

Corporate America, Confronting Racism and Sexual Misconduct, Turns to Big Law to Investigate Its Culture

BY ANDREW GOUDSWARD, BRUCE LOVE

When Uber faced a crisis over the treatment of women in its workplaces, the ride-hailing giant turned to former Attorney General Eric Holder and Covington & Burling to conduct an investigation of its corporate culture.

After interviewing more than 200 current and former employees and reviewing policies and other documents, Covington's lawyers in 2017 issued 12 pages of recommendations, including bolstering training for senior managers and overhauling human resources practices. The review ultimately factored into the departure of Travis Kalanick as the company's CEO.

The experience was gratifying for Holder and his team, who felt their work benefited the company, but it wasn't expected to become a regular feature of their practice.

Then, Starbucks called, followed by the Seattle Children's Hospital system, Tyson Foods and the National Women's Soccer League. More than four years removed from the Uber review, workplace culture investigations, driven by societal reckonings over sexual misconduct and racism, have become an expanding part of the portfolio for top-flight white-collar lawyers at Covington and other major law firms.

"This whole practice area is a reflection of where the nation is as it tries to grapple with issues that for too long we have, if not willfully ignored, been reckless in not confronting," Holder said. "And so the fact that we are engaged in this kind of practice, I think it's actually a pretty good sign."

Lawyers involved with these reviews say they signal a growing recognition in corporate America in the



(Photo: Jason Doily/ALM)

Covington & Burling in San Francisco.

wake of the #MeToo movement and the murder of George Floyd, that workplaces seen as toxic to women and people of color and tolerant of discrimination and harassment face a fundamental threat to the health of their company. Corporate boards and senior executives increasingly seek outside counsel not just to defend them in litigation or ward off federal authorities but also to examine the overall experience of their employees and how their corporation or institution interacts with the wider community.

For the lawyers involved, many of whom are former prosecutors, these reviews present an opportunity to use the traditional white-collar skills of developing fact patterns and conducting sensitive witness interviews for a cause they believe carries benefits to society.

"We always do the same thing. We develop facts objectively, we evaluate risks thoughtfully, and we

recommend remedial measures or enhancements as warranted,” said Covington partner Aaron Lewis, a vice chair of the firm’s white-collar defense and investigations group. “It’s just that the surface of risk that we’re evaluating in this space is not just False Claims Act risk, not just (Foreign Corrupt Practices Act) risk, it’s really this set of emerging norms about whether or not your people feel like they can show up at work, be treated fairly and thrive and have an equal opportunity to rise.”

A Focus for Holder and Covington

Since the Uber investigation, Covington has also reviewed Starbucks after police were called on two Black men who were sitting in a shop in Philadelphia. The firm conducted an investigation of Seattle Children’s Hospital system after a respected doctor resigned over concerns about the treatment of employees and patients of color.

Reviews sometimes arise from moments of crisis such as when managers at Tyson Foods were alleged to have placed bets on how many employees would test positive for COVID-19 during a massive outbreak at an Iowa plant last year.

Others are more routine, including a request by Citibank for Covington to audit its efforts to address the racial wealth gap and expand access to credit in communities of color.

The reviews typically begin with a meeting between Covington lawyers and their client to define the scope of the investigation and determine a set of targeted questions the review will seek to answer. The team also determines early on how their findings will be presented, which can take the form of an oral presentation to a board of directors, a private list



Former U.S. Attorney General Eric Holder Jr., with Covington & Burling in Washington, D.C.

of recommendations or a public report.

The client ultimately decides whether and how much of their findings should be released, but Holder said public controversies often increase the impetus for a public accounting.

After deciding the parameters of the review, lawyers then conduct interviews, review internal policies and other documents, and often host anonymous focus groups with employees. Many of these investigations have taken place during the COVID-19 pandemic and been handled largely remotely. Holder said that has allowed teams to be more efficient by cutting down on travel and allowed witnesses to speak about sensitive issues from the comfort of their homes.

Holder is often tapped to lead the audits. Lewis, who served as counsel to Holder while he was

attorney general, is also one of the leaders of the emerging practice along with Amanda Kramer, a former prosecutor in the Southern District of New York.

‘Lawyers at Their Best’

Lawyers said it was crucial for them not just to understand the policies the company or institution has on its books, but also the intangibles of workplace culture: The atmosphere at company meetings, whether workers feel comfortable raising complaints, and managers demonstrate respect for their employees.

Independence is another crucial factor. Holder acknowledged that employees can be skeptical at the outset that a firm hired by the board or in-house counsel can execute an objective and unflinching review of sensitive and painful issues like institutional racism and misconduct.

But attorneys involved are blunt in their demands that the firm act independently and have free rein to interview whatever witnesses and review whatever documents they deem necessary.

“We’re going to be independent and we’re going to call it as we see it,” Holder said, recounting a conversation he had with one CEO. “We may piss a bunch of people off and this may be the last time that we’ll ever work for this company, but we’re not going to compromise on that sense of independence, that desire for fact acquisition.”

For Holder, who returned to Covington in 2015 after six years serving as the first Black attorney general, this practice has taken up well more than half of his work in recent months.

Holder, who over the course of his career has been an advocate for civil rights, criminal justice reform and ending partisan gerrymandering, considers this work “a continuation of the things I’ve tried to do in my government career and certainly as attorney general.”

“This isn’t what you’d expect necessarily from a big, established, unbelievably credentialed law firm. We’re doing things here that I think are societally beneficial,” Holder said. “And all of this work really is consistent with what I think lawyers at their best, law firms at their best, can do.”

Building Trust

These culture reviews require lawyers to engage in difficult conversations with employees and others who may be skeptical of the review or otherwise hesitant to speak about painful experiences in their workplace.

Kramer, who helped coordinate efforts to crack down on human

trafficking and child sex abuse in the Manhattan federal prosecutor’s office, said each interview begins with an introduction and an explanation to the witness about why she’s doing this work and conducting the interview.

Kramer said her work on these reviews has been revelatory, even for someone with extensive experience in dealing with trauma. She recounted one interview where a witness initially denied being sexually assaulted in the workplace but then went on to recount an experience that struck Kramer as a clear instance of sexual assault.

The episode exemplified for Kramer how culture audits too often “put the weight of defining the misconduct on the shoulders of the victims” and that an individual who has grown accustomed to a toxic environment where such behavior is excused or tolerated may not recognize the gravity of what happened to them.

She said lawyers working on these investigations have learned not to put the “burden of identifying the problematic behavior on the victims who have been told it’s not problematic.”

The growth of this type of work has also underscored another major topic in the legal community: the need for law firms and the white-collar bar in particular, to grow more diverse. The lack of diversity in Big Law has long been a nagging issue in the industry, one that grew more urgent following Floyd’s murder in June 2020 and the ensuing national conversation on racial inequity.

Lawyers said it was crucial that teams examining racial and gender issues themselves be diverse to build trust with potential witnesses and to give credibility that the



(Courtesy photo)

Amanda Kramer of Covington & Burling.

lawyers leading a review have a profound personal understanding of the issues at play.

“Being in a position where you are going to be arguably presenting yourself as a voice of authority on how a particular group of people is being treated by an institution—it is impossible to do that work and gain the trust of employees or other members of an institution if they’re not represented by the team that’s doing the work,” Kramer said.

For many white-collar lawyers involved in these reviews, the mere fact that this type of work is an increasing part of their responsibilities is evidence of progress—a growing recognition that racial bias and sexual misconduct may pose just as serious a risk to a company as a foreign bribery or fraud investigation.

“I’m a Black guy who grew up on the east side of Detroit. I’ve found my way here,” Lewis said. “It did not occur to me along the way that my experience would be taken as seriously as anti-corruption risk, as institutional fraud risk. But the boards that engage us and the law departments that reach out to us are unwilling to tolerate conduct that pushes people like me out of the mainstream experience of those businesses. That’s a remarkable evolution. And it happened really, really fast.”