HOWARD KENNEDY

Internal Investigations

A straightforward guide to interviews

Introduction

Interviews are often an essential part of an internal investigation and it is vital that they are conducted properly to obtain the best evidence, protect the interests of a company and its employees, preserve privilege and maintain the integrity of the investigation.

There are important issues at play when dealing with interviews including establishing who should conduct the interview, interview preparation and the process itself.

In this guide, we break down the interview process into component stages and provide tips and advice on how best to manage what can be a complicated process.

Contents

Kyle Phillips

Partner

44 (0)20 3755 5646

kyle.phillips@howardkennedy.com

Useful resources

Internal investigations: how to get it right

A straightforward guide to internal investigations

Recognising a Whistleblowing Statement

How we can help

Identifying interviewees

Companies and their representatives should consider the need to interview:

- Any employees identified as being involved in the underlying issues concerning the investigation
- Those within the reporting line employees identified (for example line managers)
- Those with regulatory responsibilities, for example those with senior manager responsibilities
- Where any breaches of internal policies and procedures are being investigated, any person with responsibility under those policies.

Things to consider

An employee may refuse to answer questions

This could be as part of a claim of privilege against self-incrimination, for example where potential regulatory or criminal proceedings are at play. This in itself would not provide a defence against dismissal but failure to answer questions could result in grounds for disciplinary action.

An employee may not want to co-operate

Whilst employees generally have a duty to co-operate, careful consideration will need to be taken where employees have left the company or are about to leave.

Continually reviewing the interview process

It may not always be clear from the outset who needs to be interviewed. As an investigation progresses, the need to interview others might become apparent and therefore it is important to keep this process under review.

Choosing the interview team

Fairness and credibility

It is critical that the fairness and credibility of an internal investigation is preserved at every stage.

An essential part of this is ensuring that those with conduct of the interviews have the right level of experience and seniority. They must also be seen to be fair and objective.

Any interviewer (or member of the investigation team) should not have had any involvement in issues subject to the investigation, either directly or indirectly.

It will often be appropriate to instruct external counsel to conduct the investigation, in which case they will typically lead on the interview process. However, sometimes this will not be the case.

Using internal interviewers

Where external lawyers have not been instructed, the interviewer may be someone from HR, compliance team or part of the in-house legal team.

While legal advice given to the company by in-house lawyers may be privileged in the United Kingdom, there are some limitations to this that will need to be considered.

Using external interviewers

The use of external lawyers is particularly important where the allegations concern criminal or regulatory misconduct.

The use of external lawyers can be beneficial because:

- They often bring specialist expertise and experience, which is particularly helpful when there is a risk of enforcement or regulatory exposure or civil/employment litigation.
- They convey objectivity and independence, which can be vital when evaluating the credibility of an investigation.
- It will strengthen a claim to legal privilege.

Things to consider

- Companies should try to be consistent with their investigation team, and where possible, have the same team responsible for conducting the interviews. This helps to ensure the reliability of the process and reduces the risk of misunderstanding or misinterpretation.
- Having a large interview team can be daunting for an interviewee, and therefore companies should consider how many individuals are in attendance. This will often be dependent on the complexity of the investigation, however, it is usual to have at least two interviewers present, allowing one to take notes and pick up on lines of enquiry that the other might miss.

Preparing for an interview

Checklist

Does the interviewee need independent legal advice?

At the very outset, consideration must be taken as to whether interviewees need their own independent legal advice.

It is usual for interviewees to at least be reminded of their rights in this respect. This helps to ensure that the investigation process is fair and impartial.

This is particularly important where there may be a conflict of interest between the company and an interviewee. For example, for a whistle-blower, or where there is a risk of criminal or regulatory investigation, or civil litigation.

Order of interview

The company will need to decide when and in what order the interviews will be conducted.

If there is a whistle-blower involved, then this will usually be the first interview.

It is also common for persons at the junior end or at the peripheral of the investigation to be interviewed first. This allows the interviewer to build as complete a picture of the facts as possible before interviewing more senior individuals or those who appear more deeply involved in the investigated issues.

Interview timeline

In terms of timing, a company may decide to undertake an initial scoping interview with some individuals at the very early stages of the investigation process and then conduct more detailed interviews at a more advanced stage of the investigation.

However, it may be prudent to wait until later in the investigation process to investigate some individuals, for example, once documents have been reviewed so that issues are properly understood and, if required, answers can be challenged.

Other issues will also determine the timing of the interviews, for example, if employees are due to leave the company.

Things to consider

It is important to strike a balance between allowing the interviewee reasonable time to properly prepare for the fact-finding exercise and ensuring that the interview is not tainted in any way, limiting the opportunity for employees to share information with one-another.

At the very least, it is often helpful to have a core set of documents available to refresh an interviewee's memory, which can either be given in advance of an interview, or during.

Companies will also need to consider issues around confidentiality, including privilege and data protection, when considering what documents can be shared with an interviewee.

Conducting an interview

Interview process

Before the interview commences, the interviewer should be satisfied that the interviewee understands why they are being interviewed and the premise for the interview, including the following:

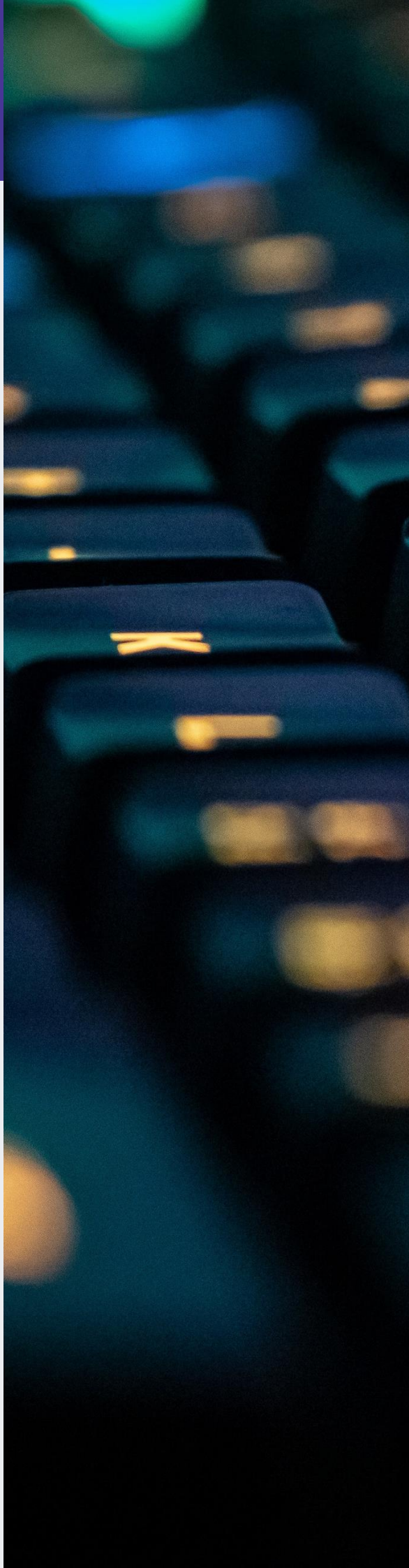
- The interview is fact finding.
- The investigation process (including the interview) is confidential, and they should be asked to maintain this confidentiality.
- They should not discuss their interview or the investigation (including recollections of relevant events) with anyone else due to the risk of tainting the evidence.
- If they cannot remember something they should say so (its not a memory test).
- If they remember something later, or want to correct something they have said, they should be afforded the opportunity to do so.

Upjohn warning

In the USA, an Upjohn warning is given at the start of an interview where lawyers are present.

This practice is often adopted in other jurisdictions including the United Kingdom. An Upjohn warning (also know as a Miranda warning) originates from US case law, and states that:

- The lawyers present represent the company and not the interviewee.
- Privilege over any communications between the lawyer and the interviewee (including the interview) belongs solely to, and is controlled by the company, and not
the interviewee.
- The company might choose to waive its privilege and what the interviewee has said to them to government agencies or other third parties.



Interview techniques

The interviewers should prepare a list of questions/key topics to be covered in the interview. However, these need not be too prescriptive or served on the interviewee in advance, as the questions will develop as the interview progresses.

Internal investigations are a fact-finding exercise, and therefore the interview should reflect this.

Here are some tips on interview techniques:

Approach the interview with an open mind, treating the interviewee with respect.

Give chronologies / timelines, including dates and locations of key events that will help with an interviewee's recollection. However, do not give so much detail that you risk influencing their evidence.

Ask open and simple questions, allowing the interviewee to give their evidence. Avoid lengthy or leading questions, or aggressive cross-examination.

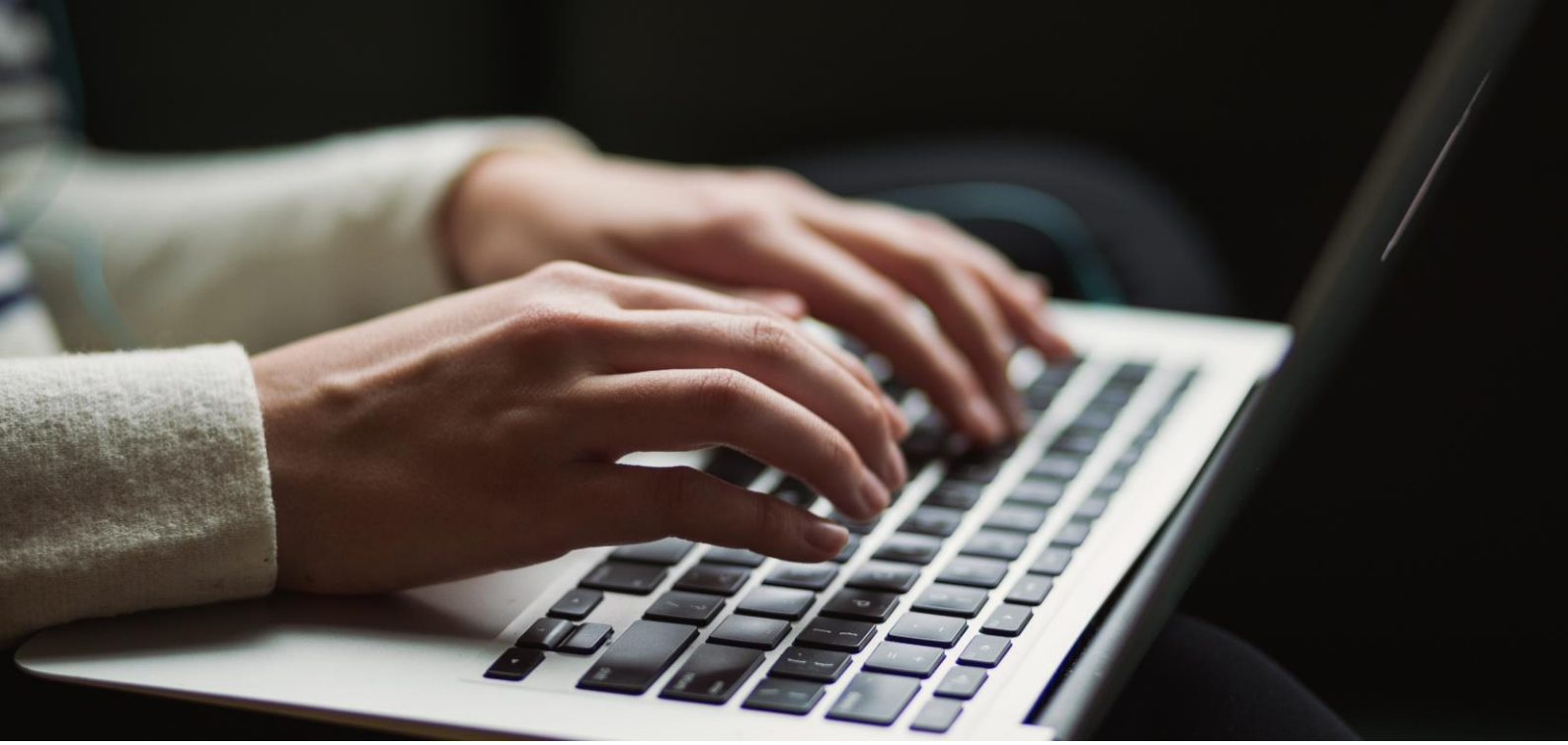
Avoid talking over the interviewee or interrupting them when they are giving their answers.

Start simple and progress to more complex questions as the interview progresses.

Provide documents to assist with refreshing the interviewee's memory, giving sufficient time for these to be properly considered. Care should be given to only provide material that they might have already seen.

Try to establish rapport. An interviewee who feels comfortable is more likely to talk freely.

Avoid informing interviewees of what others have said or showing them documents or information they have not previously had access to.



Recording the interview

There are a number of methods for keeping a record of an interview.

Whilst audio or video recordings are an effective way of taking an accurate record of what is said in interview, they can add an element of finality and formality to the proceedings, which can be unnerving for interviewees.

Another option to consider is to prepare a note of the interview, often allowing an interviewee the opportunity to review the note after the interview, prior to it being finalised, thereby creating an agreed note.

If a note of the interview is shared with an interviewee for their comment, consider ensuring that no further copies are made of the note and that all drafts are collected once the interviewee has considered them.

Things to consider

Enforcement agencies are likely to seek details of the accounts provided, including any record of interviews.

If litigation is contemplated, it is likely the interview will attract litigation privilege. However, whether litigation privilege can be asserted will be fact specific and is often a complex issue requiring careful consideration.

If litigation is not contemplated, there is a risk that these records may not attract privilege, even if they are prepared by lawyers.

Lawyers may adopt advice and comments into records of an interview, in which case legal advice privilege is more likely to apply. This is an important consideration for any company where there is a risk of enforcement action, either against the company or individuals.

Internal Investigations

Howard Kennedy's investigations team comprises specialists from across the firm including business crime and regulatory, employment, commercial litigation and company advisors who are skilled at conducting bespoke internal investigations on an organisation's behalf.

There are various factors that can sway an organisation's decision-making process throughout the investigation, including the regulatory environment, company resources and market sectors.

Contact us for further information or for bespoke advice.

Ian Ryan

Partner

+44 (0)20 3755 5691

ian.ryan@howardkennedy.com

Elizabeth Morley

Partner

+44 (0)20 3755 5620

elizabeth.morley@howardkennedy.com

Kyle Phillips

Partner

+44 (0)20 3755 5646

kyle.phillips@howardkennedy.com

Jane Amphlett

Partner

+44 (0)20 3755 5360

jane.amphlett@howardkennedy.com

David Hamilton

Partner

+44 (0)20 3755 5499

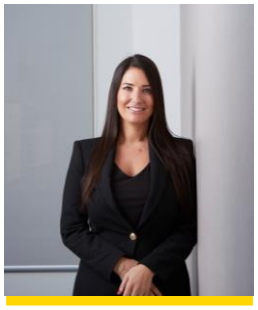
David.Hamilton@howardkennedy.com

Sam Murray-Hinde

Partner

+44 (0)20 3755 5619

sam.murray-hinde@howardkennedy.com



Chloe-Jane Belton

Legal Director

+44 (0)20 3755 5774

chloe-jane.belton@howardkennedy.com

Lydia Christie

Legal Director

+44 (0)20 3755 5402

lydia.christie@howardkennedy.com