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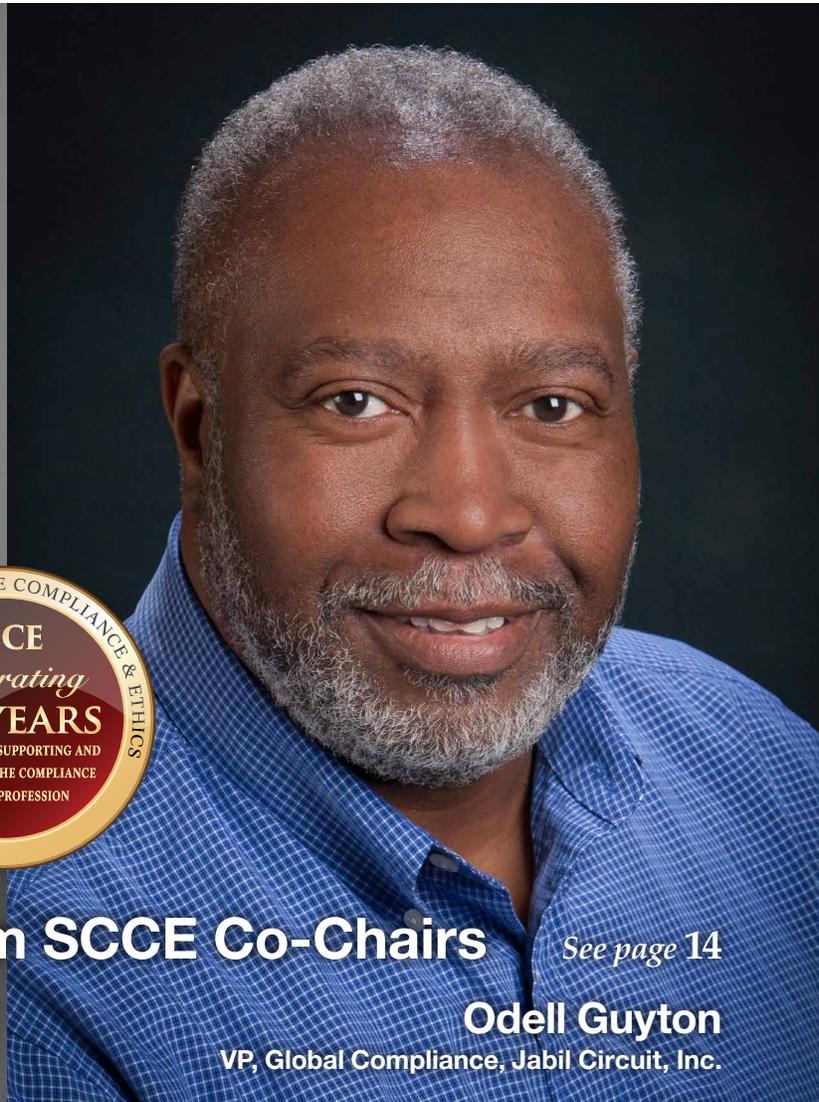
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Growing the SCCE: A 10-year perspective from SCCE Co-Chairs

Dan Roach
General Counsel, Optum360



Odell Guyton
VP, Global Compliance, Jabil Circuit, Inc.



See page 14

19

The cost of unethical behavior
William "Stuart" McNeill

27

**ERM + FSGO = CRM:
A powerful combination to help keep your CEO out of jail**
Carol Stern and C.J. Rathbun

33

Graduate degrees in Compliance: Training the next generation
Robert K. Vischer

37

The growing global Compliance profession: A roundtable discussion
Adam Turteltaub

by Paul Cogswell

“Houston, we have a problem...”: A multidisciplinary approach to corporate compliance investigations

- » Better to plan a grade A execution of a grade B plan than the other way around.
- » Consider talent and skill sets that would contribute to an investigation, beyond those you have historically used.
- » Managing investigations and crises are surprisingly similar, if you consider some different tools.
- » Be guided by the overall objective of an investigation and understand the strategic vision, but act with tactical precision.
- » Being seen and heard as a trusted advisor when no crisis exists will make it easier when an investigation needs to be done.

Of all the things a compliance professional does, the most intense is when you are called to review or investigate an emerging problem and provide the best approach to getting it back on track.

This article speaks as much to the “how” as it does to the organizational realities we as professionals often face. Hopefully, it will ring some bells with the community.



Cogswell

Actor Sydney Greenstreet, who played The Fat Man in the movie **The Maltese Falcon** and crooked club owner Signor Ferrari in

Casablanca, was not most likely one of the most famous detectives of the silver screen. Humphrey Bogart on the other hand was. Why?

Television, books, and movies have given virtual folk hero status to the lone, single-minded detective or the equally lone and driven investigative lawyer. The image of the “private eye” in a dogged hunt for evidence, unconcerned with collateral

consequences, and only minimal regard to the expenditure of resources, makes for great TV drama, but has little place a real world corporate environment.

Of all the things a compliance professional does, the most intense is when you are called to review or investigate an emerging problem and provide the best approach to getting it back on track.

Every day, corporations must face the realities of tainted products, aggressive sales people, consumer fraud, labor relations, purchasing agents in foreign markets, overzealous regulators, and chronically misunderstood and ethically challenged executives. Not to mention the “crises de jour” mentality that is often responsible for

derailing thoughtful strategy and infecting business leaders with a healthy dose of distraction.

These are a few of the external and internal trigger points that corporations face when undertaking a corporate compliance or internal investigation. They require a degree of expertise and collaboration as well as a healthy dose of thoughtful legal and investigative crisis management skills.

I emphasize the necessity of combining both abilities to accomplish the task.

When approaching the emerging crisis as a complex investigation, it is critical to lay out a solid plan by first understanding the facts, the issues, the stakeholders and, perhaps more importantly, the outcomes. Generally speaking in the context of complex investigations, remembering a solid axiom from physics (i.e., Every action has an opposite and equal reaction.), suggests thoughtful planning is probably better than applying the maxim that violent execution makes up for poor planning.

The disciplines of crisis management planning have many synergies to the disciplines required to conduct a complex investigation in a corporate environment.

The investigative crisis

An article detailing each element of a complex investigation has been the subject for many investigative treaties. My hope is to provide some insights into the similarities of managing a crisis and managing a complex investigation in a corporate environment. Many a complex investigation plan can be traced to crisis management planning disciplines. The

objective here is to provide the reader with an appreciation of the synergies between the two disciplines and provide some pragmatic strategic and tactical planning steps necessary when faced with the need to conduct a complex corporate investigation.

In the midst of a chaotic mix of legal and regulatory issues, consumer activism, tabloid media, and political agendas that might well affect a company's reputation, profitability

and, perhaps, its very survival, the collaboration of a number of disciplines is essential to insure the effective management and timely resolution of high priority investigations. Unlike Joe Friday on the TV show *Dragnet*, the competent investigative team must

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One successful approach involves forming ad hoc groups, or what I refer to as multidisciplinary investigative teams. Convening a group of individuals who have diverse professional skills (many of which have not traditionally been associated with each other) can establish a good foundation for a diversity of thought, approaches, and disciplines. It can contribute to the successful outcome of a complex investigation with alacrity and efficiency.

Those familiar with the business literature of crisis management¹ will recognize that diverse multidisciplinary teams are necessary to achieve success in the face of a crisis. This concept successfully managed many a firm through high-profile crises that threatened their continued existence. (Consider the Tylenol poisoning case in the 1980s, where crisis management techniques may have been

responsible for saving the reputation and profits of Johnson & Johnson.²⁾

Yet individuals responsible for managing the investigative process often do not grasp the concept that this similar methodology lends itself well to complex or high-profile investigations.³ Why that failure of perception exists is not quite clear; after all, both the symptoms and objectives of a crisis and intensive investigation tend to be quite similar: something went wrong. Both seek not only to identify and eliminate the cause of the crisis or suspected illicit behavior, but also to prevent future occurrences and minimize collateral damage ancillary to the incident, crisis and, more importantly, the fact finding processes.

Moreover, both are ultimately a test of the company's resolve to act as a responsible corporate citizen. Inappropriate actions could have short-term adverse affects on business continuity, smooth operations, succession planning, and image; it might in some cases result in potential civil or even criminal liability. However, inaction can also yield unfavorable results. The consequences of behaving like an ostrich, eventually becoming mired in the paralysis of inaction,⁴ or conducting a superficial investigation may prove to yield equally poor outcomes.

The necessary elements to a successful corporate investigation are embedded in the volition to act appropriately but maintain a strategic balance, using a method designed to minimize adverse consequences of what could

be an invasive process. The combination of strategic vision and precise tactical executions can be simply referred to as “ready, *aim*, fire” rather than “ready, *fire*, aim”—a subtle, yet critical difference in the path.

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corporate investigations worth understanding. By borrowing from each you are able to combine different disciplines along a common path towards a common goal. These are only some considerations and not by any means intended to provide the reader with a step by step “cookbook”

approach to achieving successful investigative outcomes. There are many means to an end, however avoiding those that make the operation a success but kill the patient, requires some sensitivity to more than just the tactical and legal aspects of fact finding.

Developing a plan, considering outcomes

Some time ago, I was brought in on what turned out to be a major crisis for a large investment banking firm. It turned out that a critical piece of the software code for their proprietary trading platform was going to be sold to a foreign competitor (unaware of its provenance) by a brilliant, but ethically challenged and chronically misunderstood software developer employed by the firm. At the time, this piece of the overall program was a critical component that allowed the bank to speed up the amount of time between when a trade was placed on the trading floor and

actually booked. In that world, an advantage of 90 seconds was worth a lot. As we treaded lightly through the world of intellectual property, computer forensics, analysis of sovereign foreign immunity, and jurisdiction (just to name a few), it became clear that the plan was driven in part not only by the facts, but also by the diverse group dynamics. Had we approached this as a simple exercise in determining who, what, when, where, how, and why, the outcome would have been undoubtedly less successful than that expected by the organization.

An investigative plan, developed by a multidisciplinary team, can be a critical fundamental first step. As many management treaties have espoused, you can never plan to fail, but you can always fail to plan. The concerns considered in the formulation of the plan are suggestive of at least some of the disciplines that may be represented on the team.

Clearly, the legal demands associated with the investigative process need to be understood and scrupulously followed. This includes federal law, state law, applicable regulations, labor contract provisions, and principles of corporate governance and human relations, as well as compliance with the myriad of corporate internal policies, much of which can be inconsistent and even contradictory.

Fairness

Beyond that, equitability and fairness issues must be of major concern. The investigation has to be fair in *effect*; management, employees, and authorities must also *perceive* it to be fair. That often means approaches used in one investigation involving serious misdeeds may be just as legal but inappropriate in an investigation involving minor infractions or policy violations. One size does not fit all.

Investigative planning requires an analysis of all of the possible approaches to the problem. It is amazing how many investigations are conducted in a manner designed to uncover only that evidence tending to support the investigator's initial conclusions. The fear that "a gang of ugly facts will beat up the beautiful theory" often results in relevant evidence being discarded, and alternative but equally valid theories being ignored without proper due diligence.

Proper analysis of the issues must consider facts beyond who, what, where, when, why, and how. Concerns such as the reputation of the company and its employees, negative media attention, unscrupulous practices by untrained personnel, and the potential for Monday morning quarterbacking by executives are just a few that could negatively affect investigative outcomes when ignored. Investigative planning must consider the potential outcome from the start and be guided, but not confined, by them.

Instant media is a fact. There is a tendency to immediately report embarrassing or negative information because of its freshness, but ignore the opposite news simply because it cannot capture the attention of the reader. Many an indictment makes the front page, whereas the outcome of the process, whether guilty or not, is forgotten. Consequently, corporations have suffered from severe myopia due to the fear of publicity.⁵

Fear is a critical emotion for survival, but it should not determine the outcome of the process. Fear should alert the company that there may be a potential for adverse publicity and these needs should be considered thoughtfully and managed. Planning the positive message from the onset, whether it is responsible corporate behavior or intolerance of illegal activity at any level, is a worthy consideration.

Personnel actions against individuals within the corporation may be necessary⁶ at any time during the course of the investigation. The timing of such actions may have an impact on both the investigation and the business itself; which is to be given priority is not always foregone conclusion. The impact on the business may be especially significant if the employee is a senior businessperson. A succession plan may need to be designed and implemented, and the notice of the decision disseminated. These should not be done at the last moment, but as part of a well-conceived strategy. Termination versus separation has a practical as well as strategic consequence.

I have no doubt that the reader has already thought of a number of other issues, either from experience or from knowledge of the particular business environment that would and should be included in the investigative plan. If so, then the article is doing the job intended. After all, the corporation does not act in a vacuum. The corporation may be selfless and willing to suffer financial consequences, but it must take into account the needs of its vendors, customers, and overall constituency.

Planning is essential, but must remain flexible based on the nature of the matter to be reviewed. For that reason, while the core elements of the team, or the “mission critical” specialists tend to be constant in all complex investigations, the additional experts are dependent on the nature of the business or

industry and the type and scope of the matter under review. Including additional members earlier may be counter to the investigative mindset; however, that diversity of expertise can lead to a better alignment with the investigative objectives.

Skill sets

If all you have is a hammer, everything tends to look like a nail.

In the process of complex investigations, having more than a hammer in the toolkit is essential. It is virtually always the case that

the core team includes investigative, legal, audit, and human resource professionals. The right mix of individuals and disciplines that supplement that team is equally important. Supplemental skills frequently desired include finance, forensic computer expertise, public relations, employee

relations, business management, and those familiar with international transactions.

Whether or not those skills come from within or outside of the organization is not always readily discernible. The need for an independent and totally objective outsider⁷ should be considered alongside the benefits (e.g., knowledge, cost savings, and commitment) derived from the use of insiders. Generally, the self-directed, multidisciplinary team will possess the requisite knowledge and experience to decide whether it should be the primary investigative resource, the manager of external resources, or part of a hybrid team. The following are core team essentials.

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The lawyer

In some ways, I may have been overly simplistic in suggesting that “legal skills” are needed on the team. While that may be technically true, the type of legal skills is what is relevant—and they are the types of skills not always readily discernable in an individual attorney.

The attorney must be familiar with the legal aspects of the business, investigative procedures, (e.g., federal law may allow one party consent recording of conversations while a particular state may prohibit the same conduct), and other available remedies, both prospective and remedial. The attorney should have a adaptable personality and good judgment.

The personality should be controlled from pleasant to aggressive as the facts/situation warrant; in essence the same skill set that is valued in investigators and managers, a common-sense ability to adapt to the exigencies of the moment. Nothing interferes with the team approach more than a lawyer who constantly opines on why a thing cannot be done, rather than determining how compliance with applicable laws and regulations can be achieved while still achieving a successful outcome to the investigative process.

Clearly a discussion of legal privileges in the context of complex corporate investigations (e.g., the attorney-client privilege, work product privilege, and self-evaluation) is too complex and lengthy a subject for this article. Scholars and practitioners have extensively written and

debated about privilege issues.⁸ However, some basic cautions may be advisable to consider. For example, the privileges that exist when an attorney acts in contemplation of litigation may not be available when the attorney takes on the role of investigator or businessperson.⁹ The expansion of the attorney’s traditional role in the investigative process could prove counterproductive if it is done merely to attempt to protect the corporation from disclosure of certain conversations and documents.

The investigator should be proficient in fact gathering methods, public record and online database research, physical and electronic surveillance techniques, and computer searches, as well as being an able interviewer.

The investigator

An experienced investigator is the second mission-critical specialist. Not every former “law enforcement type” is suited for such work; indeed, in many

cases, formal law enforcement may be contraindicated. Business acumen and flexibility on the other hand are essential, because it will enable the investigator to focus quickly on the necessary elements of the business operation to be scrutinized. The investigator should be proficient in fact gathering methods, public record and online database research, physical and electronic surveillance techniques, and computer searches, as well as being an able interviewer. The latter still is crucial. Interviewing witnesses and suspects in complex investigations requires extensive training and experience, diplomacy, exceptional listening skills, a pragmatic understanding of psychology, and large doses of common sense.

The investigator must also have strong rapport and a good relationship with essential individuals within the company, responsive

contacts in law enforcement, and access to private investigative and specialized support. Moreover, the investigator needs to recognize the limits his/her abilities. It is often only the best of investigators who know when (and where) to obtain the experts to conduct certain forensic and technical aspects of the investigation. Delivering a product and supervising experts is, in itself, a skill.

Human resource professional

The human resources professional can be essential to the core multidisciplinary investigative team, providing insights and expertise regarding the policies and rules of the company. Without such an individual, it would be virtually impossible to develop succession plans, undertake temporary or permanent personnel actions, and understand the options available to the team and management under the applicable conditions. The human resource member of the team will also be in the best position to guide the company in its disclosures to employees at the conclusion of the investigation.

Other skills

Potential team enhancements can come from other disciplines within the company, such as public relations, investor relations, or compliance; however, these additional skill sets must be appropriately utilized within the context of the matter under review.

A public relations professional is a good example of an additional team enhancement. Managing public relations for a company often involves promoting favorable press relative to the company's goods, services, or image. Managing the media in a crisis situation is a different animal. When media descends en masse at the front door, it takes special skills and experience to meet that challenge, or more importantly, to avoid it in the first place. Hopefully, it's not a

common occurrence. Companies don't have internal resources that could adequately meet this challenge. In such cases, it may be appropriate to enlist crisis management communication specialists.

Conclusion

Investigations are invasive by nature. Seeking the truth is a stressful and complicated process, filled with both pitfalls and opportunities. Considering the value of good planning, providing the right team members, and grasping the different potential outcomes, you can go a long way to minimize the zero-sum game approach to the typical complex investigation. By utilizing the challenge to thoughtfully pick the right team and consider all options, the potential exists to turn a crisis into an opportunity and align the outcome of the investigations with the best interests of the business.

If the days of the lone, dogged investigator, tirelessly solving crimes in the face of multiple, on-going obstacles were ever a true reality, they should be relegated to TV drama and nostalgia. In the world of immediate transparency and complexities of corporate operations, the investigative team that forms a collaborative cohesive unit to understand the goals and exigencies of the process will go a lot further in providing a positive outcome to a challenging situation. *

1. R. Paschal: *Critical Incident Management*. University of Illinois Press, 1992, p 25.
2. *Ibid*, p 30
3. Note the use of such teams by sophisticated law enforcement agencies. Statement of Ronald Goldstock, Director of the New York State Organized Crime Task Force, before the Senate Permanent Subcommittee on Investigations, April 21, 1988
4. See generally J. Hammond, R. Keeney, H. Raiffa: *Smart Choices*. Harvard Business School Press, 1999
5. M. Useem: *Leadership Moment*. Random House, p 187
6. EA Rial, JF Frank: "Look Before You Leap." *ABA Journal*, April 1988
7. D. Webb, R. Tarun, S. Molo: "Corporate Internal Investigations." *Law Journal Seminar Press*, 4.03
8. See generally E. Epstein: *The Attorney-Client Privilege and the Work-Product Doctrine*, 3rd edition, American Bar Association
9. L. Effel: "Internal Investigations and the waiver of the attorney-client privilege." *ABA Journal*, April, 1998.

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