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**American Conference Institute's**  
*4th Annual*  
**Corporate Counsel's Forum on**  
**Internal & Government**  
**Investigations**

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**Briefing Paper**

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*4th Annual*  
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**Internal & Government**  
**Investigations**

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# Introduction

FTI Consulting is pleased to have sponsored ACI's Fourth Annual Corporate Counsel's Forum on Conducting and Responding to Internal and Government Investigations. A panel discussion format provided practical and intimate knowledge on an abundance of relevant issues to counsel including fraud, complaints by whistleblowers, conducting internal investigations and correct and proper document retention practices.

Fraud continues to be a prominent issue and has become increasingly important in the eyes of regulators. Penalties for violating regulations are severe, and identifying and responding to incidents of fraud remain ongoing challenges for even the most sophisticated of companies. Tougher regulations are spurring companies to mitigate their risk by improving their governance and internal controls.

Panelists discussed the corporate response to whistleblowers. This is an area which should not be taken lightly or shrugged off as simply a disgruntled employee making noise. The charges need to be taken seriously and should not be connected to any disciplinary history that the employee may have. The company should do whatever possible to handle the complaint in-house; and establishing fixed personnel guidelines that carefully document all personnel actions can be invaluable.

Careful planning is essential when conducting an internal investigation. A company must continue its business operations and not cause undue distress to its employees. A forensic expert will ensure that the investigation is proceeding properly. Communication, credibility and conduct are imperative to help employees feel comfortable.

Document preservation is a hot topic in any legal proceeding. Companies should be proactive regarding information management and should direct employees to established policies and procedures. A company specializing in documentation forensics can help with the preservation process. This requires in-depth knowledge of computer systems and the 'ins and outs' of file storage. By creating clear instructions about document retention, companies ensure the preservation of relevant information.

The discussions brought into sharp relief the practical challenges of conducting internal investigations and responding to external investigations. FTI, the premier provider of complex financial and factual investigations, is dedicated to bringing successful and expedient solutions to apply government practices, minimize risk, implement regulatory provisions and respond to the critical issues discussed.

FTI hopes that this summary report will guide counsel and advisors through some key important subjects and provide sensible solutions when seeking external advice or when dealing with issues 'in-house.'

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# Internal & Government Investigations

Led by co-chairs Jacob Frenkel and Joe Whitley several panels of litigators, corporate attorneys, government representatives, and consultants shared their experience and expertise with attendees at ACI's Fourth Annual Corporate Counsel's Forum on Conducting and Responding to Internal and Government Investigations. The panel format provided lively discussions that covered new developments and key concerns of in-house and outside counsel regarding internal and external investigations.

Speakers addressed several broad themes, including the importance of cooperating with government investigators, applicability and waiver of attorney-client privilege, conducting internal investigations, handling whistleblower complaints, properly preserving and gathering documentation, and considering foreign laws and their affect on corporate investigations.

This report summarizes the panel discussions and provides general guidance and practical advice for conducting internal investigations, responding to external investigations, and working toward avoiding the need for either.

## **I. Cooperating with the Government**

Government representatives and in-house and outside corporate attorneys conveyed a clear message during the two-day event: Cooperation with government agencies that are conducting corporate investigations of potential wrongdoing is critical. Repeatedly, the panelists stressed that corporations should follow the "sooner the better" rule when deciding when to contact the government about discovered misconduct. Indeed, waiting until the government contacts executives is not a recommended option.

Establishing a company's credibility was also emphasized as a way of improving a company's experience with government investigators. More specifically, appropriate and prompt responses to government requests helps establish trustworthiness with investigators, noted panelists.

Another panel discussed the value of training employees to respond properly to government inquiries, search warrants, or subpoenas. Such training is especially important to ensure that employees don't inadvertently, in a panicked state, act inappropriately. For example, experts encouraged companies to provide instruction to employees about whom they should contact when they receive a request from the government. Reminding employees not to destroy or discard documents was also recommended.

Trends in government enforcement were also discussed, with several panelists addressing the increased pressure that prosecutors are exerting to convince management to waive the company's attorney-client privilege (See discussion of attorney-client privilege below for more detail).

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Experts also noted the mounting number of non-prosecution and delayed prosecution agreements being offered. Panelists characterized this trend as recognition of the harm that can come if a corporation is criminally prosecuted. Government representatives and attorneys also were quick to note a tendency among government attorneys toward prosecuting individuals, rather than corporations, another clear indication that executives would do better to identify, and fix, the cause of problems sooner than later.

## **II. Applicability and Waiver of Attorney-Client Privilege**

Several panelists addressed the current debate surrounding the pressure to waive attorney-client privilege. To be sure, panelists opined about whether the right to confidentiality between an attorney and client must be waived to convince the government that a company is truly cooperating with an investigation.

Several points were made regarding this contentious topic. For instance, speakers repeatedly cited the *Upjohn Co. v. United States* (449 U.S. 383, 101 S.Ct. 677, 66 L. Ed. 2d 584 (1981)) case, as well as other court decisions, to emphasize that companies--not the employee--have the right to waive the privilege. (See "Conducting the Investigation" below.)

In addition, experts told attendees that new pressure to waive attorney-client privilege had come in the form of enforcement guidance, most notably the Thompson Memorandum and the Seaboard Report. The Thompson memo issued on January 20, 2003, was authored by Deputy Attorney General Lawrence Thompson, and provides Justice Department investigators with guidance regarding when to prosecute companies. Similarly, the Seaboard report, issued by the Securities and Exchange Commission on October 23, 2001, is a policy statement about levels of corporate cooperation, including self-reporting by companies, that SEC investigators should consider when determining whether to pursue sanctions against a company.

In particular, the Thompson memo identifies cooperation and waiver of attorney-client privilege as factors to be considered when evaluating charges against a company. The Seaboard report also states that SEC investigators should consider a company's willingness to share information it has collected via internal reviews as a factor in determining potential sanctions.

Another directive, the Callum Memo, was also cited by panelists as contributing to the recent spate of enforcement pressure. Issued in 2005 by the Acting Deputy Attorney General Robert Callum, the missive called on US Attorney Departments to develop policies for reviewing waiver requests, and noted that such policies could vary from district to district.

Federal sentencing guidelines also garnered attention from the podium. The U.S. guidelines, which were amended in 2004 to include a comment stating that waiver of attorney-client privilege, and work product protection, is not required to reduce corporate liability—unless the individual situation calls for full disclosure of all information known to the corporation.

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Panelists noted that intense public debate followed the amendment, mostly focused on whether the change encouraged prosecutors to seek waivers.

Despite the mounting pressure from regulators, the experts told attendees that several recent developments may help to alleviate the government's push to press for attorney-client privilege waivers. For example, several speakers talked about the efforts of the American Bar Association to call attention to the waiver issue, a recently proposed amendment to Evidence Rule 502, and a May 2006 amendment to the federal sentencing guidelines. After hearing public response to the 2004 amendment, the Sentencing Commission has deleted the comment in Section 8C2.5 of the Sentencing Guidelines regarding waiver of the privilege because the comment could be interpreted as encouraging waivers. That deletion could be effective later this year unless Congress disapproves it.

The proposed change to Evidence Rule 502 recognizes selective waiver as an option. That is, it sets forth a general rule stating that the privilege is waived when privileged information is disclosed. It also describes several exceptions to the rule. One permits a selective waiver, stating that the privilege is not waived if the confidential information is disclosed to a federal, state, or local government agency during that agency's investigation, provided that the information is only disclosed to individuals involved in that investigation.

Nevertheless, panelists cautioned that any relief provided by such amendments could carry disadvantages as well. Consider, for example, that the attorney-client privilege--and the option to waive it--can be a useful defense tool, asserted several speakers. In some cases, the waiver of privilege can be used as a bargaining chip to secure leniency for the corporation, especially if defense attorneys can persuade government entities to allow a corporation to conduct an internal investigation in lieu of an official probe. Such an alternative, noted speakers, allows the company to contribute to the investigation process. It also eliminates the need for the government to issue a multitude of subpoenas to employees, which can significantly disrupt business operations.

The protection of selective waiver offered by proposed amendment to Rule 502, effectively leaves the defense counsel with little room to haggle with prosecutors about a waiver's risk to the corporation, added a speaker.

Panelists agreed that the option to waive the privilege should be discussed with the client early in the process, when the scope of the waiver should also be considered as well.

At least one attorney confirmed the importance of explaining to the client what is covered by the privilege and protection of work product. While the terms may be familiar to clients, the practical meaning may be less clear. A related issue for in-house attorneys is determining when the protection applies.

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For sure, in-house counsel may enjoy protection of the privilege when acting as a legal advisor, but may find that the protection fades when the attorney is simply acting as a business adviser. Panelists warned, therefore, that in-house lawyers must always be aware of what “hat” they wear.

In addition, carefully identifying privileged documents or work product, and keeping track of them, was also emphasized.

### **III. Responding to Whistleblowers/Employee Reports of Potential Misconduct**

Reports of misconduct usually precede investigations, and to that end, several speakers discussed key issues surrounding formal whistleblower charges. In a corporate context, a whistleblower is usually an employee that levies charges of wrongdoing against an employer. Panelists emphasized that despite any negative impression management may have of a reporting employee in-house counsel, or others receiving the complaint must treat the charge as if it has merit. A whistleblower's charges need to be seriously considered, insists Lisa Troe, Senior Managing Director with FTI Consulting in Los Angeles.

Because whistleblower charges may be brought by employees having a history of personnel issues, panelists encouraged companies to establish procedures for handling and responding to complaints before charges are ever levied. Dealing with the complaints brought by employees with a history of disciplinary issues can be troublesome for companies. That’s because employers must refrain from taking retaliatory action for complaints, and should establish solid grounds for taking any action that may appear retaliatory.

Therefore, panels discussing corporate responses to whistleblower allegations noted that companies should keep careful records of all personnel problems, document disciplinary actions, and have employees sign-off on records that document discussions about, or imposition of, disciplinary action. One speaker also suggested having witnesses present during any discussion of employee performance/discipline as well. The documentation should be standard procedure, so it is available before an employee raises allegations of misconduct – not after complaints are lodged.

Such recordkeeping and disciplinary action should be consistently applied at all company levels, according to panelists. The experts concluded that any action taken against an employee must be completely independent of any charges brought by that employee against management. Management also should treat reporting employees with respect and not alienate them. In some cases, the complaint or report may be a simple misunderstanding, notes Troe.

Treating employees with respect and dignity fosters a culture of compliance and encourages employees to continue to raise questions and concerns, counseled the panelists. Taking their informal complaints seriously and addressing them can also help to avoid formal whistleblower charges

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Demonstrating to employees that the company is committed to doing the right thing also helps deter whistleblower action. Accordingly, panelists made a point of reminding attendees to document the actions taken by the company to respond to, and hopefully, resolve the complaint.

#### **IV. Conducting the Internal Investigation**

Panelists were keen to discuss several practical aspects of handling investigations, including ensuring that the investigation is independent, preserving records relevant to the investigation, handling interviews, and minimizing disruption of business operations. Bringing in outside counsel and experts, such as forensic investigators, was also a topic of discussion.

Calling in a forensic expert to ensure that an investigation is proceeding properly is a fairly common practice, commented Martin Wilczynski, Senior Managing Director of FTI Consulting, in Washington, DC. For example, a forensic expert can assist other investigators by using document review tools and other technology to “facilitate and accelerate the review,” noted Wilczynski.

Careful planning can be essential to an effective investigation. The best thing counsel can do is to try to tailor and plan the investigative work as carefully as possible, advised Wilczynski. Educating employees as to what their role in the investigation is also important. “Employees need clear communication about what they need to do once a decision is made internally that there is possibly a real problem,” said Troe. “Credibility is important,” she added. “The company must make sure no one engages in any activity or conduct that could possibly appear to be a cover-up,” said Troe.

##### **A. Role of Corporate Attorneys**

The role played by both in-house and outside attorneys in investigations was a major focus of the two-day event. Most notable was a sense among many speakers that attorneys are in some way “deputized” or charged to carry out the mission of the U.S. Attorneys’ office – to discover misconduct and report it back to the government. Furthermore, the importance of an independent investigation, carried out by objective attorneys, was also underscored. To wit, if senior management, or even in-house counsel, could be implicated in wrongdoing, there needs to be a reporting mechanism that takes that situation into account.

The exposure of in-house attorneys and outside counsel to an obstruction of justice charge, a criminal offense, was reiterated during the panel’s discussion of how to run an internal investigation. Similarly, the panel also talked about the prospects of attorneys facing civil charges--brought by the SEC-- under Rule 102(e), which governs attorney practice before the commission. The bottom line, said the panel, is that while representing the company’s interests an attorney must take care not to improperly handle evidence or mislead the government.

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Finally, the experts underscored one of the basic tenets of the bar, essentially that attorneys are bound by local ethical and professional rules of conduct that govern the attorney's actions during an investigation. Panelists candidly discussed the difficult position that attorneys sometimes face when an investigation of misconduct and representing a client's interests clash.

Chief among the ethical landmines that investigating attorneys face is making sure all parties understand who the attorney is representing. Several speakers brought up instances of confusion when clear representation and reporting lines are not identified. For instance, is the investigating attorney working for the board, the audit committee, another special internal committee, or the shareholders.

Drawing distinct lines and explaining the attorney's responsibilities to everyone interviewed during an investigation is a critical ethical and legal issue. (See discussions of employee warnings below).

Again, the in-house counsel's office must always be aware of the role it plays as it relates to being shielded by attorney-client privilege. The protection only extends to attorneys acting as legal advisers, not business advisers. (See discussion of attorney-client privilege above).

## **B. Distinguishing representation of company from representation of employees**

During the conference, speakers reminded attendees that during an internal investigation, the corporate attorney must clearly indicate that the attorney represents the company, not the individual being interviewed. That means articulating that the attorney-client privilege extends to the company, not the individual.

Several panelists also noted that the atmosphere surrounding investigations, and the unfamiliarity many employees may have with lawyers, government probes, and legal proceedings, may create an uncomfortable environment, and lead to confusion about whose interests are being serviced by an in-house attorney who is interviewing employees. Despite repeated efforts by companies to dispel misconceptions, employees routinely believe that an investigating lawyer is representing their individual interests, commented several panelists. In fact, speakers referenced case law--*In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. Ct. App. 2005)--to demonstrate that employees have testified that they were convinced that company attorney conducting an internal investigation were representing their case, rather than corporate interests.

The wording and scope of such a warning was debated among several panels. At a minimum, panelists agreed that an investigating attorney must explain to interviewees that:

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- the attorney is the company's legal adviser;
  - attorney-client privilege will protect the conversation;
  - the corporation holds the right to the privilege, and can choose to waive the protection.

Some speakers also suggested attorneys advise employees that statements made during an interview would likely be released to the government if the company waives its privilege, and that any false information contained in the statements could be used against the individual.

The panelists also lined up to debate whether attorneys should inform employees that it is possible to represent both the corporation and the individual until a conflict arises, and whether attorneys must clarify who they represent when third parties and former employees are involved.

Panelists generally agreed that it was wise to clarify the representation issue whenever possible, and that providing employees with a written explanation could be useful.

In discussing what level of detail seemed sufficient when explaining that representation issue, panelists referred to court opinions, such as the Fourth Circuit Court of Appeals decision *In re Grand Jury Subpoena*, which involved an internal investigation at AOL. In that case, the attorneys told interviewees that they represented the company and that the discussions in the interview were protected by attorney-client privilege, but that the company had the right to waive that privilege. One speaker noted that the attorneys in that case also confirmed that they could represent the employee as long as there wasn't a conflict. The attorneys did inform individuals they could obtain private counsel if they wanted.

The Fourth Circuit found that the explanation provided by the attorney was sufficient and, therefore, the individual could not assert attorney-client privilege to prevent disclosure of the interview discussions after the company waived the protection. The court had also said that the attorney's acknowledgement that he could represent the individual did not mean that the lawyers were actually representing the individuals. The court found that to be true because:

- the attorneys did not tell the employees that they were representing them; the employees did not ask the attorneys to represent them; and
- the evidence did not demonstrate that the employees sought legal advice from the attorneys, or that the attorneys provided the legal advice to the individuals.

Despite that finding by the court, speakers stressed that it was best to avoid any confusion related to the attorney's relationship to the employee.

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In some cases, companies provide, or pay for, separate counsel for individual employees during an investigation. In that way, said several panelists, the corporation can ensure that the individual has adequate, competent counsel. However, the practice casts a disparaging eye on the company, as the corporation could be paying the legal fees of a potential wrongdoer. In addition, panelists noted that the government may not look favorably on indemnification of an individual's attorney fees. In fact, the often referenced Thompson memorandum notes that when assessing the level of cooperation a company provides, investigators should consider whether a corporation supports wrongdoers by paying their attorneys fees, keeping them on the payroll, or exchanging information with them via a joint defense agreement. Several speakers suggested that the anticipated ruling in the KPMG tax shelter case may offer some guidance on this issue.

### **C. Representing Employees of the Company**

One panel discussed the role of attorneys who are chosen to represent individuals, rather than the company. Panelists focused on the unique issues that face such attorneys, including determining what the employee may have already told the government or internal investigators before counsel was brought in.

Here too, the attorney must be clear about the representation issue, and therefore should question clients about who has interviewed him already, what he has said, and if transcripts of the interviews are available.

Counsel for employees should also determine whether memos about an employee's interview with company attorneys accurately reflect the employee's discussion. That's because the memo could be used later--when the employee is questioned in court -- to impeach the witness or question the witness's testimony, noted the panelists.

### **D. Minimizing Disruption to Business**

While focusing on the investigation, shareholders and other constituents still expect executives to keep the company running, which means it is incumbent upon management to minimize business disruptions. Speakers cited cost and time associated with an investigation as being two primary disruptive factors. Certainly, companies do not have unlimited resources to devote to an investigation, and experts, including Wilczynski, suggested that, when possible, executives should map out investigative work, and use technology to facilitate the review.

Easing the tension and other negative affects of an investigation may have on employee morale is another area the panelists discussed. They advocated opening up lines of communications to provide workers with facts about the investigation, and to answer basic questions. "The best thing counsel can do to ease tension is to have staff understand what they are supposed to be doing--for example in terms of document preservation--and to enlist management to communicate to the staff how they should prioritize investigation requests as compared to their normal day-to-day workload" said Wilczynski.

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Having well-trained employees, who are knowledgeable about handling the receipt of government subpoenas and search warrants, or a visit/interview with government officials, eases anxiety in the workplace and prevents inadvertent mishaps. For example, panicked employees may discard documents or act in ways that may later be construed as obstruction of justice.

Expressing empathy for employees was high on the list of human capital issues for many panelists. Even though executives may not be able to share substantive details panelists said that it was important to reassure employees that the company plans to deal with the issues appropriately, and move forward after the investigation. Encouraging messages should be drafted in advance of employee gatherings to avoid unintentional misstatements that could do more harm than good. Still, another panelist warned that any statement made in one venue will be heard in others as well. For example, statements to the media will be heard by employees and customers and the government.

Lastly, one panelist discussed the benefits of hiring a crisis management consultant to help address business disruption issues and keep the company operational.

## **V. Dealing with Documentation in External and Internal Investigations**

The obstruction of justice issue that sank Arthur Anderson—document retention—was the focus of several panel discussions. The primary issues related to preserving documentation or data, gathering documentation and data, and analyzing documentation and data to ferret out information relevant to the investigation.

### **A. Document Preservation and Retention**

Preservation of electronic documentation is a hot issue in any legal proceeding, noted Adam Cohen, Senior Managing Director – Electronic evidence at FTI Consulting, Inc., in New York City. Without question, once an internal or external investigation, an enforcement action, or litigation commences, the company must act immediately to preserve relevant records, declared several speakers. That includes informing employees that they must not destroy any records and suspend normal document destruction procedures.

It is the company's duty to ensure that employees receive clear directives about preserving documentation--they must lock down and retain documents says Troe. It's necessary that the company tell people not to destroy electronic files, she adds. This can be accomplished without unduly alarming employees by simply explaining that an investigation is in progress and the company needs to retain all records that may be relevant. Several times during the conference, experts pointed out that companies with overseas operations should be mindful of the document retention and information sharing rules of foreign countries, which could affect the document retention and gathering process at a U.S. affiliate under investigation.

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In general, companies should make it a policy to explain to employees that equipment and resources they use, and communications they create during business hours are not private, but rather company property, emphasized panelists. Panelists also singled out the broker/dealer community, noting that industry's obligations to retain electronic communications. Citing the vast number of communications within the broker/dealer operations, panelists agreed that it would be easier to just keep all communications, rather than try to carve out categories that don't need to be kept.

A forensic expert can help with the document preservation process. Indeed, the process requires an intimate knowledge of computer systems, intelligence about where and how people store information, and what processes are likely to erase information if a company lacks a robust document retention policy, explained Cohen. E-mail messages pose a particularly difficult problem because use of e-mail is so widespread and workers routinely delete emails, noted Cohen. Company attorneys can hire a forensic expert to help lockdown and preserve relevant records. Most lock downs happen electronically these days, explains Troe. A forensic expert can help to ensure that hard copy files aren't destroyed, there is an electronic backup to preserve information, and the company ceases any normal document destruction practices, explains Troe.

Panelists noted that document retention policies do permit destruction of records if the documents are not part of an investigation. Nevertheless, policies must be carefully administered. Speakers pointed to the obstruction of justice case brought against Arthur Andersen during the Enron investigation. At issue was whether Andersen executives knew that documents key to the Enron case were being destroyed. Panelists also cited the Supreme Court opinion to make their point: "It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances." *Andersen v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005).

Companies should be proactive regarding information management. They should establish policies and procedures that enable them to effect document preservation when the time comes, instructed Cohen. You don't want to be reacting on a case by case basis, he added. Companies also should have litigation hold procedures that cover a number of different aspects of document retention, such as identifying events that trigger the need to institute a hold and identifying custodians of documents, continued Cohen. Further, said Cohen, those procedures should notify employees about informing the legal department when they become aware of a potential trigger. The procedures could be incorporated into the company's regular document retention policies, says Cohen.

## **B. Document Gathering and Review**

After the company has ensured that information will be retained, it's time to start gathering and reviewing relevant information from documents and electronic data.

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According to panelists, document review is a bigger task than document retention, and more costly than the efforts to maintain documents. With that in mind, it is more efficient and cost-effective to gather documentation using technology. For example, technology can allow investigators to collect information remotely, over company networks rather than accessing individual employee terminals, explained Cohen. Furthermore, forensic experts can help capture all the information and distill it quickly for the company's investigators, added Wilczynski.

“The sooner you can get information distilled and brief the audit committee, the sooner they can get the investigation focused and moving forward on the right foot,” commented Martin Wilczynski. “If you collect data electronically and use tools to search it and assess it you can get a lot more information than otherwise available in a shorter period of time,” said Wilczynski.

After gathering that data, it must be reviewed. Again forensic experts and electronic tools can help speed the process. “Document review tools are important because they really are the whole foundation for the investigation,” added Wilczynski. “Getting a handle on all the data and then trying to craft the most efficient way to distill and review it is really important,” he said. “Computer assisted document control and document review tools can accelerate the ability to review data,” noted Wilczynski. Using electronic tools to gather and categorize the information can save time and minimize disruption. “A company can spend more time on actual analysis because it won't spend weeks wading through paper,” explained Wilczynski. It helps the investigators get a feel for the significance of a problem on a more timely basis, offered Wilczynski.

## **VI. Be Proactive: Avoiding Need for Investigations**

An ounce of prevention is the focus, assert the experts. Indeed, one of the most important steps a company can take to handle employee misconduct is to prevent it from happening. “Tone at the top” was perhaps the most repeated phrase at the conference, as all experts agreed that a culture of compliance is critical to avoiding the need for an internal or external investigation. To that end, attendees were told to consider the values the company wants to communicate to the organization and what example is set by management with regard to integrity and ethics.

Widespread compliance programs are the mechanism senior management should use to establish a culture of integrity and ethics. Panelists recommended, for example, establishing a code of conduct as part of a compliance program, and creating an environment in which employees understand that they will be monitored. One panel discussion focused on the components of an effective compliance program.

Panelist Lisa Troe of FTI Consulting noted several government sources that provide guidance on what constitutes an effective compliance program, including the U.S.

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Sentencing Guidelines, the Thompson Memorandum, the Seaboard Report, the Sarbanes-Oxley Act, and COSO (The Committee of Sponsoring Organizations of the Treadway Commission) guidelines.

The panel discussed several key elements of effective compliance programs, including:

### **Risk Assessment**

“Risk assessment is the crux of putting together an effective compliance program,” according to Troe. A company must look at its risks from several perspectives, including:

- operational;
- financial;
- industry-wide;
- current business climate;
- changes in the business;
- turnover among employees in points of control (such as the computer system and IT staff).

When considering what risks a company faces, executives should also consider the significance of the risks, any mitigating factors, and the likelihood of illegal acts being committed, maintained Troe.

### **Monitoring**

“Monitoring is done day-to-day,” noted Troe. That means supervising employees to make sure they adhere to policy and procedure, and conducting periodic evaluations for compliance. “The audit committee should ensure that the internal auditor has planned reviews focusing on risk areas,” surmised Troe. In fact, the federal sentencing guidelines require monitoring, she noted.

### **Encouraging Reporting**

All companies should have some internal mechanism to receive complaints or reports related to compliance issues. Furthermore, employees should be encouraged to report any deviation from policy they observe, or that they commit themselves, explained Troe.

### **Training**

Training is important, and should be conducted at all levels of the company and include all aspects of the compliance program. Employees need to understand why it makes sense to have a compliance program, why it’s good for business, that compliance is part of their job requirement, and what their role is regarding compliance, explains Troe.

### **Enforcement**

A compliance program without teeth is useless. If a system is in place to detect and prevent compliance problems, and the company does not act in a timely fashion to mitigate the problem, the company's program has effectively failed in the eyes of the SEC and Department of Justice.

The government will investigate employee discipline procedures to ascertain whether the program is appropriate, timely, and equitable, asserted Troe. To be sure, the disciplinary action prescribed by the compliance enforcement program should be the same, regardless of whether the offender is a lower level employee or top manager. “When management disciplines accordingly, it sends a message to everyone in the organization,” contended Troe.

In other panels, discipline and remediation were also discussed as key elements of a compliance program, as well as a way of bringing investigations to a close. Corporate and government attorneys noted that the government looks favorably on corporations that take responsibility for misconduct and work to deter future wrongdoing by instituting compliance procedures that include disciplinary action.

### **Media Panel Provides Unique Insight from the Outside**

The luncheon panel provided a new perspective for attendees who had, up until now, been studying corporate investigations from the inside out. A panel of media professionals shared their views about corporate investigations from an outsider’s perspective. Led by moderator Liz Claman, host/anchor of CNBC Morning Call, a panel comprising Kate Noble of the BBC, Peter Lattman of the Wall Street Journal, Brooke Masters of the Washington Post, and Bob Moon from public radio's Marketplace, discussed the right and wrong way companies have communicated with the press and public at large about investigations. The discussion focused on case studies, most notably KPMG's tax shelter case, accounting and market manipulation scandals at AIG and Enron, the shareholder class action against law firm Milberg Weiss and the alleged insider trading and market manipulation case involving Pequot Capital Management, which was strewn across front pages on the day the panel convened.

Panel members agreed that the classic “no comment” response to press questions from a company under investigation was not the best tactic. They explained that saying nothing provides the government and plaintiff's lawyers an unchallenged platform. Even if a company is barred from, or chooses not to, divulge information publicly, the panelists urged executives to provide some type of acknowledgement that the company is taking the problem seriously, and is, perhaps, cooperating with investigators.

Another strategy, according to the panel, is to keep the message positive. Put the issue or controversy in perspective, noting, for example, that the investigation is limited to only one part of the company, or emphasizing the overall success or general integrity of the corporation. Speakers also agreed that when addressing whistleblower claims, it’s best not to attack the whistleblower from a personal perspective, but rather focus on the allegations.

The panel gave high marks to company executives who had taken the time to prepare for media inquiries, and suggested that having a crisis management plan in place, before scandals or investigations erupt, is well worth the effort. To do that, it is important that the company employ a capable spokesperson that can field media inquiries quickly, accurately, and calmly, when the media pressure is on.

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### **View from Abroad: How Other Countries View American White Collar Justice**

Recognizing the true global nature of business, the two-day event was peppered with comments about the affects of foreign laws and regulations on corporate investigations. Both international and U.S. attorneys noted that the American justice system is perceived by foreigners as being aggressive. Speakers indicated the desire of corporate counsel to cooperate with the U.S. Department of Justice and Securities and Exchange Commission, also was noteworthy to those outside the American legal process. –[KB note: I’ve changed this because I wasn’t referring to the attendees but corporations and legal professionals outside the US]. Despite this view, at least one speaker commented on growing similarities between American and foreign legal environments particularly with regard to cooperation with the government and civil class action lawsuits against corporations.

Speakers also noted the differences between U.S. and foreign labor and privacy laws--both of which can affect investigations. They talked about legal distinctions and logistical issues related to sharing documents and information relevant to an investigation—including waiving attorney-client privileges.

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