Internal Investigations – an Overview

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Corporate internal investigations have become big business; they often generate large fees for lawyers and other professionals who conduct them, and they have become important fixtures in the criminal investigative practices in a number of countries. Much has been written about them. Most of that discussion has focused on the challenging practicalities of running a large investigation,[2] sometimes in the context of local procedures and practices;[3] or on recent judicial and legislative developments, or changes in prosecutorial policy, that affect them. The purpose here is to take a broader look at corporate internal investigations, and to ask some basic questions: What are the goals and legal parameters of a given investigation? How will its fruits be used? And most importantly, do these parameters vary from country to country in ways that may affect cross-border criminal matters? This review will show that engagements often lumped together as 'internal investigations' may have quite different dynamics, and that confusion among them can lead to difficulties. And it will further show that the way corporate investigations are conducted and evaluated can vary tremendously from country to country, complicating strategy in multi-jurisdictional criminal matters.

The article will begin by describing three somewhat loose, and sometimes overlapping, different types of internal investigations, and then lists a set of variables or criteria to apply to each type in an effort to differentiate them. It will then discuss each of the three category sets in the context of those criteria. It will conclude by listing some 'international variables,' areas where critical dynamics may be quite different from country to country.

The article cannot, and does not, offer practical insight into how to organize a particular internal investigation. Indeed, its principal message may be that there is no 'one size' that 'fits all,' and that it is often a mistake to make practical plans (other than immediate, reactive, and short terms ones) before doing a strategic analysis of goals and legal operating parameters. The hope is that the questions raised here will inform decision-makers charged with devising a critical strategic design to maximize the chances that an investigation identifies appropriate goals, and reaches them.

1. Typologies and criteria

1.1. Internal investigation typologies

1.1.1. Criminal defense

Any person – including a corporation – that learns that he/she/it is or may be the object of a criminal investigation imperatively must evaluate the known facts (and those that can be appropriately learned) and decide, sometimes very quickly, whether, when and how to respond. Indicia that a criminal prosecution risk looms may be either external or internal. Externally, a 'worst case' is to suddenly learn that an indictment or other accusation has formally been filed. In most instances, a corporation will have an opportunity to react to such a threat before formal accusations are filed: it may learn of the possibility of a criminal prosecution from a formal or informal contact by a prosecutor or investigator; from receipt of a subpoena or other formal document from a prosecutor's office or from a regulator; from learning that investigators have been pursuing individuals, or interviewing potential witnesses, associated with the corporation; or from news reports. Internally, a company may on its own discover a situation that, if discovered by a prosecutor, could lead to a criminal investigation; this may occur either from a periodic review such as an audit or a compliance function, from an internal whistleblower complaint, or simply by happenstance. Learning of such a potential threat internally – before the situation is known outside the company – provides both an opportunity and a quandary: There may be an advantage of making a 'first report' to authorities, but the decision whether or not to reach out to authorities not yet aware of any wrongdoing is often difficult.

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2. Among many, see Brian, McNeil and Demsky (eds.), *Internal Corporate Investigations* (4th ed., 2017); Letterman and Goodman (eds.), *Defending Corporations and Individuals in Government Investigations* (2020)
3. See, e.g, *France: Corporate Investigations and Regulations 2020*, published July 1, 2020, available at https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/france.

1.1.2. *Negotiation*

A pure criminal defense formally involves only one 'party' in addition to the lawyer: the client.[4] A subset of criminal defense engagements may lead to a quite different set of dynamics, namely, discussions or negotiations with an adversary, who may be a prosecutor, a regulator, or an investigator (including the police); these will be discussed below. The two situations may overlap, and a pure criminal defense may evolve into a discussion/negotiation. But it is critical to realize that the two situations are <u>not</u> the same; as developed below they are governed by quite different dynamics. Most importantly, it is important to understand that doing an investigation does not at all imply that its fruits will be shared with an adversary, since the decision to do an investigation and the decision to open communications with an adversary are separate.

1.1.3. *For publication*

Very different from the first two types are investigations that are designed to be made public. A decision to do this may arise in a variety of circumstances. Most involve situations where there has been negative publicity about a corporation, and its managers decide to address it by publicly announcing either that they are doing an investigation with the company's own resources, or that they have retained a lawyer or law firm to do so. Often the lawyer so retained is a former prosecutor or other government official with a reputation that the company hopes will quell concerns about the company's own reputation. Sometimes such investigations are called 'independent investigations,' although the extent of actual (or perceived) independence will be addressed below.

1.2. Criteria

How, then, can we most usefully analyze the functional, and ultimately the strategic, differences among these different types of investigations, and what are their dynamics? The core of this article will evaluate them by asking the following questions:

1. Who is the 'client'?
2. Who is paying the fees for the legal work done in the investigation? In most instances, of course, this will be the client.
3. Who is the 'audience'? With whom is the attorney communicating?
4. Is confidentiality critical?
5. What are the attorney's professional obligations?

4. We will discuss below the extent of an attorney's professional obligations toward third parties, such as witnesses, who may become involved in an investigation.

2. Internal investigations for criminal defense

An attorney asked to provide professional advice or representation to a client facing a criminal risk cannot provide useful advice without understanding 'what happened,' that is, the facts and, somewhat differently, the evidence that reveals those facts. In many situations, of course, this process may be so straightforward as not to have the appearance of an 'internal investigation' at all, and may simply be a conversation or interview with the client (or, in the case of a corporation, the individuals speaking for the corporation). Particularly with respect to international corporate investigations, however, the process of learning the facts can quickly become complex, and must be planned with strategic care. And in many situations, a company may not have the luxury of time to develop an optimal plan. If an investigator, regulator or prosecutor is already active, such an adversary may at any moment impose sudden and important deadlines. And even if conduct that could eventually lead to an investigation does not appear yet to be known outside of the corporation, there is still an imperative to learn the facts – and develop a strategy – as quickly as possible. Among other reasons, in some circumstances a company that 'self reports' conduct not known to a prosecutor may get total protection against criminal prosecution; a number of cartel regimes provide for such immunity – but only for the first company so to report, which means that an opportunity will be lost if another cartel member does so first. Many prosecutors give significant negotiating advantages to companies that 'first report' in the sense of bringing a situation to their attention that they had not known; such an advantage may quickly be lost if the prosecutor learns of the event, perhaps from a whistleblower eager to obtain a 'bounty' if one is available, or from a competitor. And most importantly, in an important general sense 'knowledge is power' because a company that eventually finds itself in an adversarial situation is far better situated to devise an optimal strategy if its knowledge and understanding of the facts is more complete and accurate than the adversary's.
In this context, then, what do the 'criteria' listed above tell us about purely 'defensive' internal investigations?

1. Who is the client?
In the case of most corporate investigations, the answer is straightforward: the client is the corporation itself. While generally uncontroversial, the identity of the client may have some important procedural implications.

– A lawyer advising/representing a corporation does not advise or represent its officers, directors, or employees, and doing so risks creating conflicts of interest for the attorney, as well as for the corporation. This may be obvious, but it may create awkwardness in communications since the attorney's contacts at the corporate client may themselves be implicated in an in-

vestigation. To avoid misunderstandings and difficulties, it is essential for the attorney to make it clear that she is not advising individuals associated with the corporation, and to arrange for them to have separate counsel if appropriate.
- Corporate organizational structures may involve separate entities such as parents, subsidiaries, and joint ventures that may have a degree of independence from each other. A lawyer advising or representing one entity should be careful to analyze her possible obligations to another.
- An attorney's communications with a corporate client should only be with officers or other individuals unambiguously authorized to speak for the corporation on the issues for which the attorney was retained. In many situations such a contact will be a General Counsel or other 'in-house lawyer' if the corporation has such a function, but in any event an attorney engaged to do an investigation of any sort should carefully agree on a protocol for communications to identify the duly authorized individuals who will be exclusive contacts going forward. In addition to administrative clarity, careful identification of corporate contacts may be necessary to preserve professional confidentiality, as noted below.

2. Who pays fees?

An attorney engaged to conduct a corporate investigation will normally reach agreement on the payment of fees by the corporation, but some variants may arise. If fees are paid by an insurance company, for example, the insurer may feel that it is entitled to access to information about the investigation, and its right to such access should be anticipated and addressed.

In circumstances where an attorney advises or represents someone other than a corporation itself (such as an officer or employee), the appropriateness of fee payment by the corporation may depend on corporate by-laws or contractual arrangements.

3. Who is the 'audience'?

In a simple criminal defense, the audience is clear: it is the corporation itself. Generally speaking, an attorney does not have the authority to communicate anything learned in an investigation to anyone other than the appropriately designated representatives of the corporate client.

4. Is confidentiality critical?

In a word: yes. Unless and until a decision is made by the client, on a fully informed basis, to share confidential information with others – especially but not limited with an adversary – on a professional basis consistent with local practices and rules, a client has a right to expect that its attorneys will keep entirely confidential any information they obtain or learn as part of their professional engagement. While straightforward in principle, maintaining strict confidentiality can be more complicated than is sometimes recognized. Among the factors that may need to be considered are the following:
- What are the applicable laws and principles? While most (but, surprisingly, not all) regimes recognize that an attorney's professional communications and work product created by advising or representing a client in a criminal matter should be protected from compelled disclosure to anyone other than the client, the governing principles vary tremendously. As examples, in the United States attorneys are governed by the 'attorney/client privilege' and the 'work product privilege;' in the United Kingdom by the 'legal advice privilege' and the 'litigation privilege;' and in France by the '*secret professionel*.' While these and other principles seem similar, and to some degree share common goals, they are not at all the same, and attorneys who assume that their communications will be governed by a set of principles with which they are familiar may face unpleasant surprises if an investigation extends beyond their 'home' jurisdiction.
- To whom does a protective principle apply? In the United States, lawyers employed by a corporation (often considered 'in-house counsel') qualify as 'attorneys' whose communications are protected by the attorney client privilege.[5] That is not the case in continental Europe, where employees of corporations, even if trained as lawyers and conducting a legal function, are generally not considered 'attorneys' whose activities are protected by professional confidentiality regimes.[6]
- Whose laws apply? Traditionally, communications between an attorney and a client were 'local' and thus it was obvious to link those communications to the local professional regime governing them. But when an investigations cross borders, lawyers may participate in activities that take place in, or affect the laws of, more than one country. Which countries' laws apply? There is no simple answer. In some instances, a lawyer's 'home' professional regime may apply irrespective where she exercises the profession, and thus the professional principles of that regime may travel with her. But it can often also be the case that the laws local to the place where professional activities are taking place also apply. With respect to an attorney's professional responsibility for her conduct, a safe rule might be to comply with all laws that might apply. From a client's perspective, however, the important consideration may be to insure that communications with an attorney

5. *Upjohn v. United States*, 449 U.S. 382 (1981).
6. Although the reasoning behind this position varies with the professional rules of different countries, the most frequently cited authority on this point is the decision of the European Court of Justice in *Akzo Chemicals Ltd v. European Commission*, Case C-550/07-P (September 14, 2010), which applies to European competition law cases.

be protected from compelled disclosure. In a multi-jurisdictional investigation, protecting confidentiality may require careful attention to logistical detail to make sure that all communications are clearly covered by known professional rules.

– Do the circumstances support protection of confidential communications? In the United States, virtually any communication between a personal or corporate client and an attorney relating to legal advice or representation, other than participating in potential future crimes, is covered by the attorney-client privilege.[7] Other countries' rules, however, may require some objective showing that the client actually needs legal advice or representation, or that the issue on which the client is consulting an attorney is actually a criminal threat rather than a civil or regulatory one.[8] Complex investigations involving multiple parties may create special risks.[9]

5. What are the attorney's professional obligations?
During an investigation conducted to learn facts necessary to advise or represent a client in a criminal matter, the attorney's professional obligations are straightforward: to give the best possible advice or representation to the client. Under most professional regimes, this includes a duty of loyalty (to avoid any conflict of interest) and a duty of care (to act diligently and professionally), which are duties owed to the client. A professional regime may also require an attorney to respect duties owed to the public, such as a duty of honesty. Such duties and professional obligations can in fact vary from country to country, and will be discussed further below in the context of negotiations with an adversary.

At some point, an internal investigation may be considered 'completed,' although in most instances the process of 'internally investigating' facts is a continuing exercise that will last as long as the criminal matter or risk to which it relates. Through the attorneys' efforts, the attorneys and the client may have accumulated a considerable amount of factual information, which may include copies of or information derived from documents, the fruits of interviews with witnesses, insights from specialized experts, and other kinds of information. In addition, the attorneys may have generated their own content in the form of legal research and analyses, strategic discussion with the client or internally among the attorneys, or other material. The logistics of obtaining and appropriately storing such information can be a challenge beyond the scope of this paper, particularly if the investigation involves more than one country's laws and practices. Depending on the needs and preferences of the client, an attorney may organize the findings of an investigation into a more or less formal memorandum or 'report,' which for present purposes would be considered absolutely protected by the applicable professional regimes respecting confidentiality.
So far, a guiding principle almost certainly has been that <u>all</u> of the information or communications involved in an internal investigation, including the information accumulated or generated, are considered highly confidential, and will not be shared with any third party. Thus, a 'report' of the internal investigation, if one has been written at all, will have been carefully written, stored and communicated to maximize its confidentiality and avoid the risk of inadvertent waiver; if no formalization of information into a report has been made, the attorneys will inevitably have collected memoranda or other information that will likewise be protected. The core question addressed in the next section is to determine the parameters applicable to a different situation, namely where a decision has been made to communicate with an adversary.

3. The function of internal investigations in adversarial discussions

The relatively straightforward (but nonetheless critically important) considerations applicable to pure criminal advice/defense change fundamentally when an attorney is tasked with opening or participating in a discussion with an adversary, who may be a prosecutor, regulator, or investigator. (Many of the same considerations may also apply in a purely civil litigation context.)
The most consequential question may well be whether to have any communications with an adversary <u>at all</u>, or at least whether to have communications that include negotiations that may put on the table factual or other information learned by the attorney during the course of a professional engagement. The fundamental problem is that almost by definition 'negotiation' may imply or re-

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7. A strong, and oft-cited decision on this point is *Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D. C. Cir. 2014). Even in the United States, however, nuances that can affect the application of a professional privilege continue to evolve, posing risks for the unwary. See, e.g., Berkowitz, *Internal Investigations and Word Product, Recent Cases*, New York Law Journal, September 9, 2020 https://www.law.com/newyorklawjournal/2020/09/09/internal-investigations-and-work-product-recent-cases/ .
8. See, for example, the opinion in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006*, which explored the circumstances that are sufficient to support the assertion of the litigation privilege and the legal advice privilege under the laws of England and Wales.
9. If more than one party is involved in a single investigation, under certain regimes they may agree to pool their (otherwise confidential) information in order to mount a common defense, an agreement known in the United States as a 'joint defense agreement.' While generally permissible, such an agreement should be carefully drafted with a view to avoiding potential risks. See, for example, *Joint Defense Agreements: A Primer on the Potential Risks and Benefits*, April 2019, https://www.foster.com/newsroom-alerts-joint-defense-agreements-jda-litigation . Outside the United States, the enforceability of such agreements varies widely, and local counsel must be carefully consulted.

quire at least some degree of openness or candor if it includes sharing information known to the attorney. The extent of an attorney's openness with an adversary depends on a complex mixture of ethical and professional obligations together with strategic acumen, and will vary tremendously from case to case. The threshold point, however, is that an attorney can professionally share no confidential information with an adversary (or any third party) without the consent of the client that is both explicit and informed. Optimally an attorney will share no information at all with an adversary at least until she has learned as much as possible about the matter, reached an informed strategy on how best to proceed, and consulted carefully with the client regarding the advantages and disadvantages of entering into negotiations. As a practical matter, the need to make a critical decision on negotiation may create a difficult time bind if, as noted above, there are strategic risks (or opportunities lost) caused by the passage of time.

Let us return to our criteria, and reexamine them in this context.

1. Who is the client? The actual identity of the client will presumably not have changed. It is important, though, that an attorney be extremely careful in any discussions or negotiations with an adversary to be explicit who the client is on whose behalf the attorney is negotiating. If the negotiations have an impact on individuals or entities other than the client – such as officers or employees, or affiliated corporate entities – they must in most instances have their own attorneys to advise and represent them.

2. Who pays the fees? Again, in most instances this will not have changed. In most instances it is not the legitimate business of a prosecutor, regulator or investigator to inquire into, or have any legitimate interest in, the payment of an attorney's fees. In some instances, however, a prosecutor may raise with the court issues relating to payment of fees if there is a perceived risk that the person or entity paying another's fees is attempting to influence a defendant's decision (such as whether or not to 'cooperate' against the corporation) and thereby creating a conflict of interest.[10] Whether a company pays the fees necessary to advise or represent officers or employees during a criminal investigation may depend upon the by-laws of the company.[11]

3. Who is the audience? The obligation of an attorney to her client during a defensive investigation is pretty straightforward; the obligations become much more nuanced and complicated when a third party – adversary – is part of the situation. A fundamental question confronting an attorney who opens or engages in negotiations with an adversary is the extent of the attorney's professional obligations toward the adversary. As we have established, before such discussions take place an attorney has no professional obligation to a prosecutor, regulator or investigator, other of course than those provided by the applicable procedures: an attorney must comply with rules and procedures applicable to the case, including for example 'reciprocal discovery' which may require a criminal defendant to share certain information, but at least with respect to information about historical acts[12] the attorney has no obligation affirmatively to reach out to a state actor to share that information. Once in discussions that contain an element of negotiation, however, an attorney may face professional questions such as: Do I have to tell the truth? Can I pick and choose the factual elements I have learned that are advantageous to my client, and ignore – or even deny the existence of – other facts? Can I provide misleading information to a prosecutor? Do I have to answer questions that can only be answered by revealing confidential information?

There is no simple or universal answer to this range of questions, which will be affected primarily by three considerations: What are the local professional rules and practices? What is the precise context? And what is the lawyer's strategy?

Professional rules and practices relating to adversarial discussions in criminal cases are highly nuanced, and vary from locality to locality. In the United States, a useful window into an attorney's professional obligations may be considered by comparing the *Criminal Justice Standards for the Prosecution Function*[13] with the parallel *Criminal Justice Standards for the Defense Function*[14], both published (and regularly updated) by the American Bar Association. While voluntary, these important standards are widely cited and directly address the different standards for 'candor' appliable to prosecutors and defense attorneys. The relevant section of the *Prosecution Function* is called 'The Prosecutor's Heightened Duty of Candor,' and emphasizes not only that a prosecutor should make no statement 'that the prosecutor does not reasonably believe to be true,' but also that the prosecutor has affirmative obligations to establish the truth, such as disclosing legal authority bearing on a case and 'not

10. For an interesting discussion of this sensitive issue, see Orentlicher, *Fee Payments to Criminal Defense Lawyers from Third Parties*, 69 Fordham L. Rev. 1083 (2000), available at https://ir.lawnet.fordham.edu/flr/vol69/iss3/9/
11. In one highly publicized case in New York, a federal judge found that the Department of Justice had put inappropriate pressure on a corporation for the corporation to cease paying the fees of its officers. For a general discussion, see *Comment, United States v. Stein*, Harvard Law School Forum on Corporate Governance (September 28, 2008), https://corpgov.law.harvard.edu/2008/09/28/us-v-stein/.
12. Under most professional responsibility regimes, an attorney cannot advise a client on the commission of a future crime, and any communications were it to do so would not be considered confidential.
13. https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (2017)
14. https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (2017)

disclosed by others.' The standards for the *Defense Function* are notably different, emphasized by the section heading of the 'Defense Counsel's Tempered Duty of Candor.' The standards provide that a defense lawyer's primary duties are the duties of confidentiality and loyalty to the client, and that while a lawyer has a 'duty of candor toward the court and others,' this duty is 'tempered by the duties of confidentiality and loyalty.'[15] The standards nonetheless provide that counsel 'should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or a third party,' but notes that 'it is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence.' In possible contrast, in some European judicial systems there is open discussion, including in professional journals, of a 'right to lie' in criminal defense.[16] That issue is nuanced and very easy to exaggerate, but does reflect the crucial fact that the issue of 'candor' in adversarial situations is handled very differently around the world.[17]

While these differences are easy to oversimplify, they show that the professional limits on an attorney's ability to negotiate on behalf of a client, and in particular the use of information learned in the scope of the attorney's engagement for the client, differ among jurisdictions and are highly sensitive. The quandary becomes particularly acute if the issue of 'cooperation' – in the sense of a corporation or an individual agreeing to provide evidence helpful to the prosecution in its pursuit of others – is on the table, since from a prosecutor's perspective erroneous or even partial cooperation may be useless or worse. In such circumstances, a corporation eager to obtain the best possible outcome may be asked to share the entirety of the fruits of its internal investigation, including, for example, turning over an investigation 'report' done by attorneys hired by the company.[18]

It is critical to emphasize that the decision to share information, including in the form of a written report, is a decision separate from deciding whether to investigate in the first place, even if that investigation results in an internally disseminated report. In some circumstances, however, the two functions may so closely overlap as to appear to be identical. Such can occur when an initial inquiry leads a corporation quickly to conclude that its best strategy is to offer full cooperation with a prosecutor even before a full investigation has occurred, and thus to conduct the investigation in coordination with the prosecutor. Such a rapid decision may under appropriate circumstances be advisable if the opportunity to make a 'self report' or the 'first report' could be lost by waiting. Further, a coordinated investigation – that is, one done with the advance approval of a prosecutor, and at least to some degree under its supervision – offers some further advantages, including the ability to negotiate agreed-upon limits to the investigation's extent.[19] A coordinated investigation, however, creates dynamics that may be quite different from those encountered in an internal investigation done purely for the purpose of learning facts in order to advise a corporation.

A 2019 decision in the federal court in New York in a case called *United States v. Connolly* provides a somewhat extreme example of a coordinated investigation, and suggests some of the unusual legal issues such an investigation can provoke. As found by a federal judge in a publicly reported opinion,[20] the banking giant Deutsche Bank hired a prominent

15. *Criminal Justice Standard for the Defense Function,* Section 4-1.4.
16. For example, in France see *Le Droit de Mentir,* http://www.minidroit.com/index.php/2017/11/01/71/ *(2017) ; Le Droit au Silence à Celui de Mentir,* https://www.justice-en-ligne.be/Du-droit-au-silence-a-celui-de *(2017).* See generally, Davis, *How National and Local Professional Rules Can Mess Up an International Criminal Investigation*, https://globalinvestigationsreview.com/article/1194073/how-national-and-local-professional-rules-can-mess-up-an-international-criminal-investigation (2019).
17. In France, members of the Paris Bar and of the National Council of Bars (Conseil National des Barreaux) have done a commendable job of exploring these nuances in a series of publications. See Ordre des Avocats de Paris, *Rapport sur les Problématiques et les enjeux liés au statut et au rôle de l'avocat « enquêteur » dans le cadre d'une enquête interne* (December 2019), text available at http://navacellelaw.com/fr/rapport-sur-les-problematiques-et-les-enjeux-lies-au-statut-et-au-role-de-lavocat-enqueteur-dans-le-cadre-dune-enquete-interne/ ; Conseil National des Barreaux, *Guide : L'Avocat Français et les Enquêtes Internes* (June 2020), available at https://www.cnb.avocat.fr/fr/actualites/un-guide-pour-accompagner-la-profession-en-matiere-denquetes-internes ; available in English at https://encyclopedie.avocats.fr/GED_BWZ/120568094874/CNB_2020-08-28_CREA_guide-pratique-enquetes-internes-internal-investigations%5bEN-A-K%5d.pdf, ;Conseil de l'Ordre, *Vademecum de l'Avocat Chargé d'une Enquête Interne*, (May 2020), available at http://avocatparis.org/mon-metier-davocat/publications-du-conseil/annexe-xxiv-vademecum-de-lavocat-charge-dune-enquete.
18. For an invaluable study of how 'culture' affects such legal and strategic issues, see Einbinder, *Corruption Abroad: From Conflict to Co-operation: A Comparison of French and American Law and Practice,* typescript to be published in the International Comparative, Policy & Ethics Law Review by the Cardozo School of law. The text is available from the author.
19. In 2008, the U. S. Department of Justice issued a formal 'Opinion Procedural Release 08-02,' available at https://www.justice.gov/criminal-fraud/opinion-procedure-releases , which to some degree formalized the use of coordinated investigations in the context of a corporate acquisition. The Release permitted an acquiring company acting under tight time deadlines to proceed with a corporation acquisition under assurances that it would not be held criminally responsible for acts committed by the target company (which would likely otherwise be the case under principles of successor liability) in return for a commitment to conduct as post-acquisition investigation on an agreed-upon schedule and to share the fruits of that investigation with the DoJ.
20. *United States v. Connolly*, 2019 WL 2120523 (SDNY 2019)

law firm to advise it with respect to apparent illegal activity committed by some of its bankers. The law firm advised the bank to reach out quickly to the Department of Justice and reach a deal that essentially provided that the bank would be treated very leniently if it conducted a diligent internal investigation and shared its fruits with the prosecutor. As found by the judge, during the investigation the local prosecutor gave virtually daily 'marching orders' to the law firm on how to conduct the investigation to such a degree that the bank and its counsel 'were *de facto* the Government,' and at its conclusion the law firm provided a written report to the prosecutor that the firm itself described as setting out the evidentiary basis for all 'the facts necessary to allow the DOJ to complete its investigation and reach its own conclusions about the misconduct at issue.'[21] On the basis of this private report, a number of the bank's employees were indicted, and included among the evidence against them was law firm's report of its interviews with them. As the *Connolly* case itself demonstrates, such coordinated investigations – called 'outsourced' by the *Connolly* judge -- raise a number of difficult legal and professional issues. Among them:

– The legal, professional and moral obligations of an interviewer. As the Judge in the *Connolly* case noted, the employees interviewed by the bank's law firm were under tremendous pressure to participate in the interviews, and at least some of those who did so and were later indicted were not represented by counsel during their interview. In *Upjohn v. United States*[22] the Supreme Court clarified that when a lawyer engaged by a company interviews an employee, the lawyer does not represent the interviewee, and implied that the employee must be so informed – the source of the now-common 'Upjohn warnings' routinely given by lawyers conducting such an investigation. But whether a lawyer conducting an investigation should even interview someone who is likely to provide self-incriminating information raises ethical issues that are very context-specific, and on which local professional rules may differ.[23]
– In *Connolly* itself, the judge concluded that the theoretically private interviews conducted by the were in fact so imbued with official status that the admissibility of the fruits of the interviews should be evaluated by Constitutional and procedural standards applicable to official interrogations, including the protection afforded under the Fifth Amendment against compelled self-incrimination.[24] Under this reasoning, a finding of compelled self-incrimination could lead to a form of 'immunity' where the testimony, and evidence found by follow-up on it, would be excluded from use in the prosecution.[25]
– At least in circumstances where an interviewee knows or should understand that the fruits of the interview would be shared with a prosecutor, there is the risk that a false statement made by an employee to a private attorney retained by interviewee's own employer might be the basis for prosecution under statutes protecting the integrity of official investigations against obstruction of justice.[26]
– From a prosecutor's perspective, the 'outsourcing' of an investigation to a private law firm raises issues relating to the prosecutor's constitutional or other legal obligation to provide satisfactory discovery to a defendant indicted on the basis of a private investigation, since many of what is normally considered 'investigative' files will be in private hands.[27]

4. Are the fruits of an investigation confidential?

When done solely to allow an attorney to advise or represent a client, we have established that most professional regimes – with notable differences – protect the confidentiality of the information

21. *Id.* at p. 14.
22. 449 U.S. 383 (1981).
23. At a minimum, professional rules in the United States require that an attorney hired by a corporation be sure that anyone interviewed understands on whose behalf the attorney is acting. Thus, the *Model Rules of Professional Conduct* published by the American Bar Association, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ , provide not only that no lawyer can 'give legal advice to an unrepresented person … if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client,' but state further that '[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.'
24. *Connolly* at page 19 et seq.
25. In *United States v. Kastigar*, 406 U.S. 441 (1972), the Supreme Court held that a prosecution cannot be 'tainted' by use of testimony provided by a defendant under circumstances where that evidence had been compelled and that created an 'immunity' for the testimony. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court ruled that some forms of private compulsion of testimony may create a form of 'immunity' for the person so compelled. In *United States v. Allen*, 864 F.3d 63 (2 Cir. 2017), the federal court of appeals in New York ruled that testimony compelled by a non-United States state actor (in that case, investigators in the United Kingdom) triggered a *Kastigar* defense. In *Connolly* itself, Judge McMahon ultimately denied relief to the defendants on the ground that the private obtained evidence, while 'compelled,' had not been the basis for the prosecution.
26. See O'Sullivan, *The DOJ Risks Killing the Golden Goose Through Computer Associates/Singleton Theories of Obstruction*, 44 Am. Crim. L. Rev 1447 (2007), discussing recent cases where individuals were prosecuted for obstruction of justice based on statements made to privately retained attorneys.
27. See generally, Davis, *Internal Investigations and the Specter of State Action*, ABA Litigation Journal (May 2020), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/internal-investigations-and-specter-state-action/

obtained by an attorney, the attorney's analysis of that information, and any communications with the client concerning these efforts. Part II above emphasized that care must be taken to assure the continued availability of this protection when an investigation involves more than one jurisdiction.

What happens, though, when an attorney (with the client's informed consent) enters into discussions with an adversary such as a prosecutor, regulator, or investigator? As noted above, such discussions may involve sharing with an adversary information that had been jealously kept confidential. How can this be done in a way that minimizes any risk that confidential information will be disclosed beyond that intentionally offered by the attorney? There is no simple answer to this important question, which will vary significantly depending on the specific context, the relationship with the adversary, and the applicable principles and practices.

In the United States, practitioners have developed practical procedures to address this problem. Some of them are:

– Strong traditions, and some specific rules, support the principle that negotiations should be encouraged, and thus that evidence concerning unsuccessful negotiations (those that do not lead to an outcome) cannot be used against the party that made them. Rule 410 of the Federal Rules of Evidence, for example, excludes from evidence at trial 'a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.' This and similar provisions generally apply only to actual statements, which may not be a sufficient protection if a prosecutor can use such statements as a guide to search for independent evidence.
– An attorney may make a so-called 'proffer' in hypothetical terms. An initial hurdle in many cases is whether there is in fact a basis upon which to negotiate, where a wary prosecutor may be hesitant to commit to any outcome without having a good idea of the facts that the client is willing to disclose, while a prudent attorney may be hesitant to confirm facts learned from the client. This is particularly pertinent if an ultimate agreement may include an obligation to 'cooperate' by providing evidence against others, where the prosecutor will want to evaluate the credibility and evidentiary (and strategic) value of such evidence. In that circumstance, a lawyer may make a presentation that is sufficiently concrete to be useful to the prosecutor, but remains sufficiently vague and bereft of actual evidence to avoid a complete surrender. The discussions surrounding such an agreement often depend on some degree of trust between the parties, and thus often on any relationship they may have or at least their reputations.
– Prosecutors in the U.S. sometimes agree to a so-called 'Queen for a Day' procedure, where they get to actually interview an individual client (or representative of a corporate client) under a strict agreement that the interview itself (and, if so negotiated, its fruits) will not be used as evidence against the person being interviewed.

Each such exercise requires very careful attention to detail. The complexities increase if the investigation is a big one, particularly if it involves more than one jurisdiction. Among the problems that must be anticipated are the following.

– Is there a risk that a 'partial waiver' of applicable protections will not be sufficient? Absent a very specific agreement, even a well-intentioned transmittal of some information subject to a professional protection or other form of confidentiality may lead to a claim that there has been a waiver as to the entirety on the otherwise protected information, on the ground that a person or entity (or attorney advising them) cannot 'pick and choose' helpful information to share publicly without subjecting the rest of the available information to scrutiny.
– Will an agreement reached with one adversary have any limiting effect on an adversary in another jurisdiction? The answer generally is No, in several different senses.
– Even within the United States, an agreement with a federal prosecutor logically cannot 'bind' a state prosecutor.
– The same is certainly true with respect to cross-border investigations: an agreement in one country will not, by itself, be binding on officials in another.
– An agreement reached in an official proceeding (criminal or administrative investigation) may not bind private parties in civil litigation over the same subject matter.[28]

5. Ethical obligations of the attorney

Already noted above are nuanced issues concerning the 'duty of candor' and how it applies in criminal defense generally, most particularly in the negotiation of outcomes; these issue are particularly sensitive to cultural context, and for that reason will vary tremendously from country to country. Indeed, local rules and traditions may make 'negotiation' between an attorney and an adversary difficult or even, theoretically, impossible. In France, for example, a client cannot 'waive' the *secret professionel*, which is the professional principle of confidentiality that is the near – but far from exact – equivalent of the attorney/client privilege as that is understood in the United States.[29]

28. The Court in *In re: Itron, Inc.*, Dkt. 17-60733 (5th Cir. 2018) provided a useful analysis of when information generated in a criminal investigation where the attorney/client privilege had been maintained can be obtained by an adversary in a civil proceeding.
29. See generally, Kirry, Davis & Bisch, *'France'* in *The International Investigations Review* (10th ed. 2020). The authorities cited in fn. 17, however, indicate flexibility with respect to this rule.

4. Investigations Done for Publicity

Very different from situations where an attorney is asked to advise and, ultimately, defend a corporation is when an attorney is asked to do an investigation – sometimes trumpeted as an 'independent' investigation – where the fact of the engagement is made public, and there is an explicit or implicit promise that fruits of the investigation will also be made public. Such exercises essentially amount to public relations, since they are generally designed to provide assurances to the public – often, in particular, shareholders – and minimize the negative impact of corporate misconduct. While such investigations may coexist with professional efforts to advise and defend, they involve very different dynamics.

Among the variables:

1. Who is the client?

The client may be, and often is, the corporation itself. But sometimes corporate entities with some degrees of independence of corporate management may engage an attorney to inform it about internal matters. An audit committee, for example, may either under the corporation's by-laws or by local requirements be obligated to reach its own evaluation of risk, and in fact may be required to assure that proper disclosure to the public is made if the company is publicly traded. When faced with a perceived threat of litigation or investigation, a company may set up a special committee to be responsible for internal decisions, and that committee may hire an attorney to aid in learning facts and disseminating them to the public. Such a committee may, in some circumstances, consist of 'independent' members of the board, that is, directors who are not also officers. The actual degree of true 'independence,' of course, will depend on a number of factors that will vary from case to case.

2. Who pays the fees?

Ultimately the fee-payer is likely to be the corporation itself, either directly or via an internal entity such as a committee. While an agreement on fees is usually agreed upon as a matter of course, they bear on the attorney's ethical and professional responsibilities – and upon the appearance of professional integrity. If for example an attorney is retained to do an investigation that is publicly described as 'independent,' is it appropriate that the attorney is in fact a regular or repeat attorney for the client? More generally, does not an attorney have an incentive – or at a minimum the appearance of an incentive – to favor the outcome of investigation to put the best light on the entity that pays her fees? Will the amount of the fees be made public?

3. Who is the audience?

We have already seen that 'defensive' and 'for negotiation' investigations have different audiences, which have a big impact on the relevant dynamics. This is equally true with respect to 'public' investigations.

A fundamental problem with many 'public' investigations is that there is a disconnect between the 'client' and the payer of 'fees,' on one hand, and the actual and intended 'audience' on the other. That was already the case with respect to investigations linked to adversarial negotiations, but in that situation the adversarial dynamic is open and acknowledged, and both parties can protect themselves. When an attorney conducts an investigation that is designed to be presented to 'the public,' however, the dynamic is not inherently or obviously adversarial, and readers may not necessarily have recourse to their own sources of information sufficient to evaluate the actual goals of attorney's investigation and the possibility for bias.

Any attorney hired to do an investigation must be careful to ascertain exactly what the client seeks to accomplish. In many cases, of course, the corporate officer or entity may sincerely ask that a truly 'independent' internal investigation be conducted and genuinely want to ascertain the truth, and many attorneys would as a matter of professional pride refuse to proceed otherwise. As some commentators have noted, however, as a matter of simple psychology, and possibly of economic self-interest, one cannot exclude the possibility that an attorney conducting an ostensibly 'independent' investigation for publication may have a tendency to provide a narrative that is useful to the entity responsible for fees, and for future business.[30]

Once made public, a report of investigation may have both intended and unintended consequences. In some instances, persons interested in the event being investigated may not feel that a full or adequate story has been presented, and may publicly complain about a 'cover up.'[31] In others, individuals whose acts are portrayed negatively may not only complain about their treatment publicly, but may sue the attorney or firm responsible for the report for defamation.[32] And finally, a report may be designed to have an impact on the company's shareholders,[33] leaving open a question whether

30. See, for example, Roche, *Investigating with Integrity*, Ethisphere Magazine, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ .
31. One well known university hired a prominent lawyer (and former prosecutor) to do an 'independent' investigation of allegations of sexual misconduct, the report of which was considered by complainants to be 'a work of advocacy dressed up in the garb of impartiality and 'independence.'' *UR complainants issue response to 'rickety' report*,' https://www.democratandchronicle.com/story/news/2018/02/05/mary-jo-white-ur-rochester-jaeger-sexual-harassment-response/306980002/.
32. In a highly visible case where an investigation was conducted by the former head of the Federal Bureau of Investigation, one person mentioned in the report sued its author for defamation; the suit was ultimately dismissed when the individual was found criminally guilty for the conduct discussed in the report. https://apnews.com/9e632abcc9234398bf251dd2f94839c5.
33. See Jackson, *One Take on the Report of the Independent Directors of Wells Fargo: Vote the Bums Out*, Harvard Law School Forum on Corporate Governance (April

shareholders claiming to have relied upon a publish report may attempt to sue the authoring attorney under securities laws.

So-called 'independent' investigations are a notably profitable source of business for the (often large) law firms that conduct them. This can be readily ascertained by doing a simple Google search for 'independent investigations by law firms,' which will return (along with a relative sparse number of articles on the subject) a large number of websites of firms that offer this service.

4. Confidentiality

For obvious reasons an investigation done with the goal of publishing it will not raise confidentiality concerns that are nearly as important as they are with respect to the two earlier typologies. Some issues, however, must be anticipated, including:

– If the attorney responsible for a published report also provides advice to the client, the protections normally appliable to such communications may be found to have been waived by publication of a report. For this reason, the two functions – investigation for publication and advice – should be kept rigorously separate, and conducted by different lawyers.
– Subsequent events may make the details of the attorney's investigation of interest to third parties. For example, individuals who encounter civil or criminal challenges related to the matter investigated may seek access to the investigating attorney's files and memoranda.[34]

2017), https://corpgov.law.harvard.edu/2017/04/22/one-take-on-the-report-of-the-independent-directors-of-wells-fargo-vote-the-bums-out/.

34. In one famous case involving the so-called 'Bridgegate' scandal, a prominent law firm did an investigation, and issued a public report, at the request of then New Jersey Governor Chris Christie finding that he had no involvement in the matter. See *Report*, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjOvtmAid_rAhWqmHIEHbfnAAwQFjACegQIAxAB&url=https%3A%2F%2Fwww.courthousenews.com%2Fwp-content%2Fuploads%2F2017%2F01%2Fgibdunnreport.pdf&usg=AOvVaw3GhoedIpmsOtU7Ov0WhKaO. Some of Governor Christie's former associates were criminally prosecuted for their alleged participation in the matter, and sought the interview notes and other documents generated by the investigation. The judge handling that criminal matter then discovered to her expressed annoyance that the law firm had adopted what the judge called the 'clever tactic' of simply not generating documents other than the report itself, by the simple expedient of 'overwriting' (rather than discarding) initial notes so that they literally became part of the final document. See *Judge Slams Christie Law Firm over Bridgegate Investigation*, https://www.nj.com/news/2015/12/judge_slams_christie_law_firm_in_internal_bridgega.html.

5. International Variables that Can Affect Internal Investigations

This note lists a number of factors that distinguish several quite different types of internal investigation, and of course there are others. Those variables become much more complex when an investigation crosses borders. Here are some specific issues that may arise.[35]

What countries are involved? As noted, until recently most criminal practice has been, and to a great degree remains, local: a lawyer advises or represents a client with respect to a criminal risk in the country or state where the prosecutor and the defense counsel generally share common backgrounds, and where the applicable laws, procedures, traditions and practices are clear. The burgeoning area of multinational investigations may create actual or potential links with several countries at once, in a variety of ways.

– More than one country may investigate the same conduct. The territorial limits of any country's criminal laws, and the reach of its prosecutorial function, often allow more than one country to consider that its laws apply, and that its prosecutorial function and courts and competent to address, to the same facts or series of facts.[36] The complexity of managing multi-jurisdictional investigations is complicated by the near-total absence of any international equivalent of a Double Jeopardy, or ***ne bis in idem*** principle.[37]
– Evidence may be found in more than one country. Even if an internal investigation is focused on a criminal risk on a single country, evidence relating to it may exist in other countries, whose laws may apply to efforts to discover, obtain access to, and transfer such evidence.
– Rules affecting professional conduct are not identical. The professional obligations of attorneys vary a lot from country to country. An attorney conducting or coordinating a multi-jurisdictional investigation may need to be aware of, and often to comply with, several sets of rules, including those of her 'home' jurisdic-

35. For a more extensive but still general review of the complexities of doing criminal investigations internationally, see Davis and Jenkins, *The Challenges of Managing Multi-jurisdictional Criminal Investigations*, in *The International Investigations Review 10th ed., 2020).*
36. The inevitable possibility of multiple investigations and prosecutions from the same conduct is reflected in the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, available at http://www.oecd.org/corruption/oecdantibriberyconvention.htm Article 4(3) of the Convention proposes procedures to apply '[w]hen more than one Party [that is, signatory country] has jurisdiction over an alleged offense....'.
37. See Davis, *International Double Jeopardy : U.S. Prosecutions and the Developing Law in Europe*, 31 Am. U. Int'l L. Rev. 57 (2016).

tion, those of any place where she engages in conduct relating to the investigation, and often the rules of the place where a matter may be heard or a prosecutor consulted. Among the issues on which distinctly different rules may occur are the following:
  - Does the attorney in fact qualify as a 'lawyer' for purpose of claiming professional confidentiality. As noted above, for example, the status of 'in house counsel' as members of the profession of 'lawyers' varies considerably.
  - Have all of the local prerequisites to maintain confidentiality been satisfied?
  - Is the attorney permitted, by applicable professional standards and rules, to 'negotiate' with an adversary, and if so, can the attorney use the fruits of an internal investigation in such discussions?
  - Can the attorney participate in in-person efforts to obtain information, such as a witness interview? Is local Bar membership a requirement? Are there local rules respecting the rights of witnesses?
- Other local laws and regulations may apply, including
  - Workplace conditions and labor relationships. Local, including industry-specific, norms respecting participation officers and employees of a corporate client may have a very practical impact on the success of an internal investigations.
  - Obtaining and storing information relating to an investigation may need to comply with local privacy and database management norms.
  - Transfer of information outside of one country to another, including the possible application of so-called 'blocking statutes.'
  - The applicability (and often the utility) of international information exchange mechanisms, such as Mutual Legal Assistance Treaties (MLATs) or Memoranda of Understanding (MOUs), as well as local legislation that may apply to cross-border discovery and transfer of information.[38]

6. Conclusion

As noted, internal investigations can be profitable and consequential. There is fortunately a broad literature on how best to do them. Following the precepts of such literature, however, requires some early analysis about exactly what is at stake, what are the goals, and how can the best strategy be identified.

38. As an example, 28 U.S.C. Section 1782 provides that 'any interested person' may apply to a federal district court in the United States to obtain evidence 'for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.'