

Connecticut Community Providers Association  
Conducting an Internal Compliance Investigation  
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# Introduction

- The Realities:
  - ❖ In a highly regulated industry, providers must continuously monitor compliance with state and federal laws.
  - ❖ Enforcement activity by both the Federal and State agencies are on the rise.
  - ❖ More and more complaints from patients are being made that call a provider's conduct into question.
  - ❖ FY 2013, federal government reported expected recoveries of over \$5.8 billion consisting of nearly \$850 million in audit receivables and about \$5 billion in investigative receivables.
  - ❖ For every \$1 the government spends on fraud/compliance initiatives it receives \$8 dollars in return.



# Internal Investigations and Triggers

An internal investigation is a review of the provider's own programs and activities in relation to the law. It is not a routine audit, but rather a directed focus on a particular issue.

Triggers: It is important for providers to recognize the triggers. Some of the triggers are:

- Information gathered as a result of the provider's internal compliance program (e.g., hotline complaints);
- Government query (e.g., MAC, OIG, FBI, MFCU) - Usually, the first sign of an investigation is contact with a current or former employee or a letter requesting information; and
- Patient complaint or claim.

Whatever the trigger, a prompt response, especially if it is triggered by the government, is crucial in order to control and structure the investigation. It is essential to quickly ascertain the investigation target, subject or witness.



# Deciding When to Initiate an Investigation

- **Under the right circumstances, conducting an effective internal investigation can benefit providers in a number of ways:**
  - ❖ Revealing all of the relevant facts so that management can make informed decisions;
  - ❖ Stopping the conduct to prevent further violations;
  - ❖ Memorializing the provider's good-faith response to the facts as they become known;
  - ❖ Insulating management and/or the board against allegations of complicity and mitigating damages;
  - ❖ Promoting a culture of transparency and compliance throughout the organization; and
  - ❖ Identifying and addressing internal issues before they become public and ahead of government enforcement efforts.
- **Why Some Providers May Avoid Conducting an Internal Investigation:**
  - ❖ Inadequate legal/compliance staffing resources and cost;
  - ❖ Concern about what could be uncovered and fear of reputational damage; and
  - ❖ Potential for government disclosure, enforcement, and penalties.



# Deciding Whether to Initiate an Internal Investigation

Providers should consider the following questions when determining whether an internal investigation is indicated:

- ❖ **What is the nature of the allegation/matter?** Does the allegation involve a high risk area? Certain allegations require a higher priority and immediate response team.
- ❖ **Has the government already initiated an investigation or does it appear that one is probable?** If so, the case for undertaking an internal investigation is likely to be compelling.
- ❖ **Is the issue a specific one-time event or does it represent a systemic breakdown?**





# Assembling the Investigative Team

An investigative team with complementary skills should be assembled. Typically, the team involves counsel, consultants and internal content experts.

- **Discretion:** An investigation should be conducted with a minimum number of individuals privy to the details. Inappropriate disclosure could exacerbate the situation or compromise the integrity of investigative process.
- **Capability:** The investigative team should be composed of individuals with capabilities and experience in the subject matter(s) of the investigation.
- **Conflicts of Interest:** The investigative team must not include or should carefully consider whether to permit any individuals who have a conflict of interest with the investigation.



# Investigative Team - Including Counsel

## Involving Legal Counsel:

If the complaint indicates a pattern of conduct that could result in civil or criminal liability, involve counsel at the earliest possible stage.

- Generally, when working under the direction of counsel, communications and work product will be protected under the attorney-client privilege and work product doctrine. You cannot conceal testimony or documents that exist independently of the attorney-client relationship and the privilege does not apply in furtherance of a planned crime or fraud.
- Question whether in-house counsel should lead the investigation or if external counsel should be retained. Sometimes when outside counsel conducts investigation, it is viewed as more objective.
- Best to work with experienced health care reimbursement counsel to determine the law or standard.
- Counsel may need to engage consultants such as billing, coding, or forensic accountants. Consultant work product is more likely to be protected by attorney-client privilege if counsel engages the consultant.
- Engagement letter with consultant should state that consultant will be obligated to keep both the information learned and the work product confidential. If subpoenaed, consultant must not produce material unless the court orders it.
- Consultants should express conclusions in factual terms, not legal opinions.



## Defining Objectives and the Strategy of the Investigation

Once the team is assembled, the goals and strategy of the investigation need to be developed.

- It is important that the investigative team have a clearly defined reporting relationship and designated point of contact for outside counsel for gathering documents, identifying witnesses and understanding operational and internal process issues.
- Clearly define the legal issues. Is the scope broad enough to uncover evidence that might assist the provider in responding effectively to a government investigation?
- Develop a timeline and minimize operational disruption caused by the internal investigation.
- Get the facts so you can influence the way the government perceives the case by guiding investigators through documents and witnesses.
- Stabilize the situation by stopping questionable billing practices immediately, and only resume billing if confident that the questionable practice has been corrected.
- Determine the extent to which compliance procedures should be enhanced and/or the company's compliance policies should be clarified or expanded. Correct any error, take appropriate disciplinary action and refund any overpayment.
- Consider self-disclosing.





# Obstruction of Justice

## What You Need to Know

Two areas of concern for the government are the destruction of tangible evidence and perjury from witnesses.

- Early on in the investigation, ensure that no employee attempts to hide or destroy evidence of a potential crime.
- Take steps to preserve all tangible evidence. Take steps to instruct employees not to destroy documents that may be related to the investigation.
- If government sends a written request for documents, provider should notify, in writing, all employees who potentially have custody of documents that they have the obligation to preserve all electronic and hardcopy records being requested by the government. Consider issuing a “hold notice”. Documents include electronic data, such as files for word-processing, spreadsheet, and database programs. Don’t delete relevant emails or electronic records of transactions.



# Communicating Internally

If the government is likely to contact employees directly, communicate the following:

- The investigative team should operate in a manner that minimizes employee concerns, not feeds them. It may be appropriate to issue a written statement to all employees informing them of the government investigation and communicating the employees' rights and responsibilities.
- No employee is obligated to speak with the government.
- Employee may not provide the government with the provider's property.
- Employee may choose the time and place for the interview and may choose to have a lawyer present at the interview. It may be appropriate for the provider to advise the employee to seek their own counsel and pay for such expense.
- Instruct the employees to be truthful. There is no such thing as an "off-the-record" statement.
- Employees should be encouraged to report to the provider the date and time that the government contacted the employee, the names of the government agents, agencies worked for, and questions asked.
- Important to dispel false rumors that employees may hear.
- Keeping the Board apprised is important.



# Defining the Scope of the Investigation and Developing an Action Plan

**The Investigative Plan:** In developing the investigative plan, the investigative team must always consider the need for speed. At a minimum, the plan should identify:

- ❖ The documents to be gathered;
- ❖ The individuals responsible for gathering the documents;
- ❖ The witnesses to be interviewed; and
- ❖ The nature of the questions to be posed during the interviews, and where the witnesses will be interviewed. The plan should address the order of the interviews.

**Reevaluation:** The scope of the investigation should be regularly reevaluated as information is gathered and analyzed. While the initial red flags or indications of possible wrongdoing might have warranted an investigation of limited scope, the investigation might uncover information that warrants a substantial expansion of the scope of the investigation.



# Conducting the Investigation

## Document Review

### Collecting Documents:

- Documents are a key part of almost all internal investigations. Government law enforcement officials tend to place great weight on the documents if you are going to successfully rebut allegations.
- As documents (hard copy or electronic) are assembled, a critical concept is “chain of custody.” Chain of custody requires ensuring that the receipt of each document is memorialized and that a document is prepared and retained to show who originally provided the document, where it is stored, and who has had access to it.
- During the document assembly phase of an investigation, it is imperative to maintain data integrity and a clear chain of custody, because it is virtually impossible to determine what an investigation’s outcome might be and what documents could be significant.
- If the documents need to be retained by the investigative team, they should be kept in a secure location with limited and documented access. All documents that are generated in the investigation should be stamped “Confidential and Privileged Under Attorney Client and Work Product Privileges”.
- Electronic records should be obtained from their custodian and provided in a format and media that protects and ensures data integrity.



# Conducting the Investigation Document Review

- In a typical health care setting, required investigative documents will be in one of four general categories:
  - ❖ **Financial records**, which can include financial statements, invoices, cancelled checks, remittance advices, and cost reports.
  - ❖ **Contractual records**, which can include rental agreements, service agreements and subcontractor agreements, and records related to any grants received from government sources.
  - ❖ **Billing and medical records**, which include, but are not limited to, physicians' orders, intake documents, treatment notes, progress notes, and billing documents.
  - ❖ **Policies and Procedures**, which include internal policies and procedures that are related to the factual allegations.
- The relevant documents may be analyzed in a number of ways. They may be compared to other documents (e.g., comparing medical records with claims data), or they may be used during interviews. Whatever their use, all documents should be maintained with a proper chain of custody or sourcing. Prepare summaries of document reviews.





# Conducting the Investigation Interviews

Along with documents, interviews are the primary source of the information that will be gathered during the investigation. Interviews also present an important opportunity for the investigators to assess the credibility of the witness.

- **Complainant Interview:** If the investigation is the result of a complaint by a named (known) individual, interviewing that individual could be a significant start to the investigative process. That person should be interviewed as soon as possible to ensure that the freshest information is available and that the organization's intent to fully and objectively investigate their complaint is communicated.
- **Witness Interview:** There are likely to be individuals, both within and outside the entity, who could have information relevant to the issue under investigation, but who are not considered to be subjects (i.e., involved in a culpable way if the complaint is accurate). These can be key interviews, because the individual may provide information that could explain, mitigate, or confirm the facts surrounding the complaint.
- **Subject Interview:** There might be one or more individuals, identified at any stage of the investigation, who are considered to be subjects; that is, they are believed to be culpably involved in the issues of the investigation. This interview could resolve the investigative issues one way or the other. The subject might provide logical information that negates the complaint or might make admissions against their interest.



# Conducting the Investigation

## Employee Interviews

Employees have a right to refuse an interview with the government, but if they refuse an interview with the provider, it can result in disciplinary action, including termination.

- ❖ **Prepare for the interview** - Interviews, especially those considered significant, should never be conducted without careful planning. Preparation should include the complete review of documents to be discussed and the development of detailed questions (and potential follow-up questions).
- ❖ **Select the proper setting** - A private setting is preferred. One that does not allow passersby to enter or see into the room. Under some circumstances, it may be appropriate to conduct the interview off-site.
- ❖ **Select an appropriate time** - The interview should be scheduled based on its nature and the needs of the investigation. For example, if an interview is expected to be lengthy, it should not be scheduled so late in the day that it could be cut short if one of the participants needs to leave.
- ❖ **Have a witness present** - Most interviews should be conducted with an interviewer and a witness present. This is especially true for interviews with significant witnesses and potential subjects. Having two individuals conducting the interview allows one person to ask questions and the other to take notes (see below).
- ❖ **Take notes** - All interviews should be documented, and notes should be taken contemporaneously and retained. Witnesses should not be shown the notes.
- ❖ **Interview one person at a time** - To the extent possible, the investigative team should interview one person at a time. If two people are interviewed together, one's answer might sway or suggest answers for the other. It can also waive your attorney-client privilege.



# Conducting the Investigation Employee Interviews

**Procedural Guidelines:** The following procedural guidelines apply to all three types of interviews. When interviewing employees, they must be informed of the purpose of the investigation:

- The government is conducting an investigation.
- The nature of the problem being investigated.
- That counsel has been retained to advise the provider.
- That the interview is necessary for counsel to obtain information to provide appropriate advice.
- The attorney represents the provider and not the employee.
- The attorney will report what the employee says to management.
- The conversation is confidential within the provider, but it may be disclosed to a third-party by the provider, not the employee.
- The provider may disclose the employee's statements to the government and if they are false, it could result in an obstruction of justice claim.
- The employee should be told not to discuss it with anyone, especially other employees.
- The attorney-client privilege attaches to the interview and not the employee.



## Concluding the Investigation

- When all the documents have been reviewed, all individuals interviewed, and all leads followed to their logical end, the exposure will be discernible.
- The allegations may be substantiated, in whole or in part; or they may be refuted, in whole or in part. Regardless of the outcome, the final phase, concluding the investigation, is as crucial as those preceding it.
- A final report must be communicated in the appropriate way, either written or verbally, to the key stakeholders.



## Concluding the Investigation

- **Reporting:** The selection of a written or verbal report of the investigation and its results will vary by situation. Selecting the format for the final report is best done in consultation with counsel and is typically based upon the investigation's outcome. Whether presented in written form or orally, the report should:
  - ❖ **Explain** how and when the investigation was initiated. Chronicle the events leading to the investigation, including the allegation and source.
  - ❖ **Describe** the procedures performed and a chronology of the investigative process. Include a synopsis of the information obtained during the interviews and the review and analysis of documents/information obtained from other sources.
  - ❖ **Present** only factual findings. The use of subjective words should be avoided, as should conclusions that have not been established during the investigation.
  - ❖ **Include** potential remedial actions. These could include a self-disclosure to a payer; referral of information to a law enforcement or regulatory agency; or a referral to the human resource department for further action.





# Taking Corrective Action

- **Corrective Measures:** The provider must assess what corrective action, if any, should be taken in light of the information gathered during the internal investigation. Throughout the course of the investigation, the investigative team should be alert to whether there might be an ongoing, recurring or other prospective violation of law or of the provider's policies and procedures. If it appears that there might be an ongoing or recurring violation, then the provider should take measures necessary to prevent any further violations. These measures can consist of instituting new procedures, instituting new training sessions, disseminating compliance materials, or other remediation measures.
- **Discipline:** Furthermore, the provider should consider whether any employee should be disciplined. In many instances, the decision to sanction the employee is difficult. For example: the disciplining could lead to: (a) exposing the provider to a wrongful termination claim; (b) the triggering of a reporting obligation; or (c) the disciplined employee making retaliatory claims.
  - ❖ On the other hand, there are important reasons to impose sanctions on employees who violate provider policies. If the provider does not discipline employees who act improperly, the government may conclude that the provider does not take compliance seriously.
  - ❖ The sanction should reflect the seriousness of the offense, the extent to which the employee has been put on notice that the conduct at issue was contrary to provider policy, and the need to protect the provider from future violations.
- **Compensatory Actions:** Finally, a provider considering remedial action should consider taking additional remedial steps, such as making compensatory payments to entities that were overbilled.



## Repayment or Self-Disclosure

- If it is determined that individual(s) have engaged in wrongdoing that resulted in an overpayment, a decision needs to be made regarding how to refund the overpayment.
- Deadline for reporting and returning government payer-related overpayments by the later of:
  - ❖ Date which is 60 days after the date on which the overpayment is identified; or
  - ❖ Date any corresponding cost report is due.
- Failure to return overpayment within this time period results in a false claim which may result in penalties/treble damages.
- Options:
  - ❖ Reversing claims;
  - ❖ Disclosure and payment; and
  - ❖ Voluntary self-disclosure protocols.



## Closing Comments

- **Focus the investigation.** Analyze the allegations, develop a plan, gather relevant data, interview appropriate individuals, and periodically re-assess and realign procedures to keep the team focused on the issues at hand.
- **Engage in frequent communication with counsel.** Counsel can assist the investigative team in navigating the legal intricacies that it may face. If forensic accountants and consultants are retained, communicate frequently and openly to ensure that expectations are met and the investigation is done in a complete, thorough, and efficient manner.
- **Do not make assumptions or leap to conclusions.** Rely on information that has been analyzed and verified. This is true at every stage of the investigation.
- **Carefully document the investigative findings.** The investigative record will illustrate that the organization took proper action based upon the information available at the time. It will also show that the entity responded appropriately, if it is questioned by the government or is subject to litigation.
- **Make a timely decision to self-disclose or refer information to appropriate authorities if the findings warrant it.**
- **Remember that each allegation and its resulting investigation are unique.** Some may not require a lengthy, full-scale investigation; others may take considerable time and resources to resolve. Approaching each situation systematically can better enable health care compliance officers and their team to conduct investigations that are able to meet regulatory obligations and stand up to internal and external scrutiny.