

Tips For Conducting Interviews for Internal Investigations

Health Law Webinar

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Fredrikson

The logo for Fredrikson, featuring the name in a bold, black, sans-serif font. A red horizontal bar is positioned below the 'F', extending to the right and ending under the 'n'.



Who Do You Want To Do Internal Investigations?

- Compliance team.
- Internal legal counsel.
- Outside consultants.
- Outside legal counsel.
- Internal compliance and internal legal together.
- Internal compliance/external legal together.

How Should Compliance and Legal Interact?

- What is the mission of the compliance team?
- What is the mission of legal?
- What is the best analogy within the health care world for a comparable relationship?

Who Should Do Internal Investigations?

- Attorney/compliance officer/other?
 - Who will people be most honest with?
 - Do people talk more when comfortable or afraid?
 - Who will “ask the next question?” Who knows the substantive law?
 - There should be two people; at least one might be a witness. Can there be too many?
 - Cost.
 - Privilege.

Employee Certification

- An annual certification can pay huge dividends.
- Even absent that, a good exit interview is worth something.
- Not all “interviews” are formal events during a clear investigation.

Questions to Consider

- Do you need to investigate all of the allegations?
- How should you do it? Are you flying out to San Diego? (More about remote interviews later.)
- Do you care about privilege?

Attorney-Client Privilege

- Oral and written communications.
- Communications from the client as well as advice from the attorney and retained agents.
- Key issue: whether the communication was in furtherance of obtaining legal advice? The lawyer must be in charge.

Work Product Privilege

- Materials prepared or assembled at the direction of counsel.
- Must be in anticipation of potential litigation.
- Overcome if there is “substantial hardship.”
- Opinion/mental impressions receive higher protection.
- Note that you can have AC but NOT work product for consultant work if not anticipating litigation.

What About Peer Review?

- In many states this is a different protection.
- The government often puts you in a pickle: See Illinois Council. (Is the recent 340B case a crack in Illinois Council?)

What is Privileged?

- Facts are NOT protected, just analysis.
- Exceptions to privilege:
 - Presence of unauthorized third party.
 - Overbroad dissemination of privileged information.
 - Waiver.
 - Business versus legal advice.
 - Crime/fraud exception.

Protecting Privilege

- Make sure everyone knows legal is involved.
- Upjohn warning.
- Request for confidentiality
 - Co-workers.
 - Family.
 - Government?
- What if the employee brings counsel?

Must You Label?

- Not required, but it can simplify review.
- Accuracy matters.

Tiger Traps: Happy Hoppe

- You label a document as “work product.”
- That means you think there is a risk of litigation.
- Have you just created a duty of document preservation??

Hiring Consultants

- Attorney Client or Work Product?
- Discuss the consultant's role; is s/he an advocate or a cop?
- Get references. There are some horror stories.

Should I Record the Interview?

Should I Record the Interview?

- NO, NO, NO.
- Possible impact on the interviewee.
- May make the interview discoverable.
- Even a signed statement is at higher risk of discovery.

Writing a Great Summary

- Flashy or quotidian?
- Who gets copies of the summary?
- Can the words get in the way?

What Documents Should One Use?

- “Refreshing recollection” vs. “getting story straight.”
- One goal of interviews is education.
- Is it ok to show the witness privileged documents?
- Anything you show may be discoverable, so beware of using privileged documents.

Interview Tips

- Good defense attorney/bad defense attorney?



Ineffective tools of persuasion

Interview Tips





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Interview Tips

- Make people comfortable.
- Let them talk! Choose your questions thoughtfully. Enjoy the silence.
- Educate your witness.
- No need to be conventional.
- Do you tell people they are/aren't a target?
- Phone interviews can be great when documents aren't important.

Virtual Interviews: Pros and Cons

- Cost.
- Human relations vs. the joy of anonymity.
- The clock.
- The struggles with documents.

Logistics

- Where? (And wear?)
- How long?
- Who do you talk to first?
- Do you write out questions?
- Would you ever do a sting? Use hidden cameras? If so, do you tip your hand in the interview?

Possible Questions from EEs

- Do I have to talk?
- Can I bring an attorney?
- Is this confidential?

1984



“My next guest, on the monitor behind me, is an organized crime informant. To protect his identity, we’ve placed him in a darkened studio — so let’s go to him now.”

Possible Questions from EEs

- Do I have to talk?
- Can I bring an attorney?
- Is this confidential?
- From a former employee: Can you pay me for my time? (Note: when do you reach out to former employees?)

The Opening Spiel

- Pleasantries.
- Upjohn.
- Do you know why we are here? (If appropriate, include reassurance, but only if appropriate!)
- Do you watch TV cop shows?
- Can't tell you what others say.
- Document preservation/Fawn Hall.
- Their work/education history.

Something to Ponder



**"Now calm down there, ma'am. ... Your cat's gonna be fine
... just fine."**

Substantive Topics

- How do you ask about overcoding?
- Preparation for the kickback issue: gather info re: relationships.
- How do you word questions?



Other Considerations

- Defamation/Embarrassment.
- Damaging relationships.
- Creating whistleblowers.
 - What do you say to the device company? Who do you call there?
 - What do you say to other employees?
- Obstruction of Justice/harming credibility.

Wrapping Up

- Ask about compliance plan.
- “What would the most disgruntled person say about the organization?”
- In what ways is their concern correct?
- Is there something I should have asked?
- Repeat request for confidentiality.
- Provide contact info.
- Let them ask questions.

It's Educational, In Every Sense of the Word.

- Never think you really know what's up.





It's Educational, In Every Sense of the Word.

- Never think you really know what's up.
- Embrace ignorance.
- Use M&Ms.

Presenters



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