm works with its corporate counsel client is just as important as how the team conducts the investigation. This is where I receive the most questions from potential clients – how will I know what the investigative firm is doing? Am I going to be consistently surprised by exorbitant fees or demands for more budget? Will I lose control of the process?

The apprehension is understandable – quality investigative firms do more than search public records and interview witnesses. Investigators

take a hard look at information, provide expert analysis and make connections that might not be easily apparent to others. Sometimes, the assignment is simple and the information the client seeks can be garnered fairly easily. But more-complex cases need a sophisticated analysis of issues that require multiple investigative phases, with each building upon another.

When considering a proposal to support an investigation, the investigative firm should recommend a phased approach, with detailed budgets, for the work to be done in a way that reflects corporate counsel's priorities and goals. Within each phase, the investigative firm should outline how it will provide regular updates and progress reports to the client to demonstrate that it is on schedule, making progress toward the objectives and working within the agreed upon budget. Subsequent phases to achieve the client's goals should be pursued only with the client's agreement after review of the preceding investigative phase and analysis of findings.

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I cannot over-emphasize the importance of open, frequent communications between the investigative firm and corporate counsel client: this transparency is critical to forming a true partnership, and allows the client to maintain ownership and control over the investigation. At every step, the client knows what work is being done, how information is being collected and where the investigators are with the analysis. Above all, the client always has control over the priorities and the process, and can modify the approach as needed.

This openness also allows surprises to be addressed as they arise, and accounts for changes in priorities or strategies. Investigative firms can be nimble, revise their work plans on a tight schedule and move forward on issues quickly when needed. Corporate counsels should take advantage of this flexibility to get the most out of their investigation.

The phased approach also helps provide points where the team can explore whether to continue moving forward – perhaps the insight and information needed has been obtained, or priorities have changed to where the investigative services are no longer required, or the investigative firm simply has not been able to meet expectations.

Assessing an Investigative Firm

There are red flags to look for when interviewing firms. Ask if the firm or any of its employees has been engaged in personal litigation. Ask if any employee or contractor has testified on behalf of the firm, or for or against a client. This will provide insight on how the firm handles evidence of all kinds, and inform you about how it obtains information and the methods (conventional or otherwise) it uses.

Any investigative firm retained by corporate counsel must commit to having any and all of the information it provides stand up in court. That means it must be sourced, so information from even “anonymous” sources must be corroborated. A firm that relies on only “confidential sources” is not trustworthy; if the firm can't (or won't) identify how it obtains its information, that's a big red flag that may suggest questionable investigative methods that may border on the unethical or illegal.

There also should be at least some transparency to the corporate counsel client as to the identities of the lead investigators. Many firms do not like to list their team members publicly as it can hinder their ability to keep a low profile; others inflate their numbers to appear bigger. However, key executives with experience should be disclosed, actively involved and working directly with corporate counsel.

If a firm promises the sun, moon and stars about the information it will be able to gather, consider backing away. As the saying goes, if it appears too good to be true, it probably is. It takes only one situation in which information was gathered unethically to destroy a legal case and make “bad guys” of an organization. The investigator needs to be viewed as credible and authoritative; missteps or unethical actions are not an option.

It's important to note: just as corporate counsel may decide not to work with an investigative firm for any number of reasons, an investigative firm also may turn down an offer

to work with a potential client. Investigative firms do not engage in a case if the client's goals or assumptions are questionable, if a conclusion is demanded whether the investigation supports it, or if the firm cannot be assured of the integrity of its findings. In all cases, the investigative firm must be able to agree to the client's goals and priorities before getting started.

Working with Counsel

Much of the work that investigative firms do is with lawyers; investigators work closely with corporate counsels and with any outside law firms they have retained. Law firms frequently hire investigative firms on behalf of their clients as well. At my firm, we have a unique attorney-

supervised model, which provides clients with the benefit of attorney-client privilege for relevant communications and a high level of quality control. IGI's former federal prosecutors and litigators provide the legal perspective necessary to ensure that any evidence we gather can be successfully used in court.

Working with investigative firms may help in-house lawyers avoid unintended consequences of conducting an investigation on their own. If corporate counsels are called as witnesses to the matter under investigation and asked to defend their findings, they may be perceived as biased toward their employer and therefore lack credibility. It also may be presumed that they would be reluctant to report an outcome not favorable to their employer.

One of the most fundamental realities I have learned – both through my work as a lawyer and as an investigator – is that good investigators are better at finding facts than lawyers. Law schools do not teach investigative skills; basic fact-finding is not part of the lawyer's art. Lawyers may be vital to defending your case, but be hesitant about depending on them to discover all that you need to know.

Hiring an investigative firm might seem like a last resort, but working closely with an outside firm early on can provide invaluable guidance and support for even the most difficult inquiries. Following these approaches, you will find the right firm with the right experience to help you through your most-difficult challenges, delivering a clear roadmap on what needs to be done for you to come out ahead.