Effective Internal Investigations of Compliance Matters
*Best Practices and Preservation of Privilege*

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Today’s Goals

- Initial phase of an investigation
  - Privilege
  - Scoping and risk assessment
  - Document and data preservation and collection
- Use of third parties in conducting investigations
  - Circumstances under which use of third parties is appropriate
  - Managing and working with third parties
- Minimizing bias risks
  - How implicit bias affects investigations
PART 1

The Initial Stages of an Investigation

Establish Privileges at Outset of Investigation

• Use of legal counsel
• In-house or outside counsel
• Risk of beginning investigation without counsel
• Can’t convert non-privileged information into privileged information
Privileges That May Apply To Investigation

- Attorney-Client Privilege: confidential communications to/from lawyer for purpose of obtaining legal services
- Work Product Privilege: confidential communications and materials made by or at direction of lawyer in anticipation of litigation
- Quality Assurance/Peer Review Privilege: varies according to state law

Objectives For Privileges During Investigations

- Establish privileges for information gathered during investigation
  - oral/written communications
  - written materials prepared
- Avoid waiver of privileges after they have been established
Yes, Privileges Can Be Lost!

• Privileges subject to challenge in court
• Incentive to challenge privilege claims

*Frankfort Regional Medical Center v. Shepherd*,
2016 WL 3376030 (Ky. Jun. 16, 2016) –
risk manager’s investigation, before contact with legal counsel, conducted for business purpose was not privileged

*United States v. Neuroscience, Inc.*,
2015 WL 7731475 (W.D. Wisc. Feb. 10, 2015) -
audit, without direction from legal counsel, was for business purpose, not privileged

Scope Considerations

• How specific/vague is the allegation or concern/red flag?
• Could additional individuals be involved?
  • Internal
  • Third parties (individuals or organizations)
• What other acts could the subject(s) have perpetrated?
  • Very common that if someone is engaged in wrongdoing, there are multiple schemes/acts
  • Perform role-based risk assessment
• How far back might the activity have been occurring?
• Are violations/losses potentially still occurring?
• How likely is it that other individuals may have witnessed the alleged wrongdoing?
What Triggered the Investigation?

- Allegation/tip
  - Anonymous v. known
  - Internal v. third party
  - Level of specificity
- Internal audit
- Other auditing/monitoring activity
- External process (government auditors, etc)
- How serious is the alleged or possible act?
  - Escalation issues?

Allegations

- Perform preliminary assessment to determine whether an investigation is warranted
- Consider whether it is necessary to perform without subject’s knowledge
- Data analytics
  - Consider this – If the allegation is true, what impact would the act have on electronic data? How would the digital trail of the act differ from that of a valid transaction or act?
  - Data analytics is often the most practical method of establishing credibility of an allegation
- Document analysis
  - Look for red flags, characteristics that support or refute the allegation
Identifying Records and Data Needed

- Develop process map of the transaction/activity cycle(s) involved in the target of the investigation
  - MUST understand how the transaction cycle operates in order to identify relevant records/people needed
- Based on this process map, identify:
  - People involved in each step
  - Internal controls
    - Preventive
    - Detective
  - Documents and forms
    - Received
    - Created
  - Electronic records
  - Systems and databases affected

Example – For corruption in the purchasing cycle:
- Identification and documentation of need
- Development of specifications, if necessary
- Solicitation of bids or negotiation with alternative vendors
- Selection of vendor
- Contract, statement(s) of work, etc
- Purchase orders
- Change orders, subcontracts, etc
- Receipt of goods or services
- Submission, review and approval of invoice
- Payment

- In addition, what other internal records would we expect along the way? E-mails, electronic approvals, etc.
Protecting Privileges During Investigation

- Including a lawyer in meetings or emails will not guarantee a privilege
- Lawyer must be utilized to obtain legal services for the company
- Caution when using compliance officer during investigation

Preserving/Collecting Electronic Evidence

- If internal investigation prompted by regulatory agency or whistleblower complaint, legal counsel should assist organization to issue a document hold notice
  - identify relevant records
  - identify relevant record custodians
- Negative implications of information being lost/ altered
- ESI (electronically stored information):
  - What ESI is relevant?
  - What format is it in?
  - Where is relevant ESI stored?
  - How do we ensure we collect all?
  - Proper collection (use forensically recognized technologies)
Key Elements of eDiscovery

- Identification
- Preservation
- Collection
- Processing
- Analysis
- Review
- Production
- Presentation

Use of Privileged Information

- Intentional disclosure of privileged information to outside entities usually results in waiver of privilege
- Need legal counsel to evaluate pros/cons of disclosure
- Special considerations with joint defense agreements
PART 2

Utilizing Third Parties in Conducting Investigations

When/Why Use Third Parties?

- Independence
  - For example, certain investigations of C-level execs, board members, etc or
  - Relationships, past history with subject
- Specialized expertise
  - eDiscovery
  - Data extraction and analytics
  - Case management
  - Interviewing
  - Subject matter expertise (e.g. accounting fraud)
- Capacity or geographic reach
  - We have talented people, but not enough time
  - Remote location, impractical for us to investigate
Third Parties & Privilege

- Use of third party consultants, retained by legal counsel, reinforces privileged status of investigation
  - Underscores that investigation not a routine business function
  - Facilitates legal counsel control of third parties’ work product
  - Controls distribution of third parties’ work product to protect privileged information

Privilege Issues with Third Parties

- Keeping legal counsel “in the loop” with third party consultants
- Risk of waiving privileges when third party consultants communicate exclusively with non-lawyers
- Third party consultants using subcontractors
PART 3

Issues of Bias

Bias

- The inclination or tendency to present or hold a partial perspective that is preconceived or unreasoned.
- Conscious or
- Unconscious

Can lead to unfair treatment of people and inaccurate interpretations of information in an investigation.
Unconscious (Implicit) Bias

• Unconscious (implicit) biases are those that we are not aware of at the time they are impacting us (we might become aware of them later)

• Science says we have more of these unconscious biases than we’d care to admit

• And numerous real-life cases provide further evidence of the existence and effects of implicit bias

• Unconscious bias is just one category of numerous unconscious behaviors we experience

Where Bias Impacts Investigations

- Biases we bring into an interview or meeting
- Biases of people we interview or meet with
- Biases of other personnel impacted by our work
How Bias Impacts Investigations

- Mistakes in planning or designing our procedures
- Improperly performing procedures
- Reaching incorrect conclusions
- Improper review of our own work by supervisors
- Failures in applying professional scepticism

Example Impact of Bias on an Investigation

- Biases regarding the guilt or innocence of someone alleged to have committed an offense
- Bias regarding acceptance of representations made by management or personnel
- Biases impacting our determination regarding scope of work
- Bias with respect to our initial hypothesis of what happened and how
- Biases in how we perform interviews and in how we interpret results of interviews
- Bias in how we interpret data
Categories of Bias

- Affinity bias
- Priming
- Confirmation bias
- Bounded awareness
- Anchoring
- Incrementalism
- Availability bias
- Groupthink

Affinity Bias

- There is a natural tendency to favor those people with whom we are most comfortable
- Often based on:
  - Age
  - Race
  - Religion
  - Education
  - Cultural background
  - Gender
  - Geographic location or origins
  - Common Interests or memberships
Priming

- An implicit memory effect in which exposure to one stimulus influences a response to another stimulus
- Differentiated from purely implicit forms of bias because implicit biases are formed entirely internally, while primed biases are the result of external influences

Confirmation Bias

- The natural tendency to seek out or interpret information in a manner that supports the existing hypothesis, belief, or expectation
- Satisficing is a related term that refers to selecting the first hypothesis that appears to be good enough, rather than exploring all alternatives to find the best one
Manifestations of Confirmation Bias

1. Only considering, or placing exclusive reliance on, evidence that supports an existing hypothesis
2. Interpreting evidence or information in a manner that supports an existing hypothesis
3. Only registering information during an interview that supports an existing hypothesis

The hypothesis could be the guilt or innocence of an individual in an investigation, the methods used to perpetrate a fraud, an assertion or explanation provided by management during an investigation, or assumptions used in preparing a valuation.

Bounded Awareness

- An unconscious bias in which someone fails to seek, see, use, or share relevant information or records
- Relationship between confirmation bias and bounded awareness - as more information is gathered and interpreted as support for one hypothesis (due to confirmation bias), the more inclined the individual is to stop searching for information that could contradict that hypothesis, or to ignore available, contradictory information
- In other words, the professional stops investigating or auditing
Anchoring

- Anchoring bias occurs when someone anchors—or fixates—on a preliminary estimate related to a case, and becomes convinced that the figure is correct. For example:
  - An auditor is presented with a set of financial statements from a client, and the auditor anchors on the figures in the statements.
  - An investigator anchors onto a preliminary estimate of an amount embezzled from a company, or an amount that a fraudster admits to stealing.
  - Anchoring is the thinking that if these preliminary figures are not correct, they can’t be off by a substantial amount, can they?

Incrementalism

- Focusing on a narrow range of alternatives representing marginal change without considering the need for dramatic change from the existing position. Closely related to anchoring.
  - The professional only allows himself to make incremental adjustments to the amount he anchored to, even if all the evidence gathered indicates that the preliminary amount is significantly incorrect.
Availability Bias

• The inclination to make decisions based on information that is most readily available.
• The more difficult information is to obtain, the less likely individuals are to bother with it.
• Another manifestation of availability bias, and one that is similar to bounded awareness, is the failure or inability to identify entirely new or different hypotheses.

Groupthink

• A phenomenon in which the desire for harmony or conformity in a group results in an irrational or dysfunctional decision-making outcome.
• There is a conscious and unconscious element to groupthink.
• Also known as consensus - members of a group attempt to minimize conflict and reach a decision without proper consideration of alternative hypotheses or views.
• Outside counsel may serve as counter-weight.
Becoming Unbiased

- It is virtually impossible to start out unbiased, let alone maintain an unbiased mindset throughout an engagement.
- Instead, professionals must take actions to become unbiased—to identify and counter the effects of their own biases:
  - Acknowledge that all individuals bring implicit biases with them every day and are susceptible to the effects of priming.
  - Take specific actions to eliminate (or at least minimize the effects of) their inherent biases, including priming.
    - Use of outside legal counsel as a component of monitoring bias.

Avoid Jumping to Conclusions

- This is the most obvious step, but one of the most difficult.
- Attempt not to focus on a single theory/conclusion – but how?
- Two methods for professionals to avoid becoming fixated on a single hypothesis are:
  1. Actively challenge the existing hypothesis.
  2. Develop alternative hypotheses.
Actively Challenging the Hypothesis

When actively challenging their own hypotheses, investigators should

1. Force themselves to:
   a. Identify other explanations for the suspicious behavior
   b. Consider different suspects
   c. Develop alternate hypotheses
2. Consider writing down these alternatives and challenges.
3. Use a devil's advocate
4. Consult someone not previously involved in the investigation (much like the quality-review process for an audit)
5. Take a fresh look—essentially start over with some of the very first pieces of information
6. Consider what the absence of information could mean (e.g., if this really is fraud or noncompliance, what trail or clues should be present that are not?)

Overcoming Bias in Interviews

- Both participants in an interview bring their unconscious biases into an interview, creating potential for a severely compromised interview
- Interviews are designed to provide a flow of information. Nothing can cut off that flow more than unconscious biases that make either or both individuals uncomfortable—even if that discomfort is not consciously obvious
Overcoming Bias in Interviews

• Focus on gathering facts or on the other goals of the interview, and on establishing rapport with the person being interviewed.
• All people want to be treated with respect, and most people genuinely want to help other people.
• Make a conscious effort to identify things about the interviewee that he can relate to.
• Be aware of cultural differences.
• Half the battle is the interviewer reminding himself of the necessity of overcoming these differences to establish an effective interview process.

Privileges During Interviews

• Who has the right to assert privileges for information provided during interview?
• Organization conducting the interview must control the privilege – not the employee being interviewed
• Need for “Upjohn” warnings
Additional Steps to Minimizing Bias

1. Consider all relevant records and information, not just ones that support an assertion or would most quickly close out a case. Always think “what else should I look at?”
2. In an investigation, consider all possible non-violation-related explanations for suspicious evidence and data anomalies. Write them down—this really does help.
3. Extend the scope of interviews beyond those who can corroborate facts that support the hypothesis. Include others who might have useful information that fits a different hypothesis.
4. Include all relevant findings in the report, including information that counters the hypothesis.

Additional Steps to Minimizing Bias

5. Use an independent quality-review process.
6. Beware of affinity and other implicit biases in conducting interviews (on the part of both parties) and actively attempt to counter it (e.g., the interviewer can force himself to spend sufficient time interviewing someone who has the potential for triggering a bias).
7. Avoid group interview of multiple employees (GroupThink)
8. Get sufficient sleep.
Slide 43

A3  Stairstep interaction
    Author, 2/16/2015

Slide 44

A4  Stairstep interaction
    Author, 2/10/2015
Get Comfortable with Being Uncomfortable

- Get accustomed to actively challenging our own theories, even though it initially may be uncomfortable.
- Cognitive dissonance—“excessive mental stress and discomfort experienced by an individual who holds two or more contradictory beliefs, ideas, or values at the same time.”
- It all sounds worse than it is! But addressing these natural tendencies are at the core of remaining open to alternate hypotheses.
- We all naturally gravitate toward conformity. However, challenging our assumptions, logic, and so on, and actively countering some of our unexplained tendencies in interviews, are the keys to professionals becoming unbiased.

Significant Change May Be Needed to Limit Legal Exposure

- If a government investigation or whistleblower complaint is in the background, an organization may need to demonstrate independent investigation and effective corrective action.
- Ineffective/biased investigation may compound legal exposure down the road.
- Criminal/civil liability may hinge on whether organization made reasonable effort to detect/correct non-compliance
  - knowing misconduct
  - willful disregard
QUESTIONS ??

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