



INVESTIGATIONS: UNDER PRESSURE AND OUT OF TIME

HOW GENERAL COUNSEL ARE LEADING
THEIR COMPANIES THROUGH
INVESTIGATIONS IN THE DIGITAL AGE

Pressure. It's the one constant for all legal departments, and general counsel rarely face more of it than when they're leading an investigation that has made headlines and captured the public's attention. In the digital age, the appetite for instant answers combined with intense public scrutiny has put tremendous pressure on every aspect of investigations—from the way facts are gathered to executive accountability, government relations, and managing the impact of the crisis on the brand and the stock price.

General counsel and their legal departments must navigate investigations in less time and with more at stake than ever before. Their role extends far beyond the traditional function of chief counsel as they become crisis manager, brand guardian, defense attorney, and impartial investigator. It is difficult terrain where saying too much, or not enough, can invite consumer, regulator, and media backlash that destroys a brand or exposes executives to government enforcement actions or shareholder lawsuits.

In this article, we examine a hypothetical scenario from the near future—a company that delivers pharmaceuticals by drone—to explore insights and issues that can help legal departments create effective investigative strategies. Crowell & Moring's [Investigations Practice](#) partners created this scenario based on an amalgam of real-world experiences with actual crises. And their discussions examine sound practices in moving investigations forward—from working with the board of directors and navigating Capitol Hill to the basics of interviewing witnesses.



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—KELLY CURRIE

THE SCENARIO

When Company Y, a major drugstore chain, launched a groundbreaking new home-delivery service, executives and shareholders had high hopes.

The service, AirDroneRx, used drones to take medicine to customers in selected rural areas as well as to remote Coast Guard ships and facilities. Just a month later, the company began to lose control of the airborne vehicles. Shipments were delivered to the wrong places—or not delivered at all. Then several drones crashed, damaging property and injuring people, including children.

Company Y first recognized the problem when calls began coming into its consumer hotline. Some members of Company Y’s technical team suspected that malware introduced by a malicious cyber intrusion was causing the navigation system for the drones to fail. Soon, the story hit the news, and agencies including the Federal Aviation Administration and the Department of Justice were asking for more information. Parents of injured children began to file lawsuits and complain to the government, while class action lawyers started to round up patients whose prescription deliveries were at risk.

When a whistleblower emerged and filed a qui tam False Claims Act suit, claiming that the company knew about the problem but did nothing to fix it, the FAA stated it was considering grounding the full drone fleet. Some people began to wonder: How high in the organization will this go?



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—KENT GARDINER

WHY IT’S DIFFERENT TODAY

Not that long ago, dealing with Company Y’s scenario would have been a fairly straightforward task for the general counsel: contain the issue and pursue a step-by-step, deliberate investigation. “Most investigations were fairly predictable and linear,” says Kelly Currie, chair of Crowell & Moring’s [Investigations Practice](#) and former acting U.S. attorney for the Eastern District of New York. “But now, too often, they are neither. What at first looks like a consumer complaint or a routine compliance inquiry can quickly spin up into criminal or regulatory inquiries from multiple jurisdictions and civil litigation, all potentially hurting the company’s reputation and share price, and certainly demanding the attention of senior management and the board. The general counsel’s job is containment of risk and institutional harm, but in the digital age it is challenging to do.”

The problem very often will involve more than legal issues. “The first job of the GC is to make the problem stop and to make sure that people are safe,” says Kent Gardiner, chair of Crowell &

Moring’s [Litigation & Trial Department](#). “Instincts of protecting the company from civil and criminal liability are naturally top of mind. But today, everything is under a microscope. How you handle the problem carries tremendous weight. Whether you did the right thing, proactively, trumps whether you are exposed to a product liability lawsuit.”

Gardiner recalls one investigation involving an industrial accident. The general counsel immediately set up a crisis room staffed not by lawyers, but by safety experts and others who worked with people on the ground to make sure the danger was contained and the first responders were safe. “That’s a good example of the holistic approach you need today,” says Gardiner. “In situations where people are injured, everything will turn on the ethics of how you deal with the problem—whether you were fundamentally good.”

A key difference between investigations today and, say, a decade ago is the rapidly expanding universe of digital information. “It used to be that you would talk to the people involved, then capture what they said to create the factual record,” says Gardiner. Now, however, “the record has already been memorialized in real time, through the imperfect world of email, texting, bystander smartphone video, and voice mail.”

Stakeholders in and out of the company now have easy access to that information and can use social media and other tools to create an ongoing real-time commentary around the event. “You no longer get a subpoena and respond 60 days later, with everything handled in an orderly sequence,” Gardiner says. “It’s all in real-time public view.”

In this world, the general counsel needs to respond quickly and correctly—and the actions the legal department takes in the early stages can have significant ramifications later on.

To begin, it needs to develop an understanding of what has happened. “At first, the legal department will have an information deficit,” says Currie. “Information is filtering its way up through people who may not have firsthand knowledge of events.” He suggests that the general counsel rely on the old military adage: “The first reports from the battlefield are always wrong.”

It takes time to gather the facts. But often management will want to hurry to make public statements about the investigation in the hopes of getting out in front of the issue. Doing so prematurely can create problems. “When you make statements to the government or the public that turn out to be only part of the story, that’s a terrible place to be,” says Currie.

THE RIGHT PEOPLE WITH THE RIGHT QUESTIONS

In gathering facts, the legal department will need to address a wide range of questions. Some will focus on determining what actually happened: What went wrong with AirDroneRx? Was it a hack—or a software problem? Has the problem been contained? The general counsel’s team will need to sort out legal questions, such as:

- Is there a continued risk of injury from uncontrolled drones? Is there potential harm from missed or erroneous deliveries?
- What agencies and regulators need to be notified? A report will need to go to the FAA and the National Transportation Safety Board because there was an aircraft-related serious injury involved. But what about the Drug Enforcement Agency? Or the Coast Guard, which has a delivery contract with Company Y?
- Does the evidence suggest that the company should file a Federal Acquisition Regulation (FAR) Mandatory Disclosure because of failures to comply with federal contract requirements?
- How should the company notify the Coast Guard and others of the delivery interruptions?
- Were there breaches of private consumer data that require disclosure?
- What state laws and regulations might have been broken?

- Did lost drones potentially violate export controls? Did non-U.S. nationals gain access to controlled technology or source code?
- Did the program rely on data stored overseas? That could violate other countries’ data privacy laws or make it difficult to access data for an investigation.

With so many different issues to consider, “the first thing you have to do is get just an ounce of information about what you think you’ve got on your hands,” says [Philip Inglima](#), a partner in Crowell & Moring’s [White Collar & Regulatory Enforcement Group](#), who also served with the U.S. Office of the Independent Counsel. “Then, bring together a team of the right people for this dialogue. You’re having to move in a lot of directions at once, and you can’t do that from a silo. You need a strong, horizontal team of relevant experts.”

“That kind of planning early on helps manage the scope and cost of an investigation, so the general counsel can directly focus on the critical factors in evaluating the risk to the company,” says Currie.

To piece together an accurate picture, Company Y will need to conduct interviews with employees, contractors, even customers. Here, it’s important to think ahead to potential criminal investigations from the DOJ, as well as civil lawsuits from whistleblowers, customers, and shareholders. “You should work with the assumption that the company will be receiving a subpoena and there



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KEEPING GOVERNMENT CUSTOMERS IN THE LOOP

For Company Y, keeping in touch with the Coast Guard and any other agencies it contracts with is a vital part of its investigation strategy. That means the company should tell those agencies as much as is prudently possible about the AirDroneRx problem up front. Why? “Because they don’t like surprises, and they don’t like to be ignored,” says [Gail Zirkelbach](#), a partner in Crowell & Moring’s [Government Contracts Group](#).

The company should not only explain the problem, but also present the solution. “The decision to suspend or disbar a government contractor is based on the determination of whether you’re a responsible contractor,” Zirkelbach says. “Showing that you are being proactive is a good way to demonstrate that you are responsible. Say, ‘Mea culpa, this is what happened.’ Tell the regulators what affirmative steps you’re taking to correct the problem.”

Disbarment and suspension are serious, but even lesser penalties can have long-term ramifications. “You need to work with your contracting officer to resolve the issue in such a way that he or she does not decide to terminate your contract for default. If it is terminated for default, then you will have a problem competing for future contracts; that termination for default will have an adverse effect on your evaluation,” she adds.

Moving quickly to work with agencies can pay off in another way, as well. “There could be a potential False Claims Act case brewing, and a whistleblower could be racing to the courthouse to file something. If you can get a disclosure in before they make it there—and tell the government about the problem yourself—you have a much better chance of eliminating him or her as a valid whistleblower,” Zirkelbach says.



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—ANGELA STYLES



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—TRINA FAIRLEY BARLOW

may be parallel criminal and civil litigation,” says Inglima. “You need to make sure the investigation is conducted in a way that protects privilege.” Yet companies rushing to find out what happened will rely on HR or field managers to start interviewing people, leaving that information open to later discovery in civil litigation. Instead, Inglima says, “the general counsel needs to have lawyers directing the investigation on behalf of the company.”

Those lawyers should have experience in the subject matter. For example, in the AirDroneRx investigation, the interviewers should be knowledgeable about the government agencies and regulations that might be involved.

COPING WITH THE WHISTLEBLOWER

The emergence of Company Y’s whistleblower created additional complexity for the general counsel—and considerably higher stakes for the company. The looming *qui tam* False Claims Act suit could result in significant claims and even treble damages. Furthermore, DOJ policy now calls for the department’s criminal division to automatically review such cases to determine if it should pursue criminal charges alongside civil charges.

At this point, the government will be asking for information, and the general counsel should make delivery of that information a priority.

The general counsel may also want to help officials get up to speed on the challenges involved, says [Angela Styles](#), chair of Crowell & Moring and former administrator for Federal Procurement Policy within the Office of Management and Budget at the White House. “The government doesn’t always understand the complexity of collecting the information electronically and supplying it. The government believes corporations simply press a button and the right information pops out at no cost. So, whether it comes to navigating the DOJ or working with an agency, it is important to make sure officials understand the complexity of finding and reviewing the information they’re asking for, and how long it takes to make it accurate.”

“Regulators and the NTSB share the operator’s goal to find the root cause of an accident and prevent recurrence. When a serious accident or incident occurs, they expect immediate notification and the full cooperation of the operator,” says [Marc Warren](#), a partner in Crowell & Moring’s [Aviation Group](#) and former acting chief counsel of the FAA.

Within the company, the general counsel needs to re-emphasize the need to preserve

potential evidence. That’s always important, but it becomes even more so when there’s a whistleblower, which could motivate some employees to delete emails and other documentation.

Here again, the general counsel has to find the right balance between providing information quickly and being as thorough as possible, because the company does not want to find itself having to retract or amend information later on.

The general counsel should work with HR to ensure that no retaliatory actions are taken against the whistleblower. Like many corporations, Company Y has non-retaliation policies in place, but those need to be reiterated. “Every witness should be reminded of the company’s zero-tolerance policy against retaliation and told that they won’t be treated differently because they’re participating in the investigation,” says [Trina Fairley Barlow](#), a partner in Crowell & Moring’s [Labor & Employment](#) and Government Contracts groups. “Also, remind them that if they believe they are experiencing any sort of retaliation, they should report it immediately.”

Retaliation is usually not an issue with the legal team or HR, but elsewhere in the organization. Barlow suggests the company do more than offer abstract concepts. “It’s important to give managers concrete examples of what may constitute retaliation. It’s not just firing or demoting an employee. It can be taking work away from the individual or not inviting them to key meetings,” she says.

Meanwhile, as Company Y’s case unfolds, the whistleblower claims that senior managers knew about the drones’ vulnerability to hacking but covered it up. Having the CEO or other executives implicated is unusual, but it’s a possibility that needs to be in the back of the general counsel’s mind.

An investigation that reaches the C-suite can be especially difficult to navigate for the general counsel—who, after all, reports to the CEO. That may feel like a dilemma, but, says Inglima, “the general counsel has to keep in mind who his or her client is, and remember that it’s the company, not any individual member of management.”

When interviewing those executives, the general counsel needs to make it clear that the company may eventually decide it is best to waive privilege and cooperate with government investigators in light of the Yates Memo’s expectation that companies provide all relevant facts of individual misconduct in order to obtain credit for cooperation.

“You may need to turn over information from those interviews, and the government may use that information as evidence against the officers

of the company,” says Inglima. “That can be a hard thing to explain to executives—that privilege in this case is something the company owns, not the executive, and the company can waive it. But you have the ethical imperative to basically Mirandize your executives and tell them that before you question them.”

OPERATING AT THE CENTER OF THE STORM

Communication and coordination are essential skill sets for the general counsel and the in-house team. That can be seen in the AirDroneRx investigation, which encompasses a wide range of players, including counsel, PR experts, and the board. “The role of the general counsel has to be ‘coordinator,’” says [Cari Stinebower](#), a partner with Crowell & Moring’s [International Trade](#) and White Collar & Regulatory Enforcement groups and a former counsel for the Department of the Treasury’s Office of Foreign Asset Controls. “You need to look at your constituencies and have them all working seamlessly so that no one is getting out ahead of the others.”

“It’s important that there be a clear internal communication plan,” says [Stephen Byers](#), a partner in the firm’s [White Collar & Regulatory Enforcement Group](#) who has handled corporate internal investigations for more than 20 years. “For example, the general counsel might hold a daily call among all the internal stakeholders. That can be a lot of people, but there is sometimes no substitute for oral discussion and real-time updating. There can be other regular calls among working groups. But there needs to be that element of overall coordination.”

While the general counsel needs to be a coordinator, there are times when being more hands-on might be appropriate—for example, attending key meetings with prosecutors and regulators.

Communication with the board is especially important, and keeping members up to speed helps avoid surprises later on—something that is especially important in an age when Dodd-Frank and Sarbanes-Oxley statutes can make board members individually responsible for company crises.

Communication with the board can become even more critical when questions about upper management’s involvement create “fissures” between the board and the CEO, says Gardiner. If it becomes apparent that the CEO may have some culpability in the problem, the board will be obliged to step in to protect the company. “If the board takes the lead in the investigation,” he says,

“the general counsel will still need to work with the board to support its efforts—and that will be easier if he or she had been communicating with the board earlier in the crisis.”

“The best general counsel have the support of their CEOs in helping the general counsel develop her own relationship with the board,” Gardiner continues. “That helps the board have trust and confidence in the general counsel, which can give you some running room during an investigation.” The general counsel can also help prepare for potential crises through the ongoing education of the board about the business and legal challenges.

That underscores a fundamental fact: the ability to manage an investigation has a lot to do with what is done before the crisis occurs. For example, along with building board relationships, the company should have an in-depth understanding of its suppliers. In the case of Company Y, it’s possible that the drone’s software vendor might have seen the problem with the hack, or at least been the key to stopping it. “It’s important to know your vendors and have a robust system on the front end to understand who they are and how they operate,” says Styles. “You need to understand their compliance programs, where they’re based, and how they function.”

In addition, the general counsel should get to know the people in government who are likely to be involved should an investigation be required. “It’s better to have a solid relationship with a regulator in advance, because you want the agency to trust you if something goes wrong,” says Stinebower. “The role of Congress doesn’t have to be adversarial. If you become a valued subject matter expert and trusted reference for counterparts on the Hill, you’re less likely to be blindsided by a congressional investigation.”

Finally, the general counsel should set up a crisis investigation plan and a core crisis team in advance, and even run through practice drills to identify gaps and familiarize everyone with their roles and responsibilities.

“Pulling together everything on the fly will lead to avoidable mistakes,” says Byers. Once a crisis hits, the general counsel will be dealing with multiple constituencies and the possibility of simultaneous criminal, civil, and regulatory actions. It is critical to keep all those variables in mind, and how a multitude of potential scenarios could play out in order to avoid missteps in the early stages. Overall, he says, “you’ll need to be looking at the whole chessboard right from the beginning—now more than ever.”



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