DAVID & GOLIATH: COMPLIANCE INVESTIGATIONS IN THE ERA OF SOCIAL MEDIA

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AGENDA

- REGINA GURVICH
  - Initiating the Investigation & Building on Investigative Skills: Intake, planning, and developing an investigative plan and report

- CHRISTIE MOON
  - Emerging Forensic Resources & Effective Partnership and Coordination: Attorney Client Privileges, competing legal issues and regulatory requirements (e.g. employment law, privacy, and compliance), social media tips and tricks, forensic expertise.

- BRIAN CALLIHAN
  - Effective coordination and investigation, relevant policies, regulatory reporting, outreach to law enforcement, internal partners (such as HR, Internal Audit, Legal, and IT) and their tools, closing with putting it all together.
WHEN INVESTIGATION IS WARRANTED

- Typical reasons
- Consideration of validity, duplication
- Complaint vs. Rumor
- Mandatory investigations

INVESTIGATIVE TEAM

- Internal vs. external resources
- Team selection
  - Independence & objectivity
- Defining the team structure and size
- Defining responsibilities
- Diversity of the team
DEVELOPING A PLAN

- Scoping the issue
- To Privilege or Not to Privilege?
- Forecasting potential issues
- Developing a preliminary timeline
- Investigation tools
  - Checklists
  - Interview questionnaires (outlines or scripts?)
- The effect of the Yates Memorandum
- Documenting investigative steps and decisions

INVESTIGATIVE REPORT FORMATS

- Date/ Location/ Business/ Function/ Reporter
- Allegations
- Investigation Approach
- Chronology
- Analysis
  - Matrix Approach:
    - Allegations/ Issue
    - Source of Evidence
    - Evidence
    - Reliability of Evidence
    - Evidence vs. Allegation

- Steps taken to prevent retaliation
- Expert Opinions
- Documentation/ Attachments
- Control/Weaknesses & Recommended Corrective action

Source: ABA Corporate Investigation Sample Training Manual
http://apps.americanbar.org/labor/labor-severalpapers/3160626.pdf
INTERVIEWING TEAM & WITNESS INTERVIEWS

- Selecting and pairing interviewers
- Considering skill & experience
- Structure, tenacity, and documentation
- Discussion of order, timing, and preparation
- Conducting the interviews
- Collective Bargaining Agreement impact

INVESTIGATIVE RESEARCH

- Potential physical areas
- E-mail search
- Social media and public records searches (discussed later)
- Activating audit trail review
- Data-mining for billing and clinical anomalies
- Telephone records
- Camera/video information
- Expense reimbursements
- Building access (badge in and out) records
- Company policies
RETAINING EXPERTISE

- Internal experts
  - Independence
  - Objectivity
  - Reliability
- A few tips on finding an external expert
- Contracting under privilege
- Working with the expert
- Expert report and potential litigation

LEGAL PRIVILEGES IN INVESTIGATIONS

- Attorney Client Privilege
- Attorney Work Product Doctrine
- Waivers and Protecting Privileges
- Corporate Attorney-Client Privilege (Upjohn)
ATTORNEY CLIENT PRIVILEGE

The Basics:

- **Attorney-Client Privilege** requires:
  - Communication – oral or written
  - Made between privileged persons
  - In confidence (should label and keep confidential)
  - For the purpose of seeking, obtaining, or providing legal advice
    - **REMINDER:** Client must be seeking legal advice (not just telling a secret to an attorney.)
    - **Note:** There is a CRIME FRAUD exception. Using an attorney client relationship to perpetrate or shield a crime eliminates the ability to assert this privilege.

ATTORNEY WORK PRODUCT DOCTRINE

Not as strong as attorney-client privilege but broader in scope.

- Limited to preparations for litigation (or in anticipation of litigation)
- **3 Elements required:**
  1. Documents and tangible things (such as an investigative report),
  2. Prepared at the direction of counsel in anticipation of litigation or for trial, and
  3. By or for a party or that party’s representative.
PRIVILEGE WAIVERS

- Sometimes the government requests waiver
- Work Product Privilege may be waived if other party can demonstrate:
  i. Substantial Need and Undue Hardship
  ii. Audit Related communications may not be privileged (Halifax case)
- Party may want to waive part of a privilege (gov’t.) but doing so may waive for other parties as well.
- If you’re not sure- talk to your attorney!

CORPORATE ATTORNEY CLIENT PRIVILEGE

The attorney client privilege extends to corporations and organizations

- Elements:
  - The communications were made by employees to corporate counsel who were providing legal advice to the corporation;
  - The communications were made at the specific direction of corporate superiors;
  - The communications concerned matters within the scope of the employees’ corporate duties;
  - The communications were made by the employees who were made sufficiently aware that they were being questioned by attorneys for the purpose of allowing the corporation to receive legal advice;
  - And the communications were at all times treated as highly confidential when made and thereafter kept confidential by the company.

CONFIDENTIAL AND PRIVILEGED - INVESTIGATION FILES

- When an investigation is designated as privileged, investigative files should be labeled “Privileged and Confidential.”
- Internal access, including access to the portion of the file retained in your case management system, should be limited to authorized individuals.
- Additional access should be limited to authorized individuals solely on a need-to-know basis.
- Access to investigative files or materials by third parties should be approved by the attorney directing the investigation.
  - **Important Note:** If any investigative information is shared with a third party such as a regulator or law enforcement, an exact copy of what was shared, and all related communication should also be separately and carefully maintained in the investigative file.
- All legal advice and/or attorney client communications shall be labeled and maintained as privileged and confidential.
- **HOT TIP:** Don’t do careless things that waive a privilege. Be careful with “reply all” or posting on a “shared drive.”

SOCIAL MEDIA RISKS AND TIPS

**RISKS**
- You can find relevant and valuable information on social media, but you need to be careful.
  - Some laws and policies restrict using social media in the workplace.
  - Consult with Legal and HR as needed for your organization and relevant laws.
  - Consult with a forensic expert when the stakes are high.
  - Most social media browsing is anonymous to the person or company being searched. But LinkedIn may not be unless you are browsing anonymously. If you are investigating covertly be careful!
  - Do your homework before you start searching.

**TIPS**
- Free Search Resources:
  - Google, Google Images
  - E-Verify https://www.uscis.gov/e-verify
  - Pipl https://pipl.com
- Internet:
  - Clear Web (i.e. Google)
  - Deep Web (not indexed by common search engines, requires ToR (The Onion Router))
  - Dark Web (illegal products and services – STAY AWAY)
FORENSIC RESOURCES

Consider using a licensed private investigator or firm that specializes in this area
- Experienced with public records searches, surveillance and interviews
- Experienced as witnesses in legal matters
- Experts at evidence presentation in legal matters

Identifiers of interest for social media searches
- Name
- Email address
- Social media and online user account names
- Digital photos
- Telephone numbers
- Forums and blogs
- Business Information (if investigating a vendor)

Potential risks when doing it yourself
- Possible legal action if you are not careful and compliant
- Preservation and discovery obligations?
- Methodologies scrutinized?
- Documentation
- Qualifications/Certifications
- May depend on the scope/nature of your investigation

Digital Forensics vs. Calling Your Friend in IT
- Specialized training, tools and experience
- Data becomes evidence, may need special handling
- Print key evidence located on social media as it may soon be gone
- Data is volatile, easily changed (Spoliation)
- Chain of Custody
- Technical reports and testimony may be needed

ADDITIONAL TOOLS AND RESOURCES

USE ONLY with caution, proper planning, compliant laws and organizational permission:
- www.Bellingcat.com, “Home of Online Investigations” Certainly not all inclusive, but provides a good array of websites one can use (for free).
- www.osinttechniques.com OSINT: “Follow the Digital Bread Crumbs” These folks put together a really good webpage filled with social media resources, reverse image look ups, domain name, IP address, image metadata, public records, and numerous other useful links.
- Here is a SANS webcast with an overview of how to start an OSINT investigation: https://www.youtube.com/watch?v=RR-A6G3H8w
HYPOTHETICAL CASE STUDY

- “The Clinic” is part of a hospital system in an area with a high federal government employee population.
- On February 14, 2018, 17 year old Cheerleader makes her first solo OBGYN visit to Clinic. The Clinic has a 32 year old Patient Account Representative (and prolific Facebook user), Employee. Employee checks Cheerleader in for her medical appointment and accepts her debit card for her co-pay.
- Later that day Employee sends Cheerleader a Facebook friend request, and a message on FB Messenger, telling her he made the friend request because she popped up on his “People You May Know” list on Facebook.
- Cheerleader is “creeped-out” by Employee’s “creep add” on Facebook. So, Cheerleader informs her father, “AngryDad” (who is a Supervising Special Agent with the United States Secret Service) that this “older guy” from the Clinic was “lurking” her Facebook.
- AngryDad complains to Clinic’s head of Security, Hospital CEO, and Compliance Officer.
- You are assigned to conduct the investigation.

QUESTIONS AT HAND

- What steps do you take to plan and conduct the investigation?
- Who are your investigative partners and how do you effectively coordinate?
  - **TIP:** If you are hiring contract investigators make sure your state regulations are being followed:
    - California Example-B&P code 7532(b)
- What compliance/privacy issues are present?
- What are some of the relevant statutes and policies you will review and reference?
- Is this event reportable?
### HYPOTHETICAL ISSUES

Many issues to spot in our hypothetical. They include but may not be limited to:

- Conflict of interest
- HIPAA (using PHI to try to connect on social media)
  - This is not Treatment, Payment or Operations
- Employee misconduct
- Civil (possibly even criminal) liability
- Quality or other report to regulator

### POLICIES TO CONSIDER

- Conflict of interest policies
- HIPAA privacy
- Policies and laws on video and audio recording
- Standards for conduct
  - Use of Cell Phones in Patient care areas
  - Access to Social Media during work hours
- Statutory or regulatory policies or laws
- Regulatory reporting requirements (state or federal privacy reporting requirements, state licensing requirements)
EFFECTIVE INTERNAL COMMUNICATION AND COORDINATION

- Need to balance effective communication with maintaining confidentiality
- Investigation should never be conducted in a silo
- It's best to have positive partnerships with key stakeholders in advance
  - Information Security
  - Privacy Officer or Team
  - Never forget HR
  - Local (Physical) Security

**Hot Tip:** If you have multiple internal parties working on similar investigative issues, (HR, Compliance, Privacy, SIU) consider sitting down and drafting an investigations coordination agreement to ensure consistency and effective partnering.

OUTREACH TO LAW ENFORCEMENT

- Scenario illustrates need for advance planning (and potential that law enforcement could be investigating you.)
- To extent possible, liaisons and law enforcement contacts should be pre-existing
- Consider agencies outside of your typical compliance regulatory agencies
- Limits exist on information sharing
- Can never truly partner with law enforcement
LAW ENFORCEMENT RELATIONSHIPS

- Other internal stakeholders need investigative support or training as well
- Consider basic training for employees in effectively working with law enforcement
- Differing law enforcement issues exist here
- Various law enforcement agencies have very different objectives, goals and risks

PUBLIC RECORDS SEARCHES

- Property ownership records
- Social Media postings
- Business relationships
- Business licenses
- Corporate records and ownership
CONCLUDING THE INVESTIGATION

- Reaching a conclusion
- Communicating with appropriate leaders for decision-making
- Ascertaining external reporting obligations
- Finalizing investigation documentation and preparing final report
- Takeaways from the investigation

CORRECTIVE ACTION

- Establishing controls – soft/ hard (system alerts);
- Policy review/ development:
- Incorporating related quality indicators into ongoing clinical KPIs
- Staff Education (clinical & non-clinical)
- Discipline where appropriate
COMMUNICATING CLOSURE

“Never waste the opportunity offered by a good crisis.”

Machiavelli, Churchill, Thatcher, Rahm Emanuel…

- Taking a lead in ‘telling the story’
- Contextualizing the incident
- Communication plan
  - Leadership & Board
  - Line staff
  - “Teachable moments”

QUESTIONS?