

Internal investigations

The aim of this section is to give practical guidance on the structuring and conduct of an internal investigation. It focuses on investigations which a firm decides to carry out in relation to itself, which may or may not have been prompted by regulatory concerns. For the most part, the guidance applies equally to corporates and financial institutions. Clearly, however, the regulatory environment will differ and where appropriate, this note makes reference to the Financial Services and Markets Act regime.

A separate section addresses the issues which arise in the context of an investigation into a firm conducted by the FSA.

1 Internal Investigations – Purpose

Clarify at the outset why the investigation is being undertaken and what its objectives are.	<p>The purpose of the investigation will frame the scope of the work and dictate what sort of report is required.</p> <p>The aim of all internal investigations should be fact-finding – to determine what happened and not to reach conclusions on liability.</p> <p>Terms of reference should be drawn up. These need to include details of the team (this is important in relation to any claim to privilege – see section 5 below).</p>
Possible aims	<p>One or more of:</p> <ul style="list-style-type: none">• To inform the board about the background to and circumstances of a particular event or issue.• In the context of a general (industry- or market-wide) or specific concern to enable the firm to state publicly that it has investigated the matter (and taken appropriate action).• To establish what happened in response to a complaint from a client or counterparty or to respond to shareholder concern.• As a precursor to litigation to determine whether or not there is a claim.• In the context of concerns about the conduct of one or more employees and as a precursor to potential disciplinary proceedings.• To enable a firm to comply with its regulatory obligations: NB reporting obligations, the general principle of co-operation and openness, issues about ongoing fitness and propriety.• To discourage one or more regulators from instituting a formal investigation.

2 Who should undertake the investigation?

The team should be defined at the outset, and thought given to individual roles – bearing in mind that these may develop over time. Not only will this make the investigation run more smoothly, it is important in terms of a claim to legal professional privilege.

The team may require a combination of skills.

The involvement of lawyers will assist in a claim to privilege although the entire investigation is unlikely to be privileged unless litigation is in contemplation.

The team is likely to be drawn from one or more of:

Management	<p>Considerations:</p> <ul style="list-style-type: none"> • Do they have the resources? Can they commit the time? • Are they independent and will they be seen to be independent? Is there any chance that they were involved in the underlying events? • Will individuals' relationships with potential interviewees be likely adversely to affect the quality of the evidence obtained? Will it make the interviewees reluctant to talk openly? • Do they need to be authorised by resolution of the board? • Will they need assistance in reviewing documents and/or structuring the interviews/asking the questions? • It will not be possible to claim privilege in relation to much of their work.
Non executive directors	<p>Considerations:</p> <ul style="list-style-type: none"> • Is it sensible for them to commit the time? • Do they have the resources? • Their relationship with the potential interviewees may be a factor – will it make the interviewees reluctant to talk openly? • Will they need assistance in reviewing documents and/or structuring the interviews/asking the questions? • It will not be possible to claim privilege in relation to much of their work.
Internal audit	<p>Considerations:</p> <ul style="list-style-type: none"> • Are they independent and will they be seen to be independent? Is there any chance that they were involved

	<p>in the underlying events? Would they, in effect, be asked to review their own work?</p> <ul style="list-style-type: none"> • Do they have the resources? • Will they need assistance in reviewing documents and/or structuring the interviews/asking the questions? • It will not be possible to claim privilege in relation to much of their work.
In-house legal/In-house compliance	<p>Considerations:</p> <ul style="list-style-type: none"> • Do they have the resources and are they able to commit the time? • Is there any chance that they are being asked to review their own work? • Is it important that the team conducting the investigation is seen to be independent of the firm? • If in-house legal/compliance is to be the continuing link in dialogue with the regulator is it in fact helpful for someone else to be principally responsible for the investigation and to report to the in-house team? • Do they have the resources to do the document review work? • Enables any regulatory reporting obligations to be kept under review and action taken accordingly. • Even though the work is carried out by lawyers, there are still limits on what it is possible to claim privilege over.
External solicitors	<p>Considerations:</p> <ul style="list-style-type: none"> • Claims to privilege will be easier and clearer – see section 5 below for limits on what will be covered. • Are there presentational advantages in that the work is seen to be clearly objective and independent? • Will have the forensic skills required to structure the interviews and ask the questions effectively. • Ensures that legal advice can be given as and when issues develop – legal advice will keep pace with the facts as they are established.
Auditors	<p>Considerations:</p> <ul style="list-style-type: none"> • Are the issues such that auditors are likely to be able to assist? • Will they be seen as independent? • Are they being asked to review their own work?

	<ul style="list-style-type: none"> • Will they need assistance in reviewing documents and/or structuring the interviews/asking the questions? • It will not be possible to claim privilege in relation to much of their work.
Forensic accountants	<p>Considerations:</p> <ul style="list-style-type: none"> • Are there asset tracing issues? • Can they assist with technical back-up? • It will not be possible to claim privilege in relation to much of their work.
Other experts as required	<ul style="list-style-type: none"> • May be helpful depending on the underlying facts which prompted the investigation. • Usually only used in conjunction with others.
Private investigators	<ul style="list-style-type: none"> • Great care needs to be taken with the engagement letter and instructions to the private investigators to ensure that they only use methods which are legal. • There may be reputational risks associated with instructing private investigators. The firm should consider whether any of the proposed methods would reflect badly on the firm, even if they are within the law. • Particular care needs to be exercised in the instruction of private investigators in relation to current employees. The Information Commissioner has issued detailed guidance under the Employment Practices Act. There is a very narrow range of circumstances in which covert monitoring of current employees will be considered lawful and in any event senior management need to sign off on whatever arrangements are made. This is the case both for the instruction of private investigators and for any other form or covert monitoring or investigation. Note that the involvement of private investigators will, in most cases, be a breach of the duty of trust and confidence between the employer and the employee.

3 Internal communications about the investigation

<p>The general principle should be to inform people on a “need to know” basis.</p> <p>Note that any internal written communication about why the investigation is being conducted will not be privileged. It should be kept as neutral as possible and not pre-judge the issues.</p> <p>The firm should work on the basis that what it says in communications to all, or a substantial number of, its employees has a high probability of becoming public.</p> <p>Thought should be given at the outset to how and when issues will be escalated and reported within the firm; this will help maintain confidentiality in relation to reporting lines.</p> <p>In each case, care needs to be taken where legal advice is reported in order to maintain privilege – see section 5 below.</p>	
<p>Management, In-house legal, In-house compliance</p>	<p>Should be kept up to date in accordance with the firm’s usual reporting principles.</p> <p>Care needs to be taken when reporting legal advice and separate reporting lines may need to be set up for this depending on how the “client” is defined for a claim to privilege – see section 5 below.</p> <p>Advice should be sought where reporting lines extend outside the EEA since there may well be data protection issues under the Data Protection Act.</p>
<p>All employees likely to hear of the investigation and/or be required to produce documents and/or be required for interview</p>	<p>Need to be told about the fact of the investigation. What they are told about its scope depends in large part on the underlying issues.</p> <p>Sufficient information should be provided so inaccurate speculation and gossip are limited.</p> <p>Employees must be told about not deleting or destroying relevant material.</p> <p>This group should be sent the standard warning about not creating further documents/not commenting on the investigation in emails or (taped) telephone calls and maintaining confidentiality both internally and externally.</p>
<p>Those required to produce documents</p>	<p>Those required to produce documents should sufficiently understand the investigation’s purpose, scope and importance to enable them to identify relevant documents and also to treat it with the seriousness it merits.</p>
<p>Those likely to be required for interview</p>	<p>Employees should understand the purpose of the investigation before their interviews and in particular whether there are any consequences for failing to comply with any request to attend an interview.</p>

All other employees	Consideration needs to be given to whether or not the fact of the investigation will become public and/or widely known within the firm. It is usually better for the firm to communicate with employees before any other source provides them with the information. Any communication should be carefully drafted and should remind employees of their duty of confidentiality and include general document control warnings.
Confidentiality	The project as a whole should have a password. Access to documents created in the course of the investigation should be controlled by password. Care should be taken, both within the team and externally, to be clear about who knows what and with whom matters may be discussed.

4 External communications about the investigation

Consider in each case *what* is being communicated:

- The fact of the investigation? and/or
- The underlying facts ascertained?
- NB generally there is no duty to reach a conclusion on whether or not what has happened constitutes a regulatory or other breach and great care should be exercised in concluding that it is appropriate to communicate the firm's view that it, or any individual, is in breach of a regulatory or legal obligation.
- NB in any external communication about an investigation care should be taken to distinguish between the facts and the firm's view on the facts or their consequences. In each case, the question should be: does the person to whom this information is being communicated need to know of the firm's views and opinions on the facts as established? What use will they or might they make of that information?

It may be that more than one report needs to be made – so the necessity to update an initial report should be kept under review. This is particularly the case if the initial report would be rendered incomplete or misleading as a result of information established later.

Consider privilege in relation to any external communication. If a matter is privileged, consider:

- Does it have to be communicated to a third party and why? NB privilege may be lost.
- Can the document be divided into privileged and non privileged parts and only the non privileged parts communicated?
- Could there be a limited waiver of privilege – as to which a formal agreement should be entered into.

In any voluntary report or report in the firm's interest client confidentiality should be considered. It may be that confidential details can be omitted or redacted.

If there is a duty to report a particular matter generally a client cannot complain that such a report contained information which would otherwise be confidential to it. There will be an implied, if not an express, overriding of the duty of confidentiality to enable the firm to comply with its regulatory obligations. In a voluntary report, this question may be more difficult. The first question is whether the report is truly voluntary; Principle 11 of the FSA's Principles for Businesses and Principle 4 of the Principles for Approved Persons are broadly drafted and will often lead to the conclusion that there is an obligation on the firm/approved person to bring matters to the regulator's attention.

Reporting obligations

Advice should be taken on the scope of obligations and whether on the

Duties will depend on which regulatory regimes the firm is subject to, but consider:

For all listed companies:

<p>facts a duty to report has arisen.</p> <p>Usually the working presumption is: if in doubt, report.</p> <p>Timing: as soon as possible once the conclusion is reached that a reporting obligation has arisen. An initial report can always be supplemented later.</p>	<ul style="list-style-type: none"> • To the market – there may be a need to involve the firm’s brokers. • To an overseas regulator. <p><u>For all companies and firms:</u></p> <ul style="list-style-type: none"> • To SOCA – is a money laundering report necessary? Does the firm know or suspect, or have reasonable grounds to know or suspect, that another person is engaged in money laundering? Advice should be taken as to whether or not the duty applies on the facts as known or suspected. • Any other professional regulatory authority (eg auditors, solicitors). <p><u>For FSA Regulated firms:</u></p> <ul style="list-style-type: none"> • FSA Principles for Businesses 11 – “A firm must deal with its regulators in an open and cooperative way and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice.” • FSA Principles for Approved Persons 4 – “An Approved Person must deal with the FSA and with other regulators in an open and cooperative way and must disclose appropriately any information of which the FSA would reasonably expect notice.” • SUP 15.3.1 requires a firm to report to the FSA, among other things, any matter which could have a significant adverse impact on the firm’s reputation. • SUP 15.3.11 require a firm to report to the FSA a breach of any requirement imposed under FSMA or the Rules in addition to various other breaches. • SUP 15.3.17 requires a firm to report to the FSA as soon as it becomes aware of any significant fraud and/or fraudulent or other accounting irregularities. • Is it necessary to make a suspicious transaction report? SUP 15.10.2R requires a regulated firm to report any transaction it executes or arranges if the transaction is in a qualifying investment trading on a prescribed market which the firm has reasonable grounds to suspect might constitute market abuse. Report must be made “without delay.” This is not a substitute for a POCA report. Advice should be sought if there is doubt about the applicability of this Rule or whether on the facts the transaction is “suspicious” – which is not defined in the Rules.
<p>The police</p>	<p>There is no general obligation to notify the police even where criminal conduct is suspected/established. Even if the conclusion is reached that reporting to the police would be appropriate and advisable, there will still be a</p>

	<p>question of timing.</p> <p>Factors in favour of notifying the police:</p> <ul style="list-style-type: none"> • It may be a requirement of a relevant policy of insurance that the police are notified. • The firm may well conclude that it is the “right thing to do.” • There is the impact on other employees to consider if the underlying facts show that a crime may have been committed – not involving the police may send the wrong message. <p>Factors which may point against notifying the police:</p> <ul style="list-style-type: none"> • There is inevitably some loss of control over the investigation. • There may be some administrative difficulties in relation to seizure/production of documents, although the police should allow the firm to keep copies. • If it is clear that the police are involved all employees – not just those who may be the subject of criminal charges – are likely to be less open and co-operative in the firm’s own investigation. • The fact that the police are involved does not prevent the firm from continuing its own investigation, questioning the employee and so on. However, if the employee seeks advice he may well be told not to co-operate with the firm’s investigation since it could prejudice the outcome of the criminal process. • Dealing with the police can take a substantial amount of time. • A criminal prosecution can result in some very unwelcome publicity. <p>If the police are informed and the relevant employees cease to cooperate with an internal investigation, the firm would have to consider the consequences of its investigation proceeding without the involvement of one or more employees, including whether it could terminate those employees’ employment on the basis of what it has already established. As to that, note that the fact that an employee has been arrested for or charged with a criminal offence does not necessarily justify terminating their employment (although the employment contract may specify that this could lead to summary dismissal). Generally, the employer has come to its own view about the facts and whether the employee’s conduct is such that termination is the right response and if so on what terms.</p>
<p>Notifications in the firm’s interests</p>	<p>What is appropriate clearly depends on the facts, but consider:</p> <ul style="list-style-type: none"> • Insurers – including D&O insurers and employee fidelity insurers. NB check whether investigation costs are covered, either for the firm or for individuals.

	<ul style="list-style-type: none"> • Affected clients • Affected counterparties • Creditors • Auditors • Banks as lenders – could the facts ascertained constitute an event of default? • Banks – does the firm need to cancel one or more bank mandates? • The public – very rarely it may be appropriate to indicate to the public that a matter is being investigated – where the underlying cause for concern is already public knowledge. <p>The timing of a report will vary depending on who is being told; but insurers should always be told without delay or cover may be jeopardised.</p>
Public relations advice	<p>If the matter is, or is likely to become, a matter of public knowledge, consider instructing a public relations firm and agreeing a media strategy with them.</p>

5 Internal investigations – legal professional privilege

<p>Documents which are covered by legal professional privilege remain confidential to the firm and will not have to be produced to a regulator or in litigation. The maintenance of legal professional privilege is of critical importance. English law in this area has changed, and is changing. It is impossible to be definitive about what line would be taken were a claim to privilege to be challenged – either in Court or by a regulator.</p>	
<p>Legal advice privilege</p>	<p>Documents which are created for the purpose of giving or getting legal advice (which includes advice as to what should prudently be done in the particular legal context) are privileged if this was their dominant purpose and the document is a confidential communication between the lawyer and the client.</p> <p>Points to note:</p> <ul style="list-style-type: none"> • “Client” is narrowly defined. Within a corporate or firm, “client” means that group of people who are responsible for obtaining the advice in question. This group should be as small as practicable. Thought should be given to its composition, and the conclusion documented. • To remain privileged, the communications must be, and remain, confidential. • Internal reports are not generally privileged if they are the result of a fact finding exercise with no adversarial proceedings in contemplation. This is true even if the report is prepared by or for lawyers. <p>Lawyer/client communications are privileged even if they do not contain advice on matters of construction or law provided that they are directly relevant to the performance of the lawyer’s duty to the client.</p>
<p>Litigation privilege</p>	<p>Documents created for the purposes of preparing for, or conducting, adversarial proceedings are privileged if this was their dominant purpose and the document is a confidential communication between the lawyer and client, or either and a third party, provided that adversarial proceedings were in the reasonable contemplation of the party.</p> <p>Points to note:</p> <ul style="list-style-type: none"> • Although it has never been fully tested, the better view is that litigation privilege applies to communications in the course of, or in contemplation of, regulatory enforcement proceedings (ie not just court proceedings). • The better view is also that litigation privilege does not apply to work done in the course of statutory

	<p>investigations. That said, the point has never been fully tested (it was conceded in <i>Three Rivers</i>).</p> <ul style="list-style-type: none"> • It may be that evidence of a particular claim by a particular counterparty is required in order for privilege to be claimed.
<p>Statutory vs common law test</p> <p>Under section 413 FSMA, "protected items" do not have to be produced to the FSA. The test of whether an item is protected is similar to, but not identical with, the test of whether it is privileged at common law.</p>	<p>Differences:</p> <ul style="list-style-type: none"> • The statutory test omits the "dominant purpose" test. What is important is that the communication was made in connection with giving legal advice or in connection with legal proceedings. • The statutory test has no confidentiality requirement. • The statutory test only applies to communications between lawyer and client and not, for example, the lawyer's own papers (although the practical impact of this is reduced if production is required of the firm and the papers in question are not ones over which the firm has control). • The statutory test does not extend to common interest privilege, public interest immunity, without prejudice communications or the privilege against self incrimination. <p>The practical consequence of the difference in the two tests is often not great.</p> <p>It is certainly arguable that where a communication would not be protected under the statutory test but would be privileged at common law, it is not subject to production because a claim to privilege at common law can still be maintained (ie the statutory test does not replace it). This point seems not to have been tested in any reported decision.</p>
<p>Practical points</p>	<p>Tips for the maintenance of privilege. NB once it is lost, it is lost for good.</p> <ul style="list-style-type: none"> • Documents should be marked "confidential and privileged" where a claim to privilege is made in relation to them. This is not determinative but is helpful, not least as a reminder to recipients to keep the information confidential. • A note should be sent round to all relevant staff at the start of an investigation, reminding them not to create any additional documentation – notes/emails etc – which comments on the matters under investigation and which the firm might then have to produce. • Even if a matter looks as if it will raise only regulatory issues, the risk of associated civil litigation should never be ruled out. Documents which are not privileged might, therefore, have to be disclosed in more than

one context.

- If the matter has any international connection, advice should be taken on how privilege rules operate in the relevant jurisdictions.

Privileged material may be relevant to an internal investigation. But it should be carefully segregated from non privileged material and a procedure for its review determined which will preserve privilege. Care also needs to be taken not to waive privilege in such material by, for example, referring to it in a final (and non privileged) report.

6 Legal professional privilege – potentially difficult issues

<p>If enforcement proceedings have commenced or are in the reasonable contemplation of the firm, communications with third parties should attract litigation privilege and the situation is easier. The most difficult questions usually arise if the work being undertaken is purely investigatory since the only safe assumption is that the only form of privilege available is legal advice privilege.</p> <p>It is, of course, a separate question whether the documents referred to below would be relevant to later proceedings and hence subject to production – it should never be an automatic conclusion that the documents below would be disclosable. That said, it is clearly sensible to limit the potential for damaging and disclosable documents to be created.</p>	
Advice from foreign lawyers	If advice is sought from foreign lawyers for use in relation to English proceedings, privilege should be claimable by reference to the same principles which would apply were the lawyers English.
<p>Discussions with current employees</p> <p>Discussions with former employees</p> <p>NB Both are effectively treated as third parties for the purposes of determining privilege.</p>	<p>If litigation is contemplated, all discussions should be privileged.</p> <p>If no litigation is contemplated, and the discussions are part of a fact finding exercise, for example in the course of an investigation, then what the employee says in answer to questions is not generally privileged.</p> <ul style="list-style-type: none"> • It may well be that if lawyers have conducted, or participated in the interview, a claim to privilege could be made for the questions asked of the interviewee on the basis that they give an indication of the issues which the firm has identified as relevant. • It should be stressed to the employee concerned that all discussions remain entirely confidential and covered by legal professional privilege. There is usually no reason to go into detail with an interviewee about which parts of the interview are covered and which not. • A verbatim note of the interview should be avoided. • A lawyer’s notes of the interview which reflect his identification of relevant issues should be privileged. This should be the basis for the draft statement/summary of the interview, which again should be privileged. • Drafts should be collected back from the interviewee once he has considered them. • The finalised and signed note of the interview will generally not be privileged.
Reports to the FSA or other regulators	Are not generally privileged, not least because generally the report will be of facts. If it is considered necessary or appropriate to provide the FSA with details of the firm’s legal advice – and NB the FSA has no right to its production – this should be done under an agreement recording a limited waiver of privilege and the terms on which the advice

	<p>is given.</p> <p>Care needs to be taken in any report to consider whether what needs to be reported are facts or conclusions as to liability/breaches.</p> <p>Advice from lawyers as to what needs to be reported and how is clearly privileged.</p>
Discussions with the FSA or other regulators	Are not privileged and care needs to be taken about making notes of such meetings. Lawyers' notes which are not a verbatim record should be privileged under the legal advice limb.
Challenges to a claim to privilege	<p>Legal advice should be sought before declining to produce documents on the basis of privilege and/or producing documents if there is a doubt as to whether they are privileged.</p> <p>It may be possible to show a regulator, for example, just enough of a document to confirm that it is privileged.</p>

7 Internal Investigations – Documents: practical issues

<p>Identify relevant material</p>	<p>Document the decision making process as to what material is regarded as relevant. It may be important to be able to explain later what the firm's thinking was in that regard. Ensure that those who are involved in the work of identifying and collating documents are and will be seen to be independent and objective. Material should be identified:</p> <p>By person</p> <ul style="list-style-type: none"> • Author • Recipient • NB how will relevant matters have been reported upwards within the firm? How will this have been reflected in documents? <p>By date</p> <p>By subject matter</p>
<p>Categories of documents</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Hard copy material – documents, letters, spreadsheets, statements • Electronically held material – emails, documents held on databases and filed electronically • Documents covering a number of subjects eg minutes of meetings where the issue was one of many considered • Personnel records • Risk reports • Are the firm's systems and controls likely to be an issue? What documentation would be relevant to this? • Telephone records – numbers dialled/calls received • Tapes of telephone calls • Mobile telephone records – where these belong to the firm • Mobile telephones/blackberries where these belong to the firm. Check the staff handbook for the firm's rules on these as telephones/blackberries are likely also to contain personal material

	<ul style="list-style-type: none"> • Laptops • CCTV • Security system log – showing employees’ movements through the building – may be relevant • Internal audit reports • Internal reports the subject matter of which may be relevant to the issues being investigated • Diaries – where these belong to the firm – both electronic and hard copy • Information held by secretaries • Do requests need to be made for the production of documentation which belongs to the firm but is currently at an employee’s home?
Collation	<p>Consider the impact on staff of the document collation exercise:</p> <ul style="list-style-type: none"> • A heavy-handed approach will be bad for morale and may lead to unnecessary and inaccurate speculation. • Generally it will not be possible to ensure that all relevant material is collated without involving, eg relevant secretarial staff. <p>It is important to treat all relevant employees equally. Any sign of favour/discrimination could affect the way the results of the investigation are viewed.</p> <p>Does information need to be retrieved from hard disks or back-up files? Is IT advice needed to download data into a usable form? This needs to be done in such a way as to preserve the integrity of the material. It may be necessary later to describe what steps were taken in this regard and a record should be kept.</p>
Privilege	<p>Even though with an internal investigation there may be no question of production of privileged material to third parties, it is still useful to identify and isolate privileged material at an early stage. The reasons for this include:</p> <ul style="list-style-type: none"> • It provides the opportunity for the team undertaking the investigation to consider whether privileged material should be reviewed for the purposes of the investigation. This should ordinarily only be done if it is really necessary. • It minimises the risk that privileged material will be inadvertently referred to in the final report with consequent risks of losing privilege. • If there are requests later for production of documents, the exercise of identifying privileged material has

	<p>already been undertaken and there is less risk of inadvertent production.</p> <ul style="list-style-type: none"> • If a regulator wishes in the future to see the documents on which the report was based, it avoids discussion of whether privileged material should be produced if in fact none has been relied on.
Secure the material	<p>Is there a risk of destruction? If so, consider, the provisions of the staff handbook and what is known about the issues causing concern to determine if it is appropriate to:</p> <ul style="list-style-type: none"> • Change passwords/deny access to the computer system • Remove remote log-in privileges • Remove security passes • Take mobile telephones and blackberries where these belong to the firm • Lock individual offices <p>Ensure that standard document destruction policies are suspended in relation to all relevant material.</p> <p>Ensure that standard policies for the destruction of tapes of telephone calls are suspended in relation to all telephone calls made in the relevant period.</p> <p>If there is a policy in relation to the storage/deletion of information held electronically, ensure that it does not operate so as to delete/make it harder to retrieve documents which could be relevant.</p> <p>Take advice on whether files held electronically need to be backed up.</p> <p>All steps taken to secure material should be documented so that they can later be explained to regulators/the police should the need arise.</p>
Storage	<p>Documents collated should be held in a locked room/locked cabinets as appropriate – generally in legal/compliance.</p> <p>A log should be kept of any movement of material outside the secure area in which it is now being kept. Originals should not be removed.</p> <p>Is a data room needed?</p> <p>Is there a need for a database? Do documents need to be numbered so that they can be more easily identified?</p> <p>Generally documents should be kept as they were found and files not rearranged. Records should be kept of the location from which files were taken.</p>

Copies should be made of:

- Anything which needs to be provided to the regulator
- All key documents and material required for interviews.

A core bundle should be compiled and kept under review.

8 Document collation and production – potentially difficult issues

In general, difficult issues will be mitigated if care is taken at the outset to clarify what is being sought and why. This should help to avoid criticism that the firm has embarked on a fishing expedition. It will also help to clarify the firm's reasoning and justification for particular courses of action – eg searching desks.

It is important to bear in mind that the firm is entitled to consider only such information and documentation as belongs to it – it has no power to secure production of material belonging to third parties, including its own employees.

The firm will wish to consider the least intrusive methods of collating documents first – is the proposed course reasonable and proportionate? Except where there is a risk of the destruction or concealment of relevant material, an incremental approach may be the most appropriate.

In cases of doubt, steps should be taken to secure material whilst the issues are resolved – for example, locking offices and/or denying access to the computer system. Data Protection issues are often a concern and advice should be taken in cases of doubt. If the investigation is necessary for legal proceedings (including prospective legal proceedings), legal advice or to establish, exercise or defend legal rights, data protection should not be a major concern so long as the investigation is carried out in a reasonable and proportionate manner - i.e. any interference to any individual's privacy is justified in light of the seriousness of the matters being investigated, information generated by the investigation is kept secure and, to the extent possible, only used for the purpose of that investigation. The employees whose details are collected should also be notified, to the extent reasonably practical.

If the investigation is being carried out to comply with a UK legal or regulatory obligation. Again so long as the investigation is being carried out in a reasonable and proportionate manner, data protection should not cause any major difficulties.

If the investigation is for some other purpose, the position is more difficult and the proportionality of the search would need to be considered carefully. To the extent the investigation also involves the processing of sensitive personal data, that would also have to be considered carefully. Relatively few investigations are likely to fall into this category.

Data protection rules also impose restrictions on the transfer of personal data outside of the EEA. Many international organisations will have data protection agreements in place (known as model clauses or IGAs) which will generally permit the free flow of personal data within that organisation.

Can employees' desks be searched?

Check the staff handbook for any specific provisions – it may provide consent.

However, where there are reasonable grounds to suspect that a regulatory breach or crime has been committed, ordinarily the firm can search employees' desks.

Care still needs to be taken:

- Ordinarily, desks should be searched outside office hours. The experience should not be made more

	<p>humiliating for the employee than it has to be – it should be borne in mind that the employee is entitled to be treated as innocent – and still employed – until the contrary becomes clear.</p> <ul style="list-style-type: none"> • The employee should be told that his desk has been searched – though he need not be asked for his consent if the firm is satisfied that it is properly able to conduct the search. • Anything which is clearly an employee’s personal property – eg a handbag or briefcase – should be left. If necessary, these should be taken and secured on the basis that they have not been searched through but the employee can be asked later to produce anything belonging to the firm contained in them. • No-one should search a desk on their own. Someone – preferably not in the direct reporting line – should always be there to observe. • Careful notes should be taken of how the search was conducted and a list of what was found.
<p>Can the firm conduct a review of employees’ email accounts?</p>	<p>Check the staff handbook for any specific provisions. Usually there is a policy which provides for the firm to have access in which case the firm can review the email accounts relying on the consent of the employee.</p> <p>Intercepting communications on a public network (e.g. a review of hotmail account emails or messages on personal mobile telephones) is a serious criminal offence.</p> <p>Intercepting communication without proper corporate authority even on a private network is also a criminal offence.</p> <p>The Regulation of Investigatory Powers Act 2000 and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 define when it is permissible in a business context to intercept communications without consent. Businesses can monitor and intercept communications without consent if it is necessary to establish or ascertain a number of facts or issues relevant to the business. The firm should tell employees – generally – that interception might take place and be satisfied that monitoring or recording is relevant to the business.</p> <p>NB: the laws of other jurisdictions may be relevant, for example if emails are stored on a server in another country.</p>
<p>An employee claims that a document belongs to him and not to the firm</p>	<p>Check what the staff handbook provides. Often it will give the firm a right of inspection of documents which are created on/held on the firm’s IT systems irrespective of ownership.</p> <p>Documents created in the firm’s time or on the firm’s systems should be presumed to belong to the firm unless and until the contrary is established.</p> <p>It may be clear that a document really does belong to an individual (eg personal correspondence addressed to the</p>

	<p>employee at home but which happens to be in the office). In that case:</p> <ul style="list-style-type: none"> • If the only reason for requesting the document is its potential relevance to an internal investigation (ie there is no regulatory angle) the employee can be reminded of his duty to co-operate with the employer. It may be that the employee would consent to the firm reading the document and returning it. It may be that the employee would be prepared for the firm to take a copy of the relevant parts of the document. • Ultimately, the firm has no power or authority to “seize” documents which do not belong to it. • Thought should be given to the likelihood that the document would be disclosable in civil litigation. Again, the firm’s obligations in that regard only extend to documents in its possession power or control. It may not be helpful to bring additional material within the firm’s control.
A document contains both business related and personal information – eg a diary	<p>The first question is to whom the document belongs – see above.</p> <p>If the document belongs to the firm, it is entitled to its production. Even if the document belongs to an individual, it may be possible to agree with him that the firm should have a copy of the relevant business-related entries.</p>
An employee claims to resist the production of a document to the firm on the basis of the privilege against self incrimination	<p>The first question is to whom the document belongs – see above.</p> <p>If the document belongs to the firm then there is no question of its production being refused on the basis of the privilege against self incrimination – the document is the firm’s property and it is entitled to it.</p> <p>If the document belongs to the individual then the firm has no right to it in any event. Strictly, the privilege against self incrimination, where it arises at all, prevents individuals from having to make statements which might incriminate them – it is closely allied to the right to silence. However, an employer might well take the view that if an employee declines to provide his own documentation to the employer on the basis that it might incriminate him, this refusal is not a failure to cooperate with the employer’s investigation such as would amount to a disciplinary offence. Clearly the particular facts and circumstances will be all-important here. The principal task will be to work out, to the extent possible, why the employee is refusing to hand over relevant material.</p>
Relevant material is in the hands of a former employee	<p>If the material belongs to the firm, a request can be made for its return. If this is declined, although technically the employee may be in breach of his obligations, as a matter of practicality there is not much that can be done.</p> <p>Consider the potential loss of confidentiality in the investigation in the request being made at all.</p> <p>Consider whether there is any mileage for the firm in being able to show that a request was made and that it was declined.</p>

	<p>Consider the terms of any severance agreement with the individual – does it provide for the return of documentation? Has the firm got any continued leverage over the employee eg through retained pay?</p> <p>If the material in the hands of the former employee belongs to the employee himself there is practically speaking nothing which can be done and it may well be counter-productive to ask for it.</p>
<p>Relevant material is outside the jurisdiction</p>	<p>If there is an internal investigation and no associated regulatory interest – at least at this stage – consider:</p> <ul style="list-style-type: none"> • Whether the investigation can sensibly be carried out without the documentation being brought into the jurisdiction. • If it is thought to be material, can it be reviewed overseas? • Is there a chance of civil litigation and would bringing the documentation into the possession of the firm mean that documents would become disclosable when otherwise they would not have been? • If there is a chance of regulatory action, bringing the documentation into the possession of the firm may well render it subject to production – but consider whether if the firm has ready access/power over the documents anyway they would not be expected to fall within the regulator’s request in any event.
<p>It looks as if attempts have been made by an employee to destroy relevant documentation</p>	<p>Obviously stop any further destruction if it looks like there is a risk of it – the employee needs to be told to desist and any relevant documentation needs to be secured.</p> <p>Try to ascertain whether the destruction was deliberate – it may not have been.</p> <p>If it was deliberate, the destruction may well be a disciplinary offence and the staff handbook will provide guidance as to procedure and sanctions.</p> <p>A careful note should be made of what was discovered, and when, and what action the firm took. The firm needs to be able to demonstrate the it took appropriate action once it knew the facts.</p> <p>Ensure that all relevant employees are warned about the need to preserve documentation.</p>

9 Interviews: practical issues

Identify relevant employees	<p>All those directly involved in the underlying facts should generally be interviewed.</p> <p>Consider those in the reporting lines for the relevant employees.</p> <p>It may be that more senior staff should be interviewed even if a matter has not been reported to them. The question will be whether they would have expected to have been told.</p> <p>Could there be a systems and controls issue? If so, consider interviewing those with oversight of the relevant systems even if they were not personally involved in the particular underlying events.</p> <p>Have any relevant employees left the firm?</p> <p>The list of interviewees should be kept under review: generally it will grow as interviews progress and more is learned about the underlying facts.</p>
Order of interviews	<p>Often it is a good idea to start with the most junior person and work up to the most senior. This is not least so that those conducting the interview have the most complete picture possible by the time that the senior staff are interviewed.</p>
Who will undertake the interviews?	<p>It is important that they are seen to be objective and fair. This may well rule out:</p> <ul style="list-style-type: none"> • Anyone who was involved in the underlying events • Anyone who should – by virtue of their position or role – have been involved in the underlying events • Generally – anyone in the direct reporting line of the interviewees • Anyone who would be involved in the internal disciplinary process were it to be instituted. <p>Consider whether the interviewee is likely to feel intimidated or ill at ease with the particular interviewer. Some degree of nervousness is inevitable but – for example – a large disparity in seniority or status may mean that the interviewee is less open and confident than might be the case with another interviewer. This may impact on the quality of the information obtained or its usefulness.</p> <p>Aim for consistency – the interviews should if possible be conducted by one team. It is not ideal for interviewees to be questioned by different people – it makes comparison of the information obtained more difficult. It is particularly difficult to gauge credibility if the same team is not used for every interview.</p>

<p>Preparing for the interview</p>	<p>A core bundle of relevant documentation is needed.</p> <p>It is difficult to be prescriptive but it may be right to give interviewees a list of broad topics which the interview will focus on.</p> <p>Whilst it is not the intention to trip interviewees up, often giving them a list of questions in advance is neither necessary nor helpful. It may encourage discussion amongst interviewees. And any list of questions is certain to be changed in the course of an interview.</p> <p>Again it is difficult to be prescriptive about whether interviewees should have the core bundle in advance. Even if the decision is reached to provide some information, care needs to be taken about confidentiality. Usually it is not appropriate for interviewees to have documents which they would not already have seen.</p> <p>Interviewees should be told that the interview is not a once and for all opportunity to provide information and that if they remember more detail later the interviewers would be happy to receive it.</p>
<p>Conduct of the interview – what should the interviewee be told?</p>	<p>The interviewee should be told that:</p> <ul style="list-style-type: none"> • This is part of a fact finding exercise. • All relevant staff are being spoken to. • The exercise is confidential and the firm asks him to maintain that confidentiality in the interests of everyone involved. • Not to discuss his evidence or the questions he is asked with anyone else. This risks turning the evidence into the product of a collective memory. The interviewee will not be able to identify what he knew at the relevant time from what he has learned since and this is in neither his interests, nor the firm's. • It is not a memory test and that if he does not remember something or know the answer, he should say so. • If he remembers something later, or wants, on reflection, to change something which he said, he will have the opportunity to do so. It is his final recollection in which the firm is interested. <p>Generally the following points come up in answer to questions and the information may not need to be volunteered otherwise:</p> <ul style="list-style-type: none"> • Use of the information. If the firm concludes that what it has learned needs to be reported to the regulator, it has to do so. The interviewee should not be told that the information gained in the interview goes no further. • The interview itself is not part of the firm's disciplinary process but what the firm learns through the interviews

	<p>will inform its decision on whether disciplinary proceedings should be instituted. If they are, they will follow the firm's usual procedures in that regard.</p> <ul style="list-style-type: none"> • It is not the intention of those interviewing to tell other interviewees directly what their colleagues have said. However, clearly what is learned in one interview is used to inform the interviewers' approach to other interviews.
<p>What should the interviewees be asked?</p>	<p>An internal investigation is a fact-finding exercise. The aim of all the questioning should be just that – to establish the facts. This means:</p> <ul style="list-style-type: none"> • Showing the interviewee whatever documentation it is sensible for him or her to see to assist their recollection and allowing them time to consider it. • Avoiding lengthy or aggressive cross examination. This is not the time to try to conclusively determine people's credibility. • The interview is not a memory test, interviewees should be told that if they remember something later they should ask to speak to the interviewers again/correct the note of their evidence. • It may well be sensible for interviewees to be shown a chronology or time line to help them to anchor their recollections. This should be kept neutral and objective and should not give interviewees substantive information that they do not already possess. <p>The interviewers should avoid:</p> <ul style="list-style-type: none"> • Giving interviewees information that they do not already have. It is their own unaided recollection that is important. • Telling interviewees directly what others have said on the point. • Giving interviewees the impression that their evidence is not important or "wrong." They may be interviewed in due course by the regulator and it is in the firm's and the individual's best interests that they approach that with as much self confidence as possible. • Passing on any information in the interview or showing the interviewee any document which a Chinese Wall or information barrier or duty of confidentiality should prevent that interviewee from receiving. • Discussing "case theory" with the interviewees. Questions should be open and not leading. • Asking interviewees for their view on whether or not particular conduct was compliant or met certain

	<p>standards. This is a difficult line to draw and sometimes questions have to address this – for example why something was not reported internally. However, generally it is not part of an individual employee’s role to determine whether conduct was compliant. It will also affect the quality of the evidence if the interviewee thinks that he is being asked to sit in judgment on himself or others in relation to regulatory or other breaches.</p>
<p>Recording the interview</p>	<p>The interview needs to be recorded and this should be done accurately in the interests of both the firm and the interviewee.</p> <p>Check the staff handbook for any provision relevant to this (eg tape recording).</p> <p>Some favour tape recording, but there are factors against it, including:</p> <ul style="list-style-type: none"> • It adds an air of formality and finality which may be unhelpful. • It makes interviewees feel very ill at ease and may therefore impact on the quality of the information obtained. • What is important is people’s fair recollection of events. The interview should not be designed to trip people up. So their exact language the first time they are asked a question is not determinative. What is important is their considered memory of relevant facts. • The tape recording is clearly not a privileged document. • It will not be an agreed document so in using it later there can always be a debate about whether that was what the interviewee really meant (though there can of course be no debate as to whether it was what they said). <p>Often the best approach is to have a lawyer make handwritten notes. These are usually full but there should be a good claim to privilege in the lawyer’s notes if they represent – in some measure – the lawyer’s own thought processes – ie they are not verbatim. A draft statement can be prepared on behalf of the interviewee which can then be finalised with his or her input to the point where they are happy to sign it.</p> <p>There are advantages in having a statement which is in the form of a witness statement and signed by the interviewee even if no proceedings are in contemplation at that time. It means that if the cooperation of the interviewee is subsequently lost, the firm is in the best position to rely on the evidence in whatever context that is needed.</p> <p>Failure to sign a statement once it is accepted as accurately and completely recording the employee’s evidence is –</p>

	on its face – a failure to cooperate with the employer and as such may be a disciplinary offence. The reasons for this failure should be considered before a decision is reached about disciplinary measures.
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10 Interviews – potentially difficult issues

<p>The interviewee declines to be interviewed</p>	<p>Try to ascertain why.</p> <p>Remind the employee that he has a duty to provide reasonable cooperation to his employer whilst still employed. This would extend to answering questions about business which the employee has been involved in on the employer's behalf.</p> <p>Ultimately, it may be a disciplinary offence to decline outright to be interviewed, though the reasons for the refusal will have to be taken into account.</p>
<p>The interviewee wants legal representation</p>	<p>Clearly an employee cannot be prevented from seeking legal advice – at his own expense – and it would be wrong for the firm to try to discourage him from doing so. But the firm does have control over its own internal investigation process and can dictate whom it will permit to attend interviews.</p> <p>Individual representation should not be necessary at the stage of a first interview with the employer, but the facts already known may show that it is clear that there will be a divergence of interest between employer and employee. The firm may have a policy on this and the staff handbook needs to be checked.</p> <p>There may be a directors and officers insurance policy which may offer cover for this kind of representation – check from what stage it would cover costs (often it is not available for the internal investigation stage). This cover does not necessarily dictate a particular answer in terms of whether representation should be allowed but is a factor in the overall decision.</p> <p>Consider overall fairness: can one employee sensibly be offered independent representation and the others not? Often having separate legal representation at the interview stage will slow down and complicate matters.</p>
<p>The interviewee says he will only be interviewed if the firm pays for legal representation for him</p>	<p>There are two separate questions: should the employee be offered the opportunity to take legal advice; and if the answer to that is “yes” who should pay for it?</p> <p>Depending on the seniority and position of the particular employee, there may be indemnities from the company and/or insurance cover for legal costs. It is a separate question when these become available in the process – ie is it essential that there is a formal regulatory investigation or civil/criminal/regulatory/disciplinary proceedings?</p> <p>The firm can agree to pay the costs which an individual employee incurs in relation to an internal investigation. The factors relevant to that decision include:</p> <ul style="list-style-type: none"> • Whether it is likely that the individual will only consent to participate in the investigation if legal

	<p>representation is available to him and paid for by the firm (whether or not this attitude would constitute a breach of his duties under the employment contract).</p> <ul style="list-style-type: none"> • Whether the investigation can sensibly be conducted without that employee's input. • Fairness to all employees – if payment is made for legal representation for one, on what basis is the firm going to decline to offer it to all? • Whether it is in the <i>firm's</i> interests that the individual be represented at the investigation stage. • NB if the individual is a director, the firm cannot pay his legal expenses if the individual is in breach of his duties to the firm and should not pay the expenses – even on the basis that they will be recouped if the directors is exonerated if it believes that the director is in breach of his duties to the firm. <p>Even if the firm agrees to pay some legal expenses, the agreement to do so should be documented and:</p> <ul style="list-style-type: none"> • There should be no open-ended commitment to pay. • The firm may want a cap on the expenses. • It may wish to negotiate and document what the duty to cooperate with the investigation means. • Ordinarily, the firm will either recommend an independent lawyer who is known to be sensible, or offer the employee a list of three or four names to choose from. The firm has an interest in ensuring that the employee is represented by someone experienced and pragmatic.
<p>The interviewee refuses to be interviewed by the panel selected by the firm</p>	<p>Try to ascertain why. Are there legitimate reasons for objecting to one or more of the panel? (Eg direct reports etc).</p> <p>It may be that the composition of the panel can be revised.</p> <p>If the employee is uncomfortable being interviewed by anyone other than external interviewers (eg the external law firm) be careful that no assurance is given about what will happen to information gathered in the course of the interview – it will all be provided to the firm in due course.</p> <p>Ultimately, if this amounts to a refusal to be interviewed, this is likely to be a disciplinary offence.</p>
<p>A relevant employee has left the firm</p>	<p>Consider carefully whether to ask him for input – he has no duty to cooperate (unless a relevant agreement has been reached) and confidentiality may be a real problem.</p> <p>The question is whether a conclusion can sensibly be reached without their input.</p>

<p>Should a caution be given?</p>	<p>The only point of the PACE 1984 caution language is that it affects the admissibility of the evidence in criminal proceedings if a caution is not given to someone who is believed to have committed a crime. There is no need to caution where the investigation is purely internal. Evidence can be used for the firm's own purposes whether or not the PACE caution is given even where the underlying conduct would constitute a crime.</p> <p>The PACE caution is as follows: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."</p> <p>If a police investigation is already in progress, their views should be sought on whether interviews should be conducted under caution.</p> <p>It is impossible to be prescriptive, but often giving a caution is unhelpful.</p> <p>Reasons why it may be better not to give a PACE caution:</p> <ul style="list-style-type: none"> • It may come across as heavy-handed and the interviewee may react badly and be less cooperative as a result. • The interviewee may – not unreasonably – conclude that he needs legal advice before he can determine what he should do. • It gives an impression that the firm believes that a criminal prosecution may follow when this may very well not be the case. • It is not needed for an internal interview. • Often there will be other ways of securing the evidence in any event so that even if a criminal prosecution does eventually follow it is not bound to be adversely affected by the fact that the caution was not given.
<p>An interviewee declines to answer one or more questions</p>	<p>Ask the interviewee why they are declining to answer and record what they say. Review in the light of their answer whether the question was appropriate. Could the question be asked in a different way?</p> <p>Suggest leaving the question for a later date so that both the firm and the interviewee can think about their positions further. Give the interviewee a chance to reconsider and also to change his mind.</p> <p>Remind the interviewee about the duty to cooperate.</p> <p>Avoid getting drawn into a debate in the interview about whether failure to answer is a disciplinary offence – this confuses the two contexts. It will usually not be for those conducting the interview to determine whether or not a</p>

	<p>disciplinary offence has been committed and this point should be picked up in the appropriate way later. Ultimately, of course, an interviewee cannot be compelled to answer.</p>
<p>An interviewee seeks to rely on the privilege against self incrimination</p>	<p>As a general rule, claiming the privilege against self incrimination is unattractive and points to one very obvious conclusion.</p> <p>If the interviewee has no legal representation at the interview:</p> <ul style="list-style-type: none"> • It is usually counterproductive and may be oppressive to require an interviewee to answer a question if he believes that to do so would incriminate him – whether or not that belief is well-founded. • Suggest that the issue is left so that the interviewee can consider further and/or get legal advice and the firm can also consider further what it wants to do. This leaves the issue open. • If the interviewee does not yet have legal representation consider whether it is in everyone’s interests that it should be offered to him/he should be encouraged to get it for himself (see separate notes on individual representation).
<p>The interviewee wants an "amnesty" before giving evidence</p>	<p>There will usually be a firm policy on this.</p> <p>Many factors count against giving an amnesty. They include:</p> <ul style="list-style-type: none"> • Difficulties over scope. NB: <ul style="list-style-type: none"> • The amnesty can usually only cover the firm’s own disciplinary process. No assurances can be given that conduct will not be reported to the regulator where the firm would be obliged to do this under the Rules. • For FSA authorised firms, no assurances can be given that if the firm concludes that the individual is no longer fit and proper it will not dismiss him. • The firm cannot give an amnesty in relation to conduct it does not know about – so an amnesty could be considered in relation to the facts which have given rise to the particular investigation, but it would be unfortunate afterwards to discover that the employee had, in fact (also) been guilty of potentially much more serious and unrelated misconduct. • Consider whether the firm is in possession of sufficient knowledge to enable it to judge fairly whether an amnesty should be given. Can it be sure that it has a good appreciation of what the individual has done/is likely to have done?

	<ul style="list-style-type: none"> • Consider the effect on others if an amnesty is offered to one but not more individuals. Can there be a fair investigation and/or fair disciplinary proceedings following the investigation if an amnesty has been given to one but not all interviewees? • Consider how even a limited amnesty would be viewed by the regulator – usually negatively.
<p>The interviewee wants to keep a copy of the interview notes/transcript</p>	<p>This should be declined.</p> <p>The notes are the property of the firm and not the individual. They are also confidential to the firm and having additional copies in circulation risks compromising that confidentiality.</p> <p>Reassure the individual that he will have an opportunity to review the notes and to sign off the resulting summary/statement.</p> <p>If there are concerns about this, the review of the notes should be done on the firm's premises and without giving the interviewee a copy to take away.</p>
<p>The interviewee wants to keep his own notes of the interview</p>	<p>The interviewee himself will not be able to write and concentrate on what he is being asked at the same time and should be discouraged from trying to make his own notes.</p> <p>Re-assure the interviewee that what is important is their final evidence and that they will have a chance to review and correct the summary/statement which is drawn up as a result of the interview.</p> <p>If the interviewee is accompanied by someone who is not a lawyer their notes would not be privileged. The firm could permit someone to be present on condition that they do not take notes.</p> <p>If the interviewee is accompanied by a lawyer acting for him and not the firm, their notes should be privileged in the hands of the interviewee (and not for the benefit of the firm). Clearly, if legal representation is permitted it is not appropriate to try to dictate what form that takes and if the appointed lawyers wish to take notes, so be it.</p>

11 Employment issues

The key employment issues that arise normally relate to whether to suspend/discipline/terminate an/any employees.

Suspending an employee

Prior to deciding whether and whom to suspend, thought should be given to the reasons for suspension and the risks connected with the decision to suspend.

Consider whether the following reasons for suspending an employee exist:

- The employee's continued presence in the workplace potentially jeopardises the investigation?
- There is a justifiable suspicion that the employee might destroy or conceal relevant documentation?
- There is a justifiable concern that an employee is "no longer fit and proper" and he must be suspended pending determination.
- Would the employee agree to a suspension?
- It is predictable that the employee's employment will be terminated?

The risks associated with the decision to suspend an employee include:

- The employee may claim constructive dismissal (see below).
- A suspended employee may be far less willing to cooperate with any investigation and/or only be willing to do so with his own legal advice.
- A suspended employee can be hard to control as he or she is not at their place of work.
- Suspension of an employee can unsettle other employees and make it more difficult to secure their cooperation.

Constructive Dismissal

- An employee may bring a claim against his or her employer for constructive unfair dismissal if two elements are present:
 - A repudiatory breach by the employer – eg failing to suspend the employee in accordance with their contractual rights;
 - An election by the employee to accept the breach by resigning, within a reasonable time frame.
- If an employee can demonstrate that he or she was constructively unfairly dismissed the following issues

	<p>arise:</p> <ul style="list-style-type: none"> • The restrictive covenants and contractual confidentiality obligations will no longer be enforceable. • Bonus payments or incentive arrangements may be triggered. <ul style="list-style-type: none"> • The employee may bring a claim in an employment tribunal and potentially the County or High Court (if bonus/incentive issues exist). Such claims can be hard to manage from the PR perspective. <p>Prior to deciding whether to suspend, the employer must check:</p> <ul style="list-style-type: none"> • The employee’s employment contract; • Any ancillary agreements or documents; • Share incentive awards and plan rules; • Bonus provisions; • Whether the employer has a “custom and practice” in such situations; <p>If, after assessing the legal position, a decision is taken to suspend, the following should be noted:</p> <ul style="list-style-type: none"> • The employee’s contract remains in force and the employment relationship is still subject to all the statutory protection afforded to employees. • The suspension should be limited to as short a time as is reasonably practicable. • The employee should be kept updated if the suspension is likely to be extended. • Any investigation should be carried out to the extent possible without delay. • The firm needs to consider what performance related remuneration (bonus) may be impacted by the employee’s suspension and how it will deal with this. • Communication to other employees should be carefully considered. • Communication to or about the suspended employee should be carefully considered. <p>If the employee is an FSA Approved Person, the FSA will need to be told of the suspension.</p>
Disciplinary proceedings	<p>Disciplinary proceedings are separate from the fact finding investigation.</p> <p>A disciplinary procedure must be fair and any decision must be fair. The contractual procedure should be followed (unless the parties agree to a variation) and there are a number of “must do’s” – for example, the right to be accompanied, notification of maximum sanctions, right to appeal, which must be complied with to ensure that the</p>

	<p>overall procedure and decision are fair.</p> <p>Consideration of any “special” features should be given – for example, is the employee pregnant/suffering from an illness including a non physical illness/blown the whistle/working part time/a witness in another employee’s claim?</p>
Sanctions	<p>If a fair disciplinary process is followed and the employer reasonably decides that the employee is guilty of misconduct it will need to apply a sanction.</p> <p>The options are:</p> <ul style="list-style-type: none"> • Termination. • Demotion. • Remuneration decisions. • Warning. • Training/performance management. <p>Thought has to be given to which sanction is the most suitable, and to the risks involved in applying the particular sanction.</p> <p>Parity of treatment between employees is particularly relevant at this stage.</p>
Termination	<p>If it is concluded that termination is the most appropriate sanction:</p> <ul style="list-style-type: none"> • Is this termination with or without notice? • What is the “reason” for the termination? • Will a compromise agreement be negotiated and are there any special terms to be included? • Is the person an approved person? If so, the appropriate notifications need to be given.

12 Internal investigations – the report

<p>Consider what form the report which results from the investigation should take.</p>	<p>When should the report be written? Has all the necessary evidence been collated and considered? Does a point need to be made about any gaps in the evidence?</p> <p>Is there a case for discussing conclusions orally first so as not to create a record which is not privileged?</p> <p>Anything which is written and potentially subject to production should, so far as possible, only consist of facts and views which the entire team conducting the investigation agree with. This may need discussion before drafting starts.</p> <p>It may well be worthwhile asking lawyers – internal or external – to draft the report if this would render the drafts are privileged.</p> <p>Refer back to the terms of reference for the investigation – does the written report address these and achieve the intended aim of the investigation?</p>
<p>Preserving privilege</p>	<p>Consider having the factual element of the report – which may well not be privileged – separate from any legal advice or analysis.</p> <p>For any parts of the report which are privileged:</p> <ul style="list-style-type: none"> • Ensure that they are only circulated to those who are designated “the client” for the purposes of receiving legal advice. • Ensure that the report is marked “confidential and privileged” – although this will not change its character it serves as a reminder. • Consider having numbered copies of the report and keeping a record of who has which copy. • Consider asking for the return of copies once they have been read and for those copies to be held in legal. <p>The regulator may ask for copies of the report. There is no obligation to hand over privileged material but it may be in the firm’s interests to do so. If this is done:</p> <ul style="list-style-type: none"> • It should be on the basis of a limited waiver of privilege and this should be agreed and documented. • Consider carefully what effect a limited waiver of privilege may have in other jurisdictions – particularly the US – where it may be concluded that privilege the advice has been completely lost.

13 Internal investigations – Lessons learned

<p>What lessons should the firm learn from the investigation and/or report?</p> <p>This will be of critical importance – particularly in a regulatory context – if the issues were to recur. The firm needs to be able to show that it has implemented such changes as are prompted by the findings of the internal investigation.</p>	<p>Even if these are not issues documented in the report or associated advice, consider whether advice should be taken on what lessons the firm should take away from the exercise:</p> <ul style="list-style-type: none">• In particular, can what happened be described as an isolated incident, or does it highlight a defect in systems and controls?• Does it highlight any deficiencies in, or confusion over, internal reporting lines?• Does it highlight any deficiency in, or confusion over, internal procedures?• Does it highlight the need for further training of particular staff or groups? <p>Advice should be sought where appropriate on what changes to practices are needed as a result of the investigation.</p> <p>How will those changes be communicated to affected staff?</p> <p>Organise review meetings at appropriate intervals to consider whether such recommendations as are indicated are being implemented.</p> <p>Care should be taken properly to document the thought given to lessons learned and the implementation of appropriate changes.</p>
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