

Barbara J. Dawson - Anatomy of Director-led Investigations

Corporate boards are increasingly being required to be involved in internal investigations, often directing special counsel to the board. I want to share a look at the anatomy of the investigation with a focus on the role of special counsel to the board.

So, let's start with what prompts the director-led investigation. Reports of possible wrongdoing can arise in a variety of ways. There would be an anonymous tip or complaint, a shareholder suit or demand, an inquiry or investigation by a government agency, such as the SEC. A notice from outside auditors can prompt it, or there can be other allegations of misconduct that prompt the investigation. The directors must carefully evaluate the situation to ensure that they act quickly and decisively in handling the investigation appropriately.

So, who should be involved? Investigations directed by the Board of Directors are often delegated to the board committees, such as the audit committee or a special committee of directors formed for the purpose of conducting the investigation. The committee in turn is able to retain independent counsel and other professionals to perform investigative work at the guidance of the directors.

What's the process? Ensuring a proper process is critical for protecting the integrity and usefulness of the investigation. A key component in the process is making sure to use the attorney-client privilege in an appropriate way. Whether a privilege can be asserted to protect the investigative work and findings will depend upon how the investigation is handled in its scope.

The following process is a general roadmap for an investigation. The first step would be document preservation, including suspending any routine document destruction of important information. The second step is preliminary document interviews with key personnel to ensure that you know where the documents are and what needs to be collected and reviewed. Third, documents should be collected, and it may require involvement with the IT staff to secure the collection, which would include emails and imaging hard drives in some circumstances. Fourth, document review would be done of important documents. And fifth, you would have interviews of witnesses following the document collection and review. And finally, there would be a preparation and sharing of conclusions with directors and advisors and other appropriate audiences.

So, what's the end result? At the conclusion of the investigation, the investigative team will present their findings to the board or the board committee that initiated the investigation. The findings will be presented in a variety of ways depending upon the circumstances. It could be a written report or presentation. It could be oral or a combination of oral and written, depending upon the circumstances.

While no two investigations are identical, a common pattern has emerged. A focus on having the right parties take the right steps in the right order is critical to ensure the success of any director-led investigation.

[End of Audio]