

Anatomy of an Outside Investigation

Ohio State and CBS investigations bring lessons for independent corporate probes

BY JULIA CARDI
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In ideal circumstances, companies have a culture where sexual harassment doesn't happen at all. When that's not the case, the next best situation would be for employees to always feel they can come forward to report harassment and trust the company to take their allegations seriously without fear of retaliation.

But ongoing investigations into sexual misconduct at Ohio State University and CBS show a company handling an internal investigation itself isn't always the best path for a fair and independent investigation. Attorneys with expertise in corporate investigations weigh in on the "anatomy" of such probes: How to make sure an outside attorney is truly independent, the benefits of a women-led probe into sexual misconduct and how #MeToo has affected the instances of companies appointing outside attorneys.

Stefan Stein, a member of Sherman & Howard's litigation, trial and appeals

practice group, said even appointing an outside attorney to conduct an investigation doesn't necessarily guarantee they are truly independent. In

lions of dollars in fees from that company, their independence in reaching a conclusion, particularly one that might be favorable to the management

bers of the board or a board of trustees.

After news broke in July about CBS president and CEO Les Moonves' alleged sexual harassment of six women, the company announced an independent investigation into the allegations and into possible systemic issues with the company's culture as a whole.

A Denver-based partner at Perkins Coie, T. Markus Funk, is one of two partners at the firm leading the independent investigation into Ohio State. The investigation focuses on decades of alleged sexual abuse of student athletes by now-deceased university doctor Richard Strauss. Attention on the investigation recently turned political when news broke that former wrestling coach Jim Jordan, now a U.S. representative, is a witness in the investigation.

Funk could not speak on the record with Law Week while the investigation is ongoing. Andrew Boutros, a partner at Seyfarth Shaw in Chicago who previously worked with Funk as a federal prosecutor in the city, said while the

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investigations that involve high-level employees, it may be smartest for companies to hire a firm that is not their usual outside counsel.

"[An outside investigation] has its own set of issues, because how independent is independent?" he said. "If an outside law firm has received hundreds of thousands of dollars or mil-

of the company, would be called into question."

Stein said it's important to understand who has authority to make an ultimate decision about action to take after an investigation. Often the investigating entity does not actually have that authority, which instead may lie with the full board, independent mem-

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aftermath of the #MeToo movement has seen the appointment of a number of outside attorneys to conduct corporate probes, he said the use of outside investigators directly correlates with members of the upper echelons in organizations being the subjects of probes.

It can be difficult to use internal investigators such as those in companies' general counsel offices in those instances, he said, especially if the people they report to are the subject of their investigations. Boutros said the probes are "entering into the C-suite in a way that has never happened before."

Stein said it's also critical to for outside attorneys to keep attorney-client privilege during the course of their probe. But to ensure the integrity of the investigation, attorneys need to make it clear they represent the company, and not any one individual.

"You'd say... 'The purpose of this interview is for me to gather information from you so that I can provide legal advice to my client,'" Stein said. "I don't represent you, any other individual in connection with this matter. ... I represent the entity or the special committee of the board."

Katherine Varholak, an attorney with Sherman & Howard, said having a diverse investigative team tends to yield better results in a probe because

members can bring different perspectives to the table and in particular, having women participate can help combat implicit bias. Two women law partners from Covington & Burling and Debevoise & Plimpton, Nancy Kestenbaum and Mary Jo White, were announced at the beginning of the month to lead the independent investigation into CBS.

"When you have really sensitive issues involving sexual misconduct, it's critical as an investigator that while you're fair and you ask the tough questions, that you also have to be careful not to revictimize the victim," Varholak said. "And so I think being a female can provide a level of empathy in that type of situation." She added, though, that she doesn't believe her perspective as a woman affects how she structures an investigation.

Varholak said challenges for women participating on or leading investigative teams probably mirror the challenges they face in other areas of the legal profession.

"Despite the increase in women in the law, the upper echelons of law firms and other companies and especially big corporations are still male-dominated," she said. "There are gender-based challenges there. They're no different in the investigations world than they are in other professional aspects."*

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execution and false arrest, as well as his Fifth Amendment right against self incrimination."

The defendants filed a motion to dismiss, which was denied by the district court. Setting aside a handful of questions for which the 10th Circuit found it did not have jurisdiction, the federal appeals court in particular reversed two of the lower court's findings.

First, concerning the question of malicious prosecution, the 10th Circuit noted there are five relevant factors that must be proven: "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages." The defendants challenged only the second factor, arguing that the case did not technically terminate in favor of Montoya.

In the 10th Circuit opinion, Tymkovich wrote, "In this case, the prosecution agreed to vacate Montoya's conviction as a compromise after Montoya filed a petition for relief due to ineffective assistance of counsel and actual innocence. Montoya argues this vacatur sufficiently demonstrates his innocence, and thus claims the criminal proceedings terminated in his favor. Looking to the prosecution's stated reasons, as well as to the surrounding circumstances, we conclude Montoya has failed to allege a favorable termination. Accepting the facts Montoya alleges as true and construing them in his favor, the question of Montoya's innocence was left 'unresolved' by the vacatur of his prior conviction."

The second part of the 10th Circuit's reversal concerned Montoya's Fifth Amendment claim, which the defense refuted by asserting "absolute testimonial immunity." In this case, the 10th Circuit noted: "The Supreme Court has defined this immunity broadly, explaining that 'a trial witness has absolute immunity with respect to any claim based on the wit-

