

The globalization of the economy has had a marked effect on the legal issues faced by U.S. companies. These issues increasingly include an international component, and nowhere is that more commonly the case than in the area of product liability. Many products sold in the U.S. by U.S.-based companies are manufactured outside the U.S., and many more incorporate components that are made outside the U.S. As a result, when a U.S. company faces allegations that one of its products has a design defect or has been manufactured defectively, investigating the underlying facts necessarily entails an investigation into the company's operations outside the U.S. and, in some cases, the operations of its subsidiaries or suppliers in other countries.

Investigations into overseas operations present challenges different from those involved in domestic investigations. First, there are obvious cultural and linguistic barriers to completing

COORDINATING INVESTIGATIONS BETWEEN U.S. COMPANIES AND THEIR SUBSIDIARIES OR SUPPLIERS OVERSEAS

a thorough investigation. Second, because of the time and expense involved, investigations in other countries often are done on a compressed schedule, usually on a "one-shot" basis, with no opportunity for follow-up interviews. Finally, many people outside the U.S. view the American legal system with a particularly jaundiced eye. While they know little about U.S. litigation, they have heard enough to know they do not want to be involved. In some cases, this reluctance leads to recalcitrance.

All these factors compound the difficulty of conducting investigations into operations outside the U.S. This article describes ways in which these investigations can be facilitated and made as productive as possible.

PLAN AHEAD: OBTAIN CORPORATE AND DEPARTMENTAL ORGANIZATIONAL CHARTS

Before leaving to visit non-U.S. operations, those performing the investigation can take a number of steps that will make their later visit and interviews more productive. A critical first step is to obtain organizational charts for the operations involved. You will need to understand the reporting relationships between those operations and the U.S. company, which sometimes are complicated by tax and other considerations. On a more granular level, you will need to understand the roles, responsibilities, and reporting relationships of the relevant employees, especially the leadership and the departments that are directly involved in the situation under investigation. If possible, locate organizational charts with pictures of the employees or obtain company "face books" that you can use with the organizational charts. Learning to recognize important faces will help you during the investigation.





by John W. Edwards II and Gillian K. Garrett

PLAN AHEAD: REVIEW THE COMPANY'S RELEVANT PUBLIC STATEMENTS

It is important to review the U.S. company's public statements relevant to the investigation and to its overseas operations. One important focus of the investigation will be to assess the accuracy of these statements. The attorneys conducting the investigation also should establish a liaison with the company's public-relations department to ensure that its future statements are consistent with the results of the investigation and the overall strategy for handling the situation.

PLAN AHEAD: IDENTIFY KEY WITNESSES AND RECORDS CUSTODIANS; PRESERVE DOCUMENTS

The attorneys conducting the investigation will need to conduct initial interviews of more accessible personnel in the U.S. to prepare for the investigation of the overseas subsidiary

for the later interviews and investigations overseas. In many cases, it will be necessary to arrange for translation of some of the documents before the review can begin.

One note of caution: Before collecting documents and data, counsel should review both the company's internal policies and the laws of the relevant jurisdictions. Some countries have enacted privacy laws in which the boundaries between

INVESTIGATIONS INTO OVERSEAS OPERATIONS PRESENT CHALLENGES DIFFERENT FROM THOSE INVOLVED IN DOMESTIC INVESTIGATIONS.

or supplier. One focus of the initial interviews should be to identify key witnesses and records custodians outside the U.S. It is important to begin working with the company's IT specialists and records custodians as soon as possible to secure and copy the paper and electronic files of custodians and witnesses both within and outside the United States. If litigation has ensued or is likely to be filed, the company has a legal obligation to preserve relevant evidence.

In addition, as discussed herein, a thorough review of the relevant written evidence is necessary to prepare





“employer” and “employee” information differ from those in the U.S.

Once you have compiled the initial list of witnesses and evidence custodians, counsel should review that list with the company’s human-resources department. You should request advance notice of adverse employment actions against persons on the list. It can be disheartening (to say the least) to arrive in another country only to find that a key witness was discharged a week earlier. Advance notice also would allow you and the company to consider consulting agreements with key witnesses who may exit the company.

PLAN AHEAD: PREPARE FOR WITNESS INTERVIEWS

You should prepare for your witness interviews by learning as much as possible about the target overseas subsidiary or supplier and the witnesses you wish to interview. First, you should review the documents you collected from key evidence custodians within the company. As you review the documents, organize them by topic and witness. Mark the documents for easy sorting and retrieval during the interviews process.

Second, you should review any audit reports, testing reports, or other material the company has concerning the performance of the overseas subsidiary or supplier. Ask the company’s security department for any similar information it maintains that may be separate from the company’s other files. Obtain as much background information as you can, whether from the company, third-party auditors, stakeholders, or the media. Key documents are useful during interviews to refresh witnesses’ recollections, validate or contradict witnesses’ comments, and encourage recalcitrant witnesses.

Third, you should review any applicable contractual provisions with overseas suppliers related to liability, indemnification, access to premises or employees, rights to discovery, and employee privacy. You also should consider consulting local counsel about local laws related to discovery, employee privacy, and any other relevant issues.

Fourth, prepare witness interview outlines. The outlines should encompass issues raised by any pleadings, investigative reports, or other documents you have reviewed, as well as issues raised by other witnesses. Highlight important

documents you wish to discuss. Identify the witnesses with whom you wish to discuss each issue and in each important document.

PLAN AHEAD: SECURE NECESSARY VISAS

Once you have finished preparing for your interviews of non-U.S. witnesses, you should plan your trip abroad. Begin by obtaining the appropriate visas for all the countries you wish to visit. For example, if you seek to conduct interviews in Mainland China as well as in Hong Kong, you will need a “double-entry” Chinese visa. To build flexibility into your schedule, request more time in the host countries than you think you will need.

PLAN AHEAD: SCHEDULE WITNESS INTERVIEWS

You should schedule witness interviews before you go, to ensure maximum efficiency and witness availability. Consider whether you should request a tour of the plants or work areas in addition to witness interviews. Ask company executives in the U.S. to introduce you to the executives at the overseas subsidiary or supplier before contacting them to arrange interviews or workplace visits. If you wish to interview lower-level staff, consider asking these executives to inform their staff that you will be contacting them to arrange a meeting. Schedule interviews during working hours and try to accommodate witnesses’ schedules as much as possible. Find appropriate conference space for the interviews, preferably a private location. If possible, schedule two-person lawyer teams to perform the interviews, to make the best use of the witnesses’ time and to facilitate more complete note-taking at meetings. Plan to have extra time at the end of your scheduled interviews.

If you wish to interview witnesses formerly employed by the overseas subsidiary or supplier, consider whether a company executive should make preliminary initial contact. Then, contact the former employees directly. Schedule the interviews at the witnesses’ convenience and at the locations of their choice.

Consider whether a company representative should be present for any interviews. If necessary, arrange for translators and/or security to be present or available. Evaluate whether any witnesses should be advised to retain separate counsel or informed that they may bring separate counsel to the

interviews. Also consider whether other third parties, including forensic accountants or other experts, should be present for any of the interviews. If you invite third parties to an interview, evaluate the effect on attorney-client privilege and work-product issues and how best to resolve such issues.

In general, schedule witness interviews so that you interview lower-level employees before higher-level employees. Otherwise, you will have to interview higher-level executives more than once, to address details that arise during meetings with lower-level employees. If questions or discrepancies you wish to address with a witness arise after you have completed that witness's interview, however, schedule a second-round interview if possible within the time constraints.

DURING THE INTERVIEW

At the commencement of the interview, explain to the witness the purpose of the meeting and why the interview is important. Introduce yourself as counsel for the company and introduce all other meeting attendees to the witness. Explain to the witness that you do not represent him or her personally and that, as counsel for the company, you are required to report the results of your investigation to management (or, if applicable, to a committee of the board). Ensure that the witness is comfortable and tell him or her that you will be taking regular breaks.

Confirm the witness's background and try to establish rapport. Then, address the topics and documents identified on your outline. Check off the topics as you address them. In addition to the witness's personal knowledge about the topics, discuss rumors and hearsay. Do not be wedded to your outline. Ask both broad and narrow questions. Investigate "good" and "bad" facts. However, do not say anything you would not want repeated to a jury.

Observe the witness's body language carefully. Take comprehensive notes on his or her demeanor and comments. Before you finish, review your notes and outline to ensure that you have no further questions.

As you begin to wrap up the interview, explain that the witness should keep the matters discussed during the interview confidential. Tell the witness that you may need to speak with him or her again and obtain contact information. Ask

the witness if he or she expects the contact information to change within the next three to six months. Give the witness your contact information and encourage the witness to contact you if he or she later thinks of any additional relevant information. Of course, thank the witness for his or her time.

AFTER THE INTERVIEW: FOLLOW UP

During interviews, it is common for a witness to offer, or for an interviewer to request, further information or copies of additional documents. During interview blitzes, it can be easy to lose track of these follow-up action items. Make a list of them. Execute your action items and follow up with witnesses to ensure that they do the same.

AFTER THE INTERVIEW: PREPARE WITNESS INTERVIEW MEMORANDA

You should prepare your interview memoranda as soon as possible after each witness interview, especially if you are performing a series of interviews. Your memoranda should contain your thoughts and impressions about the witness's demeanor and comments and should so state explicitly. You also should mark the memoranda as attorney work product, protected by the attorney-client privilege. When your memoranda are complete, distribute them to your legal team and maintain them in a paper file. You likely will need them again. ■

John W. Edwards II

Silicon Valley
+1.650.739.3912
jwedwards@jonesday.com

Gillian K. Garrett

Silicon Valley
+1.650.739.3973
gkgarrett@jonesday.com