



Best Practices in Internal Investigations

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- I. **PLANNING**
- II. **GATHERING & COLLECTING EVIDENCE**
- III. **ANALYSIS OF FACTS**
- IV. **REPORTING**

Always Consult Investigation Counsel and Department Policies



[T]he only way to deal with a whistleblower’s accusations – again every single time and often against your own instincts – is with a hyper-bias toward believing that the informant is onto something big. Such a bias must impel you to investigate every claim ferociously. You may think it’s a waste of time and money, and will go nowhere; you should be so lucky. And for goodness’ sake, don’t let the investigation be conducted by the boss who’s being accused of wrongdoing! Bring in an outside agency to do the sleuthing, or at the very least, executives outside the scope of the alleged problem, with no relationship to the people involved. Yes, you may hate the whole mishegas and so might everyone it touches. But it’s the only way to overcompensate for the propensity to wish whistleblowers away with the perfunctory spot check or the “Everything O.K.?” kind of look-see that usually occurs.

-- Jack and Suzy Welch, Reuters (May 1, 2012)

Every Internal Investigation is an Opportunity to Improve the Organization



Initial Planning Considerations:

- Define what you are aiming to accomplish. What questions does the company need answered? This will help define your Scope.
- Who should conduct investigation? Inside or Outside Counsel, HR, Security, EEO?
- Plan with Organization *and* Curiosity.
- Investigation must be both comprehensive and timely.
- Exigent Circumstances - Ongoing issue or historical event? Health or safety concern? Risk of spoliation of evidence?



Elements of an Effective Investigation Work Plan

- Consult with Law Department
- Methods to Preserve Attorney Client Privilege
- Methods to Preserve Evidence
 - Identify custodians
 - Identify how evidence will be preserved – hold or freeze orders
- Document Requests, Collection & Review
- Identification of Key Individuals to Interview
- Interviews
- Review and Analysis
- Reporting

TIP: Remember that an outside regulator may eventually be interested in the steps that were taken to investigate internally; the proper scope and components of an investigation plan along with document retention can be keys to the overall credibility of your investigation.



- Review Document Retention Policy
 - Preserve documents as necessary; automatic deletions?
 - Consult with Office of Counsel to issue a “Litigation Hold Memo”
 - Ensure relevant custodians have received Litigation Hold Memo
 - Coordinate Litigation Hold Memo with IT and HR
- Who will collect documents? Self-collection? Outside vendor?
 - Identify whether a forensic collection is needed
 - IT involvement needed?
- Review Documents Prior to Interviews
- Identify Potential Witnesses



- Be Prepared – There is absolutely no substitution for proper preparation
- Be Respectful At All Times
- Interview One Witness at a Time
- Two-person rule
- **Initial Remarks in an Interview**
 - Give the appropriate introductory warnings to the interviewee (e.g., Upjohn warning)



- **Establish a Good Rapport Early**
 - When appropriate, begin the interview with routine background questions about the employee's work history and current responsibilities
 - Typically puts the witness at ease
 - Easing into an interview can create a good rhythm and lead to a productive session
- **Ask Concise Open-Ended Questions**
 - You want the witness to supply as much information as possible
 - Don't ask questions in a way that could be interpreted as influencing the witness's answer
 - Don't ask leading (Yes/No) questions – learn the story from the witness
- **Do Not Ask Questions That Convey Excess Information**
 - For example, don't ask questions that share another witness's version of events and thereby influence this witness' answers



- **Confirm the Potential Locations of Additional Evidence**
 - Do they have any personal files on the subject matter?
 - Confirm what computers and devices they use for work
 - Confirm if they use personal devices for work
 - Confirm who else has access to those devices
 - If they use personal devices, would they be willing to give you a copy of relevant information?
 - Instruct them not to alter, destroy, or hide any documents or information



- **Listen to the Answers & Adjust the Next Questions**

- If you hear something in an answer that requires more probing, do not just move on to your next question, probe that thread and develop the additional evidence
 - Please tell me more about that
 - What do you mean by _____?
 - Can you please walk me through what you were referencing when you said _____?
 - What else?
 - What makes you say that?
 - How did you come to that conclusion?
 - In searching your memory, is there anything else that happened prior to noon that day?
- Also, continually listen for answers that help develop leads as to other individuals who should be interviewed or additional documents to be collected



- **Carefully Observe Your Witness**

- Observe the physical demeanor of a witness
- With practice and experience, investigators can often spot someone who may or may not be telling the truth based on body language



- **Characteristics of Potentially Deceptive Behavior**

- Making oneself smaller, *like an animal avoiding detection*
(i.e. hands behind back, crossing arms, posture changes, fidgeting)
- Changes in speech rates and breathing patterns
- Avoiding eye contact with you, even on simple questions
- A deceptive person may often put a hand to eyes/mouth to obscure what is being said
- Starts to answer questions not asked or over emphasizes details on non-relevant items; will ask you what other people have said
- Overuse of qualifying language; “To tell you the truth...”
- Repeating your questions before answering; a stalling technique
- Often point their feet toward the exit or will glance at location of evidence (*i.e.*, computer, satchel)
- Will often put things in between them and the interviewer
- Terrible at telling their stories backwards



- **Wrapping Up The Interview**

- Thank the witnesses for their time
- Remind witnesses of the non-disclosure requirement / keep confidential
- Advise witness that it is possible another interview will occur
- THANK THEM AGAIN



ANALYSIS: Capturing the Factual Findings

• Interview Memos

- Draft your Interview Memos promptly after the Interview
 - Ideally memos done within 3 days of interview to keep recollection fresh
- Interview Memo should contain privilege and work product language at beginning, if investigation being conducted under privilege
 - Ask Law Dept. for proper language for intro
- Should be in summary – not transcript or “Q&A” –form but include:
 - Names of all individuals who were present
 - Location, time and date of interview
 - Accurate description/account of what interviewee stated. Avoid quoting/quotation marks
 - Description of facts of any unique reactions by witness (e.g., witness walks out, begins to cry, starts shouting). Avoid personal judgments (e.g., “witness is not credible,” “I think John Doe is lying”)
 - Do not have witness review or adopt memo as her/her statement
 - Attach copies of all documents reviewed with witness or otherwise reference for clarity
- Assume it will be seen by others
- Control distribution carefully



ANALYSIS: Adjusting Investigation Scope

- As your investigation progresses, ensure that you are staying on track
- Expect new facts to emerge and adjust appropriately
- Analyze the evidence obtained and evaluate whether additional interviews should occur
- Maintain Control of Information
 - Be mindful that employees' reputations and relationships to the organization may be at risk
 - Do not carelessly disclose information
 - Can cause rumors, create legal exposure, and impact morale and productivity



- Reporting the preliminary results of the investigation

- Reporting the “final results” of the investigation
 - Written Report
 - Background (reason for investigation; procedural history)
 - Summary of Investigation (scope; interviews; documents reviewed)
 - Findings
 - Recommendations

- What happens next?
 - Potential disclosure
 - Discipline
 - Corrective / Remedial action – Come Back This Afternoon!

