

McDonald's CEO Case Instructs On Outside Investigations

By **Thomas Wendel, Arun Rao and Madeline Prebil** (August 24, 2020)

An independent investigation is effective only to the extent that its scope is properly defined and appropriately tailored through clear communications between investigators and the client. The scope of inquiry should be sufficient to address the most significant questions facing the client.

Both parties also must share a common understanding of the scope and the conclusions supported by the results of the investigation. Failure to meet these requirements can produce a compromised engagement that ultimately disserves the client.

The board of McDonald's Corp. recently learned this lesson the hard way. The company retained independent outside counsel in 2019, after receiving allegations that its former CEO Steve Easterbrook had an inappropriate personal relationship with a female employee, in violation of company policy.

According to a complaint filed by McDonald's against Easterbrook in the Court of Chancery of the State of Delaware earlier this month, during the initial investigation Easterbrook admitted to a single consensual nonphysical relationship via text messages and video calls, but denied any physical sexual relationships with McDonald's employees.

Independent outside counsel searched images and videos saved on Easterbrook's phone, as well as text messaging activity retained on his devices. But they apparently did not search for email communications that were not stored on his devices.

While the investigation confirmed the consensual relationship to which Easterbrook had admitted, it did not identify evidence of other relationships between Easterbrook and employees. The board reportedly concluded that while the relationship was singular, short-term and consensual, it nevertheless violated company policy and raised questions about Easterbrook's judgment. Easterbrook ultimately was terminated without cause, entitling him to receive substantial severance benefits.

Approximately eight months later, however, the company received an anonymous tip that Easterbrook had engaged in a sexual relationship with an employee, according to the complaint.

A subsequent internal investigation belatedly discovered "dozens of nude, partially nude, or sexually explicit photographs and videos of various women, including photographs of ... Company employees, that Easterbrook had sent as attachments to messages from his Company e-mail account to his personal e-mail account." These images were part of a remarkable trove of evidence maintained on McDonald's servers that the initial investigation apparently did not address.



Thomas Wendel



Arun Rao



Madeline Prebil

In its complaint, McDonald's seeks to claw back Easterbrook's severance benefits. But Easterbrook is fighting back.

In his response, he asserts that "the 'new' information [McDonald's] now relies upon is not new at all." Instead, Easterbrook contends that "since the outset of the investigation it was in the 'Company e-mail account stored on the Company's servers.'" McDonald's now faces the unhappy prospect of long and expensive litigation.

What went wrong? While we have not seen documents establishing the scope or reports detailing the results of the investigation, close scrutiny of the language of the McDonald's complaint suggests a possible answer — a lack of clarity regarding the scope and the conclusions supported by the results of the investigation.

The complaint states that the board commissioned an investigation of the allegation — related to a single employee. The investigation as executed, however, extended beyond that limited scope and inquired into the broader question of whether Easterbrook had ever engaged in any physical sexual relationships with other company employees. The board found this broader question to be of crucial importance in its deliberations on whether Easterbrook ought to be dismissed for cause.

We offer two potential explanations for the predicament in which McDonald's now finds itself. If the broader question of whether Easterbrook had engaged in "another such relationship" was part of the original scope, then the investigators erred by failing to check the McDonald's servers for relevant emails.

But if the original scope did not include the broader question, then investigators and the board seriously miscommunicated — with the investigators failing to grasp the enormous financial significance of the question and the board failing to grasp that the question had not, in fact, been thoroughly investigated.

The lack of clarity as to scope is reminiscent of a 2018 investigation at Ohio State University. In that case, investigators hired by the university chose not to send former football coach Urban Meyer's phone to a forensics lab to determine if he had destroyed evidence related to his handling of abuse allegations against an assistant coach, purportedly because the analysis would have been a "multiday project" with "an uncertain outcome."

Apparently without probing further, the university then sweepingly asserted that Meyer had not "violated any policy, rules, law, or contractual obligation in connection with the alleged domestic abuse claims" — a claim that seems to have gone beyond what the investigation had, in fact, determined. Meyer was suspended for only the first three games of the season, returning in time for conference matchups that a multiday investigation likely would have foreclosed.

The decision initially paid dividends for Ohio State, as the team went on to be crowned Big Ten and Rose Bowl champions. The glory of these victories, however, was short-lived. University officials faced severe criticism for their handling of the situation, and Meyer ultimately resigned at the end of the season, citing health problems.

Both of these unfortunate episodes illustrate that defining the parameters of an independent investigation — and ensuring clear communication between investigators and clients about the scope, the results, and the conclusions supported by the results — can be challenging.

Complex and high-stakes investigations typically are dynamic and constantly evolving. As new lines of inquiry and sources of potential evidence are identified, periodic reassessments of the scope can be useful.

Ongoing discussions about the scope are particularly advisable in situations where a modification may result in the discovery of significant new facts that could materially alter the client's understanding of the situation and assessment of the potential risks. And if certain investigative steps are deferred or not pursued, clients must have a clear understanding of the implications — including whether doing so may limit the conclusions that properly can be drawn from the results of the investigation or carry adverse financial or public relations consequences.

All sensitive investigations involve important and difficult questions of scope, resources and timing. Investigators, especially independent ones, must ensure that their work and their communications about that work are clear and responsive to their clients' immediate concerns, as well as to any potentially significant related legal, regulatory or public relations problems that arise during the engagement.

Thomas E. Wendel is the CEO of Investigative Group International.

Arun G. Rao is the president of IGI and the principal of IGI-affiliated law firm The Lenzner Firm PC.

Madeline C. Prebil is a third-year law student at the University of Chicago Law School. She previously served as a director at IGI from 2015 to 2018.

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