THE COMPLIANCE PROGRAM CRUCIBLE: THE ART OF THE INTERNAL INVESTIGATION

BY DONALD C. KLAWITER[1]

1 Donald C. Klawiter is an antitrust and competition law partner at the virtual law firm of Sterlington, PLLC. For 46 years, he has been conducting investigations in cartel investigations at the Antitrust Division and in private practice. For 28 of those years, he has conducted internal investigations in international cartel matters in over 20 jurisdictions. The author learned a great deal about how to conduct these investigations successfully over many years from his colleagues and friends with which he has had the privilege to practice. He wishes to thank, in particular, James A. Backstrom, Robert E. Bloch, Jennifer M. Driscoll, Roxann E. Henry, and Hiroko Namura for their support over many, many years and for all they taught him.

Visit www.competitionpolicyinternational.com for access to these articles and more!

CPI Antitrust Chronicle November 2021

www.competitionpolicyinternational.com

The Compliance Program Crucible: The Art of the Internal Investigation

By Donald C. Klawiter

This paper explores the most difficult, challenging, and usually concluding portion of a corporate compliance program – the internal investigation. Unlike the other major components of the compliance program – training and audits – the internal investigation is triggered by a government investigation, whistleblower, or even rumor – it is not an action planned by the company. For that reason, the conduct of the investigation has no fixed agenda. It is truly art, not science. This paper sets out the basic steps that a company must take, providing illustrative situations from actual investigations that worked for me and my Internal Investigative Teams.

I. INTRODUCTION: THE CRITICAL ROLE OF THE INTERNAL INVESTIGATION

A compliance program that meets the requirements set forth by the Antitrust Division of the U.S. Department of Justice is a complex mechanism composed of many moving parts. A program that is "well designed," "applied earnestly and in good faith" and "works in practice" is much, much more than an annual lecture, a multiple-choice test, or even an audit.[2] Indeed, the full-scale internal investigation usually occurs only when a government investigation is rumored or initiated, or a whistleblower emerges within the company or the industry. Because of its scope, substantial cost and impact on the business, it is not something to be approached casually or handled internally. The investigation should always be authorized by the corporate board or the board committee responsible for the investigation, and it must be conducted by experienced outside counsel for the protection of the company and its executives and employees.

A well-planned and well-executed internal investigation requires a creative approach to gathering evidence to achieve a result that puts the company in the best possible position to gain a good result from the Antitrust Division. In an era of superior technology that makes document production and document review much more scientific, rapid and reliable, the true skills in conducting a successful internal investigation are experience and creativity – in other words, it is art, not science.

Given that beauty in art is in the eye of the beholder, there can be many successful approaches to the internal investigation. The strategies and tactics described in this article worked for me and my colleagues; they also evolved over time, particularly in addressing international cartel investigations. This article, therefore, is intended to open the mind to successful and innovative strategies that internal investigation teams have used successfully for our clients.

There are truly excellent books and articles that set out, in detail, how to conduct internal investigations and how to prepare witnesses.[3] I highly recommend those materials to organize and conduct the investigation step-by-step. Mike Tigar's books, in particular, speak with reverence on the relationship between the client/witness and counsel, noting that witnesses look to counsel for "guidance and strength."[4]

This article proposes ideas that may improve the internal investigation, some by careful and deliberate planning and strategy – and some by simple luck. It is my hope and intention that you use these strategies to conduct a more inspired investigation and obtain the best possible result for your client.

II. THE ART OF BUILDING THE INTERNAL INVESTIGATION TEAM

The Team Leader should always strive to build the "dream team." The Team must be diverse – by gender, race and ethnicity – with a special focus on Asian counsel, especially if there are language challenges. To the extent possible, a native speaking counsel should be a senior team member, since counsel will be important to the witnesses – and to the nuances of language and culture.

A. The Value of Trial Experience on the Team

To the extent possible, at least one team member should have tried a criminal antitrust trial to verdict. It is vitally important that a team member have experienced the investigation and prosecution of a criminal case to understand how the evidence is developed, how the witnesses are positioned and how the discipline of a judge presiding affected counsel's thinking and action. I had the great advantage of trying my first criminal antitrust case as an Antitrust Division prosecutor at age 27 and several of the techniques discussed in this paper flow directly from that experience.

2 The Antitrust Division's corporate compliance policy, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigation," was released by the Antitrust Division in July 2019.

3 The most comprehensive volume on how to conduct a full-scale internal investigation is Brad D. Brian, Barry F. McNeil & Lisa J. Demsky, editors, Internal Corporate Investigations, Fourth Edition, ABA Section of Litigation, 2017; a fine article on preparing the witness is Daniel Nathan, et al., The Art of Prepping a Witness, Litigation Magazine, Volume 47, Number 3 (Spring 2021). For a truly outstanding analysis of witness development, see Michael E. Tigar, Examining Witnesses, Second Edition, ABA Section of Litigation, 2003 and Michael E. Tigar, Persuasion: The Litigator's Art, Second Edition, ABA Section of Litigation, 1999.

4 Tigar, Examining Witnesses at 468-472., *supra* note 3.

B. The Importance of Diversity to Witness Relationships

Gender, racial, and ethnic diversity are important because witnesses relate to different styles and different personalities. We have extensive experience with switching off questioners to test whether a certain witness relates to a certain examiner, and, at the end of the case, we have asked which team member they felt most comfortable with when discussing bad conduct. My experience has demonstrated that senior executives tend to prefer women examiners to men. We have gotten more detail and more incriminating evidence when a woman leads the questioning. When the witness displays all the attributes of a bully, however, an older male examiner appears better, although the likelihood of that type of witness providing incriminating evidence is very remote.

C. The Enormous Value of Native Translator/Counsel

When representing non-U.S. companies and individuals, it is critical to have senior counsel on the team who is a native speaker of the company's home. In most situations, this person would be from the company's outside counsel in its home country. The counsel will generally serve as the chief translator in the investigation and a true partner in setting strategy.

Non-U.S. counsel has an even more critical role when it comes to presenting witnesses to the Antitrust Division. The Division usually brings its own non-lawyer professional translator, who translates the questions and answers in the witness interviews. In our experience, Division staff never invited defense counsel to bring their own translator. Our strong recommendation is that defense counsel **always** bring a native translator/counsel who is familiar with the case to any meeting with the Antitrust Division, and any internal investigation interviews as well.

In one early international cartel case, we prepared and presented three key witnesses to the Division in an effort to obtain corporate leniency. The Division staff brought a non-lawyer professional translator. We brought along native translator counsel who had worked with the team throughout the investigation. She had a full understanding of the facts, the corporate and national cultures and the concerns of the witnesses with being interrogated by Division counsel. Early in the interview, the witness became visibly upset and had difficulty answering questions. Our native translator/counsel intervened and raised serious objections to the questions of the Division's translator, who was asking for incriminating conclusions, not facts. Our vigilant native translator/counsel changed the tone of the interviews for the rest of the presentation and the witness performed well. Without her knowledge of the case and her courage in questioning the Division's practices, the witness would not have provided the excellent evidence he did. Ultimately, we qualified for leniency, and the witnesses were pleased to be protected and defended.

From that day to this, a native translator/counsel has always been a major participant in our internal investigation teams for non-U.S. jurisdictions. It makes an enormous difference for the Team, for Division staff, and, especially for the client.

D. The "Common Interest" Relationship with Independent Counsel for Executives

In virtually all criminal investigations, several senior executives are advised that they require independent counsel to avoid actual or potential conflicts with the company. In most situations, company outside counsel recommends counsel to the executives. Although they are not a formal part of the Internal Investigation Team, counsel for the senior executives generally have a common interest with the company since the company operates through its executives. The executives, through their independent counsel will likely join a joint defense agreement with the company and its counsel. It is, after all, company outside counsel and they are the ones who conduct the internal investigation that recommend independent counsel to the executives. Matching up independent counsel to senior executives is, itself, an art. Independent counsel, therefore, should be considered an important of the Internal Investigation Team within the limits of the joint defense agreement. We maintain a list of outstanding counsel that focuses on the special skills of those counsel – trial experience, relationships with Division staff, substantive knowledge that will be of great value to the entire Team – corporate and individual.

III. THE INITIAL APPROACH TO THE ANTITRUST DIVISION STAFF

As soon as we are retained as the Internal Investigation Team, our practice is to call the Antitrust Division to advise staff that we are acting for the company and wish to open up communications that hopefully will be of mutual value. We always advise the staff that we have not yet started our investigation, and then ask two questions: (1) is corporate leniency available to our client, and (2) what type of evidence could the client produce which would further the Division's investigation and the client's situation. I believe that counsel must have this conversation before the internal investigation begins (although it will be important be advise the Division of the existence of the company's compliance program, if they have one) to make certain counsel is being honest and direct with the Division.

Over the years, we have asked the "is leniency available?" question over twenty times, and we have at least three leniencies and numerous "second in" results to show for it. Whether leniency is available or even vaguely possible (as it often is) is important information for how to conduct the internal investigation and what to tell the client.

Whether the Division staff provides any information in response to counsel's "what should we be looking for as we begin the investigation" depends on the staff and whether the staff has a degree of trust in counsel. This is not a one-time conversation – it is a process that should begin at the first meeting and continue to resolution. Most Division staffs will provide some helpful information; there will, however, always be those prosecutors who respond to your inquiry by folding their arms and responding: "Your client knows what it did." Do not allow that attitude to stop you from attempting to engage them in discussions about the evidence. One area of comfort is that the stonewalling prosecutor is treating everyone the same way, so you have a level playing field. Make it very clear to that prosecutor that you will be back to discuss the evidence on a regular basis.

IV. ENTER THE COMPANY HEADQUARTERS WITHINDEPENDENCE, EMPATHY AND DIGNITY

The Internal Investigation Team must project a feel of independence and skepticism towards all corporate executives, including the general counsel's office. There must be a dignified, arms-length relationship, even if the Team and general counsel and staff are good friends with outside counsel. At the same time, the relationship must not be hostile – the corporate management and general counsel's office are scared and are looking for guidance and strength from the Internal Investigation Team. It should be a kind and empathetic relationship, and, at the same time, a disciplined and formal business dealing. We always tell the executives and the general counsel that, at the end of the matter, we want them to be able to truthfully say that we were tougher and more demanding than the Antitrust Division staff. Happily, most of them do. An example from an actual investigation illustrates the situation: The Team was invited to the company's national sales retreat to interview all employees potentially involved in the conduct (which was an efficient way to conduct a nationwide investigation). Because we needed to demonstrate our empathy, we properly and politely declined to attend the lengthy social events each evening. That turned out to be an important decision given a serious disagreement with senior management before the retreat ended. Not attending the events gave everyone time to reset and develop a proper strategy.

The Team can learn an enormous amount at the initial "all hands" meeting by the Team Leader with the company's executives. There are two elements that are critical at this stage: first, the opening group meeting should be direct and frank. The Team Leader needs to set out the scope and seriousness of the investigation, the liability executives could face, the need for separate counsel in certain instances and the serious liability for obstruction of justice and perjury or false statement, along with prohibitions on discussions about the investigation with each other. Second, at the opening group meeting, a member of the Team should position himself or herself to observe the executives in the meeting – and, if possible – create a seating chart to identify executives. We have experienced situations where executives in such a meeting become visibly uncomfortable or turn to make eye contact with a colleague or colleagues, as well as situations where executives in the room take a contrary view of the facts when asking questions. These executives can inadvertently provide key information to the investigation. In one illustrative case, a very senior executive angrily shouted "that conduct is not illegal in this country." He was technically right; however, the case involved bid rigging in the United States, not in Europe where he worked. He did not realize it, his outburst provided us with significant information for the investigation.

The Team should always look and act professionally. Despite the casual dress policies of most companies – and in contrast to it – the Team should look like prosecutors and FBI agents in the grand jury. Our teams were instructed by several general counsel to wear casual clothing at the interviews to have the executives feel comfortable and secure. That is exactly why the investigative team should wear business attire. Business attire should be worn even for virtual interviews on Zoom or Microsoft Teams. The witnesses should also be addressed as Mr., Ms. or Dr., not by first name. This is common practice in Europe and Asia, and it is very effective in instilling in witnesses the seriousness of the process. Several general counsel who have questioned our business attire rule later acknowledged its importance and value, as they understood that it made the executives more serious and respectful of the process.

V. THE ART OF GATHERING EVIDENCE: DISCOVERING "INVISIBLE" EMPLOYEES

Before interviewing the key senior executives, the Team should develop a plan based on what they have learned from the Antitrust Division, general counsel and early document production. From that meeting, the Team should develop a list of what we call the "invisible employees." These are employees who know how the company operates – from pricing and knowledge of the activities of senior management to knowing industry jargon and having familiarity with competitor relationships. These employees, in our experience, have told the Internal investigation Team some incredible things. This has two possible effects: first, on pricing, the Team can learn about strange and unexplained patterns of pricing (from

people far more likely to explain why the pricing decisions make no sense); and second, on industry practices, explaining industry jargon and acronyms that will show the executives that the investigative Team knows the facts and behavior of the industry.

Finding the "pricing person" is often the key to deconstructing industry pricing. The person is usually underappreciated by the executives, underpaid given the importance of their jobs, and probably much smarter than their superiors. They know a great deal and are happy to talk about their career for as long as you can manage. In one case, the individual was the technical arbitrator of price sequences – and was instructed to talk to pricing people at all the other companies in the market so that the prices were uniform. As it developed, that individual was a critical witness in the case.

Learning industry jargon, especially with regard to competitor relationships, is a key method to show the executives that the Team is serious and knows what happened. In one case, an assistant to a pricing executive told the Team of confidential terminology about a trade association that suggested that it was a front organization for discussions of price. When a certain acronym was mentioned in the executive interviews in a very matter of fact manner, the executives looked stricken and soon explained how the conspiracy worked. They later confided that they were shocked by the Team's knowledge, since everyone was sworn to secrecy by the key conspirators. One break in the wall is usually all you need to develop the case – and obtain a favorable deal.

Finally, make certain that the Team meets with personal assistants and secretaries who know the senior executive's travel patterns, activities in the office and correspondence, documents, and telephone activity.

A real-life situation involved a corporate head of sales who proved to be a difficult and evasive witness. He gave the Team no useful information. When he left the office for a customer call, we questioned his assistant about his demeanor. Asking if anything unusual was going on in the office or in his life, she thought for a moment and said that the one strange thing he did the night before was to ask how the office shredder worked. She said in 10 years he had never asked about the shredder. She offered to shred the documents, but he refused. She believed that the documents he was shredding were pricing documents. When confronted the next day, he claimed the documents were personal financial documents that he shredded every week. He was terminated two hours later by the General Counsel.

VI. THE ART OF PREPARING THE VERY BEST WITNESSES FOR COOPERATION WITH THE ANTITRUST DIVISION

In evaluating executives as witnesses, the Team should cultivate its best witnesses based on performance and credibility. The company, through the Internal Investigative Team, should never be reluctant to recommend its best witnesses to the Antitrust Division staff, especially if it has applied for leniency or is looking for a deferred prosecution agreement or a 'second in' deal. It is incumbent on the company and the Team to support its cooperating executives and prepare them to be excellent witnesses.

There are two real life situations – one of them very successful, and one less so at that moment – that illustrate the art of preparation and its success. First, when your most senior executive implodes as a witness, look down the organization chart to one of the "invisibles."

Several years ago, the most senior executive at a key company was an impossible witness to deal with. His assistant, however, was the best witness I have ever encountered. When asked any question about meetings or conversations with competitors, he would raise his head as if staring into space and recount events and conversations in amazing detail. When we asked the witness and his colleagues whether he had a photographic or identic memory, they all said he had a good memory, but nothing else. At trial, he was a prosecution witness who, staring into space, presented the details of a key meeting and identified everyone's position around the meeting table – corroborated by the check where the person who paid wrote the names of the individuals in the order of seating. Defense counsel decided to argue with him, suggesting the meeting was a golf outing; the witness, staring into space, described the color of the suits, ties, and shirts everyone was wearing. It was truly a breathtaking and dramatic moment in an antitrust trial.

Discovering the witness' special skill and fitting it into the examination took a good deal of time and clearly kept the witness from prosecution – unlike his boss. Although this is likely a once-in-a-lifetime witness, it demonstrates the importance of having the patience to work with a witness, especially when he is the second-tier witness who made the case.

The second real-life situation developed in the earliest period of the international cartel era when the Antitrust Division was developing its 'leniency plus" and "penalty plus" policies. Many of the international companies manufactured and sold multiple products, and, as history

shows, were involved in multiple conspiracies. As a result, the Division began to ask witnesses what they called the "omnibus question." The question was, essentially, "are you aware of any discussions or agreements on pricing or allocation of territories or customers relating to any product in the United States or in any country of the world?"

The first witness to confront the question simply said no, and the Division staff did not comment, but later raised the issue with us. We knew it could jeopardize the deal the company was negotiating. We immediately visited and interviewed the senior executive staff responsible for the second product the company sold. Within a week, we presented several key executives to the Antitrust Division staff. The Division was satisfied with the evidence; the deal was unaffected; and we knew that the "omnibus question" would become a regular fixture of Division interviews.

Since that time, each witness that the Team prepares is questioned in detail on price activity in other product areas. The witnesses are advised of the dangers to the company and to the executive by not taking the "omnibus question" seriously. This topic also became a critical subject in compliance training.

VII. CONCLUSION – ENCOURAGING ART

It is my hope that this approach to internal investigations will help antitrust defense counsel think about investigations differently – and creatively. These other practices worked for me; others were likely less successful. All investigations and cases are unique. All face different issues at different points in time. That's what makes antitrust practice so fascinating and exciting. That's what makes antitrust internal investigations an art.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.