



# **INTERNAL INVESTIGATIONS 2.0**

JOSH WALLENSTEIN  
MANAGING MEMBER, THE WALLENSTEIN LAW GROUP

## **INTERNAL INVESTIGATIONS 2.0:**

### THE SAME OLD DISCLAIMER.

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**These materials are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.**

Feel free to contact:

Josh Wallenstein

[jwallenstein@wallensteinlawgroup.com](mailto:jwallenstein@wallensteinlawgroup.com)

+1.713.598.4581

## **INTERNAL INVESTIGATIONS 2.0**

### WHAT THIS IS **NOT**:

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1. A survey of how allegations are generated
2. An outline of essential elements of a policy or procedure on internal investigations
3. A step by step process map for internal investigations
  1. Scoping and staffing
  2. Organizing interviews
  3. Issuing hold notices
  4. Conducting documentary reviews
4. Best practices on reporting on internal investigations



## **INTERNAL INVESTIGATIONS 2.0**

### WHAT THIS **IS**:

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Key issues and interesting / nuanced topics to “up your game”!



- ✓ Understand your required standard(s) of proof with workplace investigations
- ✓ Detect deception and truthfulness in your interviews and records
- ✓ Draft flawless reports that avoid subsequent second-guessing
- ✓ Secure your claims of privilege in chaotic circumstances



## **INTERNAL INVESTIGATIONS 2.0**

### STANDARDS OF PROOF – COURTS.

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- Companies are not courtrooms. They do not have police forces or subpoena power.
- The standard of proof for internal investigations is not “beyond a reasonable doubt.”

#### Courts, generally

1. Expect internal investigations to be held to a “preponderance of the evidence” standard (i.e., “more likely than not”).
2. Review whether the factual basis was reached honestly, after appropriate investigations and for reasons that are not arbitrary or pretextual.

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### STANDARDS OF PROOF – US DEPARTMENT OF JUSTICE.

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The DOJ wants to see credible efforts to determine the truth, coupled with reasonable conclusions and active remediation.

- Credible Efforts: in accordance with reasonable policies and sound judgment
  - Helps create a sense of “organizational justice”
  - The opposite may support a finding of criminal intent
- Reasonable Conclusions: should be documented to be demonstrable...but don't create liability by documenting inappropriately! (More later.)
- Active Remediation: prevent (or help detect and mitigate) a reoccurrence, through training and/or controls



## **INTERNAL INVESTIGATIONS 2.0**

### STANDARDS OF PROOF – REMEDIATION.

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Let's talk a little bit about “remediation”...

- Regulators consider short lags in implementing audit recommendations—as brief as eight months—to be evidence of faulty internal procedures
  - General Cable – rebuke for taking 8 months of inaction
  - Biomet – criticism for not following up on concerns from a draft report
- Speedy implementation of audit recommendations and mitigation strategies is viewed favorably (Nortek, Anheuser-Busch InBev)





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### STANDARDS OF PROOF – REMEDIATION (2).

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- Regulators will take note if the same issues arise in repeated audits but remain unaddressed (Qualcomm, Bristol-Myers Squibb)
  - Consider whether a problem is a one-time aberration or more systematic (GlaxoSmithKline)
- Regulators are particularly critical of intentional doctoring or destroying records of audits (Och-Ziff, Avon Products)





## INTERNAL INVESTIGATIONS 2.0

### STANDARDS OF PROOF – SECURITIES AND EXCHANGE COMMISSION.

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The SEC focuses not on the bad acts, but rather on the presence or absence of sufficient internal controls.

- It's not just “accounting” controls: a “compliance program” is considered part of a company’s “internal controls” (*FCPA Resource Guide* at 62, 68.)
  - Jennings (2011) – former CEO consented to an SEC injunction and disgorgement for, *inter alia*, signing false SOX certifications **and annual compliance certifications** re the Code of Conduct. (He later pled guilty in the UK to bribing Iraqi and Indonesian government officials.)
  - This tells us that the SEC viewed both financial and non-financial material misstatements to be violations of the internal controls provisions of the FCPA.
- The standard of proof seems a bit fuzzier; it seems to incorporate both the benefit of hindsight and a theoretically limitless treasury.
- A faulty internal investigation could be used to support the contention of insufficient internal controls (e.g., around internal investigations).



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### STANDARDS OF PROOF – WORLD BANK, MULTILATERAL DEVELOPMENT BANKS.

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The World Bank and similar focuses not on the investigation, but rather whether it be “more likely than not” that procurement guidelines or integrity principles were violated.

- An inadequate investigation could be the key to being disbarred. It could also be irrelevant to the sanctions proceeding.
- Consequences can be severe: sanctions (and cross-debarment), and then subsequent ongoing debarment until the entity certifies the company’s compliance program as consistent with the bank’s integrity principles.



## **INTERNAL INVESTIGATIONS 2.0**

### MAINTAINING PRIVILEGE - DEFINITIONS.

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Wait! What are “privileges”?

- Work Product: product prepared in anticipation of litigation or for trial
- Attorney-Client: candid communications relating to legal advice





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## MAINTAINING PRIVILEGE - LIMITATIONS.

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**Caveats!** While the privileges are not “dead”...

1. In the US:

1. Privileges are not automatic. Claims of privilege are weighted to determine whether they predominately relate to legal or commercial advice. The latter is not protected.
2. Privileges are of limited assistance. Privileges do not protect from underlying facts; only to an attorney’s trial prep work.
3. Privileges may easily be waived:
  1. Accidentally: by breaking the attorney-client nexus.
  2. Intentionally: through voluntary disclosure in any jurisdiction, or by defending your actions/inactions before the authorities.

2. Outside of the US: in-house counsel privileges are limited or non-existent in many jurisdictions around the world.





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### MAINTAINING PRIVILEGE - STRATEGIES.

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Distinguish material investigations from routine ones to demonstrate the distinction between *an investigation conducted in the ordinary course of business* and a *focused legal investigation*.

1. Clear, written initial direction from the GC/CLO as to the specific investigation “being conducted under claim of privilege”.
2. Consider use of outside counsel.
3. Clear documentation of legal purpose on all documents and memos.
4. Clear communication of legal purpose to all interviewees. (“Upjohn”)
5. Consistent documented attorney direction and oversight.
6. Limited exposure (as inadvertent communication or forwarding of emails could undermine the claim of privilege).



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MAINTAINING PRIVILEGE – UPJOHNS (I.E., THE CORPORATE MIRANDA).

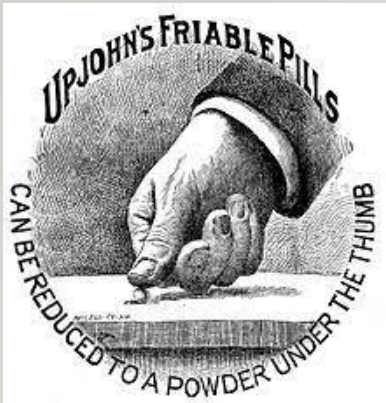
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The Upjohn logo consists of the word "Upjohn" in a bold, white, serif font, centered within a solid black rectangular background.

### Um...“Upjohn”?

Thanks to a 1981 Supreme Court decision re Upjohn Co, we should all initiate interviews with an “Upjohn” warning (and document that it was provided in the subsequent notes).

- I represent the company, and not you.
- I am conducting this interview to gather facts to provide legal advice.
- Your communications with me are protected by the attorney-client privilege, which belongs to the Company. This means that the Company can decide what it wants to do with this information in its sole discretion, and without notifying or advising you.
- In order for this discussion to be subject to the privilege, it must be held in confidence. *[Other than your attorney,]* please do not therefore disclose the substance of this interview with anyone.



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### DETECTING DECEPTION - INTERVIEWS.

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To assess credibility of an interviewee, consider:

- The inherent plausibility of the story
- Any motive to lie
- Corroborating evidence
- Past record (bad acts) – remember, this is not a court!  
(Here, its probative value could outweigh its prejudicial impact.)
- Demeanor – but...be careful!





## **INTERNAL INVESTIGATIONS 2.0**

### DETECTING DECEPTION – BEHAVIOR ANALYSIS INTERVIEW.

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The Behavioral Analysis Interview is a technique taught to law enforcement officers and investigators across the US and Canada. It provides “cues” to deception, such as:

- ✓ Not looking you in the eye
- ✓ Sweating and stuttering
- ✓ Fidgeting
- ✓ Looking defeated
- ✓ Licking of the lips
- ✓ Wiping of the eyebrows



## **INTERNAL INVESTIGATIONS 2.0**

### DETECTING DECEPTION – FALSE CUES.

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Research suggests that at least some cues from the Behavioral Analysis Interview are the opposite of what liars most often exhibit:

- ✓ Not looking you in the eye –
  - Knowing this to be a commonly-held belief, liars often look you straight in the eye.
  - Some cultures consider looking you in the eye to be impolite.
  - There are many alternative reasons this may happen (e.g., the interviewee may simply not like you).
- ✓ Sweating and stuttering – being interrogated makes both liars and truth-tellers very uncomfortable.
- ✓ Fidgeting – to overcompensate, liars are more likely to be extremely rigid.
- ✓ Looking defeated – lying is a deeply unpleasant activity. So is telling the truth during an interrogation.
- ✓ Licking of the lips – lying is stressful, and a major symptom of stress is a dry mouth. Do you know what else is stressful? Being interrogated while telling the truth!
- ✓ Wiping of the eyebrows – the eyebrows are a highly sensitive spot, and has more receptors that are calmed when stroked. In a stressful situation, it helps liars – and truth-tellers – to calm down.



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DETECTING DECEPTION – THANK YOU, MR. PRESIDENT.

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## INTERNAL INVESTIGATIONS 2.0

DETECTING DECEPTION – CONCENTRATE ON WORDS, NOT DISPOSITION.

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Listen to what is “not said”.

- Bill Clinton used the term “sexual relations”, a strange technical term.
- He likely thinks he told the truth, misleadingly, i.e., trying to leave a false impression with a half-truth.

Try these too:

Q: Governor Clinton, have you ever smoked marijuana?

A: *I have never violated the drug laws of my country.*

Q: Governor Bush, have you ever used cocaine?

A: *The White House security check asked about prior drug use, and I can pass that security check.*

\*Think how much easier it would be to detect deception by reading – as opposed to listening to – responses...



The most important  
thing in communication  
is hearing what  
isn't said.  
Peter Drucker



## **INTERNAL INVESTIGATIONS 2.0**

### DETECTING DECEPTION – FIND ERRORS IN THE LIE.

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1. Note illogical inconsistencies.
2. Liars use a lot of mental energy to memorize a false chronology of events. Increase the liar's "cognitive load" to make it harder to maintain the facade:
  1. Poke holes in alibis with unexpected questions.
  2. Use reverse order (i.e., "What happened right before that?")





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### DETECTING DECEPTION – BEWARE OF POTENTIAL BIASES.

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- Confirmation Bias – seeking information that confirms your theory and discounting contradictory information.
- The Othello Error – assuming nervousness is guilt.
- Individual Bias – being influenced by beauty, composure, race, culture, ethnicity, nationality, personal animus, etc.

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## DETECTING DECEPTION – RECORDS.

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Caveat: I'm a lawyer, not a "numbers guy". You're going to want a specialist forensic accountant to do detailed fraud work. That said...

Here are some example red flags:

### Submissions

1. Round numbers.
2. Entries not supported by evidence (receipts).
3. Split invoices for the same date.
4. Sequential invoices for expenditures that are not close in time.

### Systemic Review

1. Expenditures not subject to arms length financial controls.
2. Growth in inventory materially outpacing growth in sales.
3. Strange seasonal swings in revenue and expenses at period end.
4. Off balance sheet entities.



# **INTERNAL INVESTIGATIONS 2.0**

## GOOD DOCUMENTATION STRATEGIES.

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Goal: credible reports with no gaps for subsequent prosecutors.

I. Write a narrative for the lazy reader.

- Avoid a sequence of several-page summaries for each witness.
- Provide all sides to any story.
  - For differing accounts, combine both into a single narrative, highlighting where they disagree.
  - If appropriate, also add whether explanations or facts either support or undermine credibility.
- Cite sources for all facts.





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### GOOD DOCUMENTATION STRATEGIES (2).

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Goal: credible reports with no gaps for subsequent prosecutors.



2. Avoid unsupported assumptions.
  - Not, “he was drunk,”, but “he was unable to walk and kept slurring his speech”. [could be intoxication, a stroke, or a Sylvester Stallone impression.]
3. Avoid adjectives and adverbs.
  - Not, “it was a cold night,”, but “he said it was a cold night,” or, “it was 37 degrees.”
4. Document violations of policy or practice, but avoid legal conclusions.
  - This could really hurt the company’s case, were opposing counsel to find such an admission.
5. Avoid recommending discipline.
  - This could create a huge potential gap.



# **INTERNAL INVESTIGATIONS 2.0:**

THE END

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# **THANK YOU!**

Josh Wallenstein

[jwallenstein@wallensteinlawgroup.com](mailto:jwallenstein@wallensteinlawgroup.com)

+1.713.598.4581