

Quick Overview: Conducting Internal Investigations in India

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It would be fair to say that the landscape of internal investigations in India has undergone a sea change.

What was once, perhaps, something that corporate India did as an inconvenient last resort has slowly, but surely, turned into a process which most businesses today realize as a most effective way of defence, with or without statutory levers.

Multiple factors have contributed to this evolution - alignment with global standards, tougher questions from regulators, heightened awareness among the workforce and management, and last but certainly not least, the acknowledgment that ethics and business go hand in hand and that their marriage is the edifice on which successful and sustainable operations rely.

This article breaks down the structure of a typical internal investigation in India. While the overall process may not be markedly different from an international one, we must acknowledge that the nuances of language, culture, and ways of doing business in different parts of the country can impact how the investigation is conducted.

Whether you should initiate an investigation and the factors that influence such a decision

The obvious first step is to ascertain whether there is an actual need for an investigation. If there is a statutory requirement to investigate or an internal policy that says that



all complaints must be investigated, then one has no choice but to pull the trigger.

The issue becomes complex if there is no statutory requirement or the internal policy is silent. The complication gets further intensified if the complaint is generic in nature.

For instance, if a complaint comprises specific allegations of procurement fraud or financial embezzlement or insider trading, or instances of harassment and bullying, the path is fairly clear on what needs to be done.

However, if the complaint sets out generic language which insinuates suspected malpractice in the procurement department or toxic work culture in a particular team/vertical, or the suspicion that a certain CXO has assets not commensurate with his/her income, it boils down to discretion more than anything else.

The considerations that often influence such decision making are:

- The organization's risk appetite,
- The seniority of employees named (if, any),
- The importance of the issue internally, and
- The prevalent culture of ethics and compliance.

Discussion with the complainant(s)

This is particularly tricky in India. While not always necessary, it is sometimes critical to have direct contact with an anonymous whistleblower. Anonymity is more often than not permitted by most organizations when it comes to whistleblowing.

However, if the investigation team can effectively communicate the seriousness of the exercise and the fact that the complainant(s) will always be protected, anonymous whistleblowers sometimes meet in person or at least maintain a consistent line of communication with the investigators.

Even in situations where the complainant is not anonymous, they are frequently reluctant to share more details than the initial complaint, primarily out of fears of retaliation.

It is critical to stress to the complainant the organization's anti-retaliation policies, the rigor of due process, and the seriousness with which the organization is addressing the issue(s)/complaint.

A neutral third-party investigator (e.g. outside counsel) also goes a long way in providing adequate comfort.

Importance of maintaining attorney-client privilege during an investigation

In-house counsel in India do not enjoy the same legal privilege as outside counsel. Professional communication between an in-house counsel and officers, directors, and employees of a company are also not protected as privileged communications between an attorney and the client.

Given this position, many organizations decide to have outside counsel lead investigations, depending on the seriousness and nature of the allegations being investigated.

Gathering of evidence

In an internal investigation, evidence can be categorized in three buckets:

- Documentary evidence comprising written records that can prove or disprove elements of an investigation;
- Digital evidence that would include all information stored or transmitted in digital form, and can include data from computers, smartphones and other electronic devices; and
- Witness testimony from individuals that can provide direct accounts of events or corroborate information discovered during the investigation.

The first step should be to preserve documentary and digital evidence, which should include measures like activating IT system controls and sending clear instructions to relevant employees to not delete anything from their systems or devices.

The instructions should make clear that employee(s) may face stern disciplinary action for not complying.

The situation however becomes problematic when there are third parties, as they are usually outside the company's operational control.

Determining whether additional third-party assistance is required

Depending on the nuances and emerging fact patterns of an investigation, different kinds of assistance may be required. To maintain the highest degree of privilege, it is best to always have outside counsel (if appointed) directly engage the following:

- Agencies which conduct detailed background checks, integrity checks and market reputation checks.
- Agencies which conduct exhaustive asset tracing exercises.
- Forensic accountants.

Conducting interviews and behavioral analysis

One of the most crucial aspects of any internal investigation is conducting interviews. There are different styles at work during interviews, depending on the background of the interviewees and/or the seriousness of the issues.

Building rapport with the interviewee, whether he/she is a witness or the subject of the investigation, never hurts.

Some teams also employ, in different forms, the Behavioral Symptom Analysis, which is the systematic study of



behavior symptoms to identify the probable truthfulness of a witness.

By way of example, the investigation team could easily consider common honest attributes like being composed, cooperative, direct, and sincere, as well as shared dishonest attributes like anxiety or insincerity.

It's important to recognise that nervousness, fear or anger are common traits of both honest and deceptive individuals.

Body posture can be another key indicator. Individuals with honest accounts typically have an upright posture, and seem to be open and relaxed, while a deceitful witness may slouch or retreat. Physical expressions such as crossing arms, legs or hands in front of their face may be indicative of deception.

The exact choice of words can also often demonstrate the level of truthfulness. Dishonest accounts of events usually comprise vague language or reference to prior statements to prevent direct responses to questions.

Another factor that stands out is that dishonest witnesses often use bolstering statements to influence the interviewer into believing that they are giving honest responses, whereas truthful accounts usually comprise natural and spontaneous answers without the urgency to convince anybody in the room.

Preparation for interviews

While interviewing styles may very well differ and there is, of course, no single most effective way of conducting one, what remains non-negotiable is the factors to keep in mind while preparing for interviews:

- **Location.** Choose a location where you either want the interviewee to be most comfortable, or in some rare situations, where you would intentionally want them to feel uncomfortable.



- **Facts.** Familiarity with the facts is paramount, including knowledge of relevant legislation, internal policies and procedures.
- **Questions.** Assemble a list of questions beforehand, and additional questions can (and should) evolve with the interview.
- **Documenting the interview.** The jury's still out on this one. There are two strong schools of thought where one believes in recording interviews (post-consent of course) and the other is apprehensive of the perils of documenting an exchange.

Submission of the report

The brevity (or lack thereof) of the report often depends on the nature of the investigation, the issues involved, and the implications of any regulatory breaches (if, at all). While there are several styles of drafting a final report, consider the following aspects:

- **Executive summary.** This always helps crystalize the issues, implications and conclusions up front. The detailed analysis can be restricted to the main report.
- **KYA – Know Your Audience.** It is important to always remember who will read the report. The office of the General Counsel or the Chief Compliance Officer may have a very different lens from the Board of Directors. While making edits on the basis of the reader is not recommended, the emphasis on issues and actions to be undertaken requires keeping in mind who the audience would be.
- **Unnecessary facts.** It is inevitable that a plethora of facts is discovered during an investigation. A good report separates the grain from the chaff. It focuses on the relevance of each fact while aligning with the overall scope. All effort must be made to ensure there is no information overload.
- **Simplicity.** The most effective and “reader-friendly” reports are the ones that do not have complicated language and long, convoluted sentences even while

explaining the most complex of legal analysis or the most intricate of fact situations.

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