

FEBRUARY 2024

UT LAW | CLE

 **TEXAS Law**  
The University of Texas at Austin  
School of Law

# GOVERNANCE: MANAGING AN INTERNAL INVESTIGATION

James Joseph, Arnold & Porter  
Kate Karl, Caplin & Drysdale

1

UT LAW | CLE

 **TEXAS Law**

## Introduction

- Internal investigations can be high stakes, both from a legal and a PR perspective.
- Mishandled internal investigations can cause additional damage beyond the original wrongdoing – it is important for organizations and their counsel to understand how to plan for and conduct effective investigations to avoid pitfalls.
- Internal investigations are generally unexpected, fast moving, intense/all-consuming for key players in an organization, and full of potential landmines. This means pre-planning (to the extent possible) and hitting the ground running.
- The goals of any investigation are to uncover any wrongdoing, propose solutions or corrective actions and avoid collateral damage.
- Given stakes, role of the board is crucial but will vary depending on organization and nature of investigation.

2

2

1

## Introduction (cont'd)

- The best defense is a strong offense, so try to avoid problems or catch them before they become full-fledged crises.
  - Identify high-risk areas; low risk problems that occur constantly; significant disruptors that are not highly likely but would be devastating if they occurred.
  - In allocated resources, look to deal with the high risk, highly likely events first, and then work your way down the continuum.
  - Involve the board and ensure alignment with management.
  - For example, if your organization regularly holds highly sensitive personal data, then invest in cyber security.
- Put necessary policies and systems in place **and follow them**.
  - Have policies and periodic trainings in high-risk areas (conflict of interests, sexual harassment, use of the organization's credit cards/reimbursement of expenses).
    - This would include a strong, well-publicized whistleblower policy.
  - Ensure the organization has key governance policies that are followed as structure matters most when times get tough.
    - What policies apply to directors? Are bylaws up to date and followed? Are committee charters clear on the role of each committee? Are the right directors on appropriate committees? Do the directors have a clear understanding of their roles and responsibilities in routine and non-routine matters?

3

3

## Introduction (cont'd)

- Prepare the board.
  - Does the board have a strong understanding of the organization, its mission, and the role of management, including its strengths/weaknesses?
    - Without that fundamental understanding, the board's assistance may be unhelpful at best.
    - Consider orientations, ongoing director trainings, information shared at board meetings, and ongoing board engagement.
  - Does the board have the right combination of experience and expertise?
    - Diverse backgrounds, approaches, and skills enhance decision-making.
    - Consider board pipeline and turnover (or lack thereof).
  - Do the board and management have a strong functional relationship with clearly defined roles?
    - A failure to communicate or miscommunications and misunderstandings can make an investigation even worse.

4

4

## HOW TO PLAN FOR THE UNEXPECTED?

- It is important to have clearly written and agreed-upon protocols in place before a crisis and follow them when the crisis hits.
  - Who gets contacted (the executive team, the board chair, the executive committee, the board, key donors, or other stakeholders) and when?
  - Is immediate action needed?
    - Restricting IT and building access?
    - Changing signatories on bank accounts?
  - How does the organization keep running when top management is focused on the crisis?
  - Generally, an organization does not budget for a crisis, so how does it pay for the fallout?
  - Who is authorized to speak publicly? Who must clear public statements before they are issued (remember to include someone from legal).

5

5

## WHAT IS REQUIRED OF MANAGEMENT AND THE BOARD?

- Officers and directors owe a fiduciary duty to the non-profit organization.
- In performing their duties, officers and directors must act in the best interests of the non-profit organization (e.g., work to fulfill the organization's tax-exempt purposes and maintain its tax-exempt status).
  - This is where understanding the mission is key.
- Consistent with the duty of care, officers and directors must devote the necessary time and attention to any crisis and subsequent investigation, which will vary depending on the nature of the investigation.
  - This can be particularly difficult with a volunteer board that may have attended a few board meetings a year and not do much else.
  - Using the Executive Committee (if there is one) or forming a Special Committee of qualified directors willing and able to spend the time and give the attention needed to oversee an investigation should be considered. But also consider how full board will be kept adequately informed.

6

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Governance: Managing an Internal Investigation

Also available as part of the eCourse

[2024 Nonprofit Organizations eConference](#)

First appeared as part of the conference materials for the  
41<sup>st</sup> Annual Nonprofit Organizations Institute session

"Governance: Managing an Internal Investigation"