I. CONDUCTING AN INTERNAL INVESTIGATION OF AN ORGANIZATION

A. Introduction

1. Federal government initiated investigations have led organizations to consider a response and strategy for managing an investigation.

2. Key components for response strategy to government scrutiny and liability for violations of Federal statutes include:

   (a) Conducting a self-evaluative internal investigation of those matters under scrutiny by the government, but also those matters which could cause exposure to the organization.

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(b) The initiation of an internal investigation as part of such a strategy requires:

1) Careful consideration;

2) Equally well though-out methods and procedures; and

3) An appreciation of the issues and pitfalls involved in this type of matter

3. Information obtained through such an investigation may be transformed into documents suitable for criminal and civil pre-trial discovery and trial.

4. This discussion seeks to enumerate factors which should be taken into consideration when conducting an internal investigation of an organization related to potential violations of Federal statutes.

B. Scope and Accountability of Internal Investigation

1. The most important initial consideration to be taken into account when directing and conducting an internal investigation of an organization involves a clear understanding regarding the scope, method, accountability and reporting between:

(a) The law firm directing the investigation;

(b) The consultants conducting the investigation; and

(c) The client organization which is authorizing the internal investigation.

2. This is important, considering:

(a) Those conducting internal investigation will not be the most popular visitors with members of the organization; and

(b) The investigation may not necessarily result in positive findings and recommendations for the organization and/or key individuals in the organization.
3. The issues which should be raised in discussing the scope of the internal investigation with your client should include:

(a) The subject matter to be addressed;

(b) Who the law firm will be accountable to within the client organization; and

(c) Who the investigative team will be accountable to within the client organization.

4. The reporting responsibility for the investigative team could be to:

(a) A special committee of the Board of Directors;

(b) The in-house counsel for the organization; and/or

(c) Selective members of the management team.

5. This assessment will necessarily require a determination of the degree of independence/control which will be exerted by management over the internal investigation.

(a) This obviously has implications for the credibility and effectiveness of the internal investigation.

(b) The degree of credibility of the internal investigation also could have an extremely important impact on the level of cooperation and credibility which the organization may have with the government entities investigating the potential violations of Federal statutes.

6. An investigation, at a minimum, must collect the relevant facts associated with the issues within the scope of the investigation.

7. Additional issues which should be discussed at the outset with the organization:

(a) The extent to which the internal investigative team will develop the facts and proffer conclusions based on those facts; and
Whether conclusions of law should be drawn from those facts or whether they should be left to other parties and, perhaps, even other outside or inside counsel and/or management of the organization.

1) Any determination is not without risks, especially as it relates to strategy with the Federal or state government law enforcement authorities.

2) This requires careful consideration at the outset and continued reassessment during the course of the internal investigation.

3) Whether an official report should be submitted to management outlining the factual and legal conclusions should be considered and discussed with the client.

C. Matters of Privilege

1. Any internal investigation should preferably be conducted through outside counsel in order to maximize the privileged nature of the investigation and protect confidentiality and the integrity of the internal investigation.


   (b) Information that counsel obtains may also be protected under the attorney work-product doctrine, which protects from discovery documents or tangible things prepared in anticipation of litigation or for trial. *Hickman v. Taylor*, 329 U.S. 495 (1947).

   (c) Information obtained by counsel also may be protected under the critical self-evaluative privilege. *See Bredice v. Doctor’s Hosp., Inc.*, 50 F.R.d. 249 (D.D.C. 1970), aff’d, 479 F.2d 920, (D.C. Cir. 1973). But the scope of this privilege is extremely limited and many jurisdictions

(d) Counsel may also retain experts and/or investigators to assist in gathering information. The expert or investigator must truly function as counsel’s agent, and disclosures to the agent will be protected only if they are necessary to obtain informed legal advice. See *In Re: Grand Jury Matter*, 147 F.R.D. 82 (E.D. Pa. 1992) (where the client’s ultimate goal is not the receipt of legal advice, but is rather accounting, medical or environmental advice, the privilege is inapplicable).

(e) This does not mean that the conduct of the internal investigation is utilized to otherwise attempt to cloak documents which were previously not privileged, but it does mean carefully tracking what new information is gathered by the investigative team and ensuring that it will be privileged and confidential.

2. Issues of future disclosure must be considered:

(a) Findings and conclusions may be disclosed to the government at a later date in the context of resolution of issues concerning potential violations of Federal statutes.

(b) The very fact that such a disclosure may be contemplated requires realization that information gathered during the internal investigation may, ultimately, be shared with a third-party which could result in waiver of the attorney-client and work-product privilege in other parallel civil or criminal proceedings. This can be a particular problem when parallel civil litigation arises, which is often the case when publicly traded companies are involved.

3. Joint defense as a possibility:

(a) Issues of privilege are also implicated when other organizations or individuals related to the organization may also have individual exposure for culpability for
their own actions involving allegations of violations of Federal statutes.

(b) A decision may have to be made at an early stage of the investigation regarding whether or not to enter into joint defense arrangements between the organization and such other entities and/or individuals.

(c) This decision should consider how a joint defense agreement may limit discretion on the part of the organization regarding potential disclosure of information gathered during the internal investigation to the government authorities.

(d) This decision should also consider how a joint defense agreement may be viewed by those government authorities conducting the investigation.

D. Managing The Investigation

1. Another critical aspect of any internal investigation is defining the organization’s expectations and managing those expectations as the investigation continues.

2. In between the investigative team and the organization should be developed regarding:

   (a) The time frame for completion of the investigation;

   (b) The resources necessary to do so within that time frame;

   (c) What types of experts may be needed to be brought in during the course of the investigation both for gathering the facts and/or analysis of facts relevant to any potential violations of Federal statutes; and

   (d) The potential scope of the problems to be addressed and whether it may include criminal, as well as civil and administrative liability under such laws as the health care fraud and abuse laws.
3. Continued updates on the progress of the investigation and some assurance that the client understands what will unfold as the investigation continues should be given.

4. If the internal investigation is being undertaken parallel to the government investigation consideration should be given to:

   (a) Communicating with the government as to what the intentions of the organization are in this self-evaluative internal investigation;

   (b) Seeking cooperating from the government in either delaying or completing their own investigation in as orderly a manner as possible and with as little disruption to the day-to-day business affairs of the organization;

   (c) This is not only an important reason for conducting an internal investigation to begin with, but depending on the credibility and persuasiveness of your investigative team it is possible to obtain a level of cooperating from the government authorities who are presumably interested in the same issues which the investigative team may be reviewing within the organization.

   (d) The level of law enforcement interest in the issues which will be addressed during the internal investigation will play a large part in the strategy of the internal investigation and potentially the ultimate issue of self-reporting and voluntary disclosure of the information obtained by the organization in the context of achieving a resolution of the issues with law enforcement authorities.

E. Investigative Methodology

1. The investigative techniques and methodology should also be discussed thoroughly with the client organization so a clear understanding can be achieved concerning how the investigation will impact the organization and what level of cooperation can be expected from the organization.
2. The following issues should be addressed before the investigation begins:

(a) How many current or former employee interviews are likely?
   1) Who will be interviewed and where will they be conducted?
   2) Who will conduct the interviews?
   3) Do the employees to be interviewed have any legal exposure for their own actions and is the client willing to provide them with an attorney at a cost to the organization?
   4) What will happen if an employee refuses to cooperate?

(b) What documents have to be reviewed?
   1) Where are the documents and have they been secured?
   2) How will they be categorized and organized?
   3) Who will review these documents?

(c) Do any computers have to be downloaded and searched?
   1) Is there a local area network?
   2) A wide area network?
   3) Electronic mail?
   4) Where are the servers?
   5) Can the hardware and software be secured?

(d) Will offices have to secured and searched?
   1) How many are where and will the client be cooperative in such a search?
(e) Does your clients company currently have a compliance program?

1) A compliance officer?

2) Has any investigation been conducted prior to the initiation of the internal investigation?

(i) If so, what were the findings and was any corrective action taken?

3. This should not be the last time that you visit the question concerning your client’s compliance program, because if there is an eventual settlement of issues with the government it will likely mandate the imposition of an “effective” compliance program.

(a) The organization will be far better off in many respects by ensuring that its compliance program is “effective” before the government defines its effectiveness through the onerous requirements which have appeared in recent health care fraud and abuse settlement agreements.

(b) Regardless of our client’s line of business, an effective compliance program should mirror the recommended guidelines set forth by the United States Sentencing Commission in the Federal Sentencing Guidelines for organizations, or those model programs endorsed by the OIG.

(c) An effective compliance program can mitigate the fines, penalties and sanctions that your client organization may be subject to in any settlement negotiations with the government.

F. Directing, Conducting and Documenting The Results Of The Investigation

1. An important part of an internal investigation is providing the legal team with period (daily is recommended for large investigative matters) updates so that the client organization can be kept abreast of the status of the investigation.
(a) A formal presentation of facts to the client can be made while the investigation is in the progress or an informal approach can be utilized, depending on the preference of the parties.

(b) If updates on progress are in writing or whether they will merely be orally presented may depend on the extent to which such documents are potentially discoverable by third-party litigants or the government.

2. The legal team must also make certain decisions for the investigative team such as:

   (a) Whether to have one or two people present during interviews;

   (b) Who should take notes and whether those notes should be memorialized in written interview memoranda;

   (c) If the results of the interviews are to be put into written form, a decision must be made whether the investigative team should retain their original notes or dispose of them after the write-ups are finalized;

   (d) A standard preamble should be used prior to the interviews which states that the information gathered is to assist the law firm in providing legal advice to the client (the organization) and that the memoranda are not verbatim transcripts of the interview;

   (e) The legal team should brief the investigators who will be conducting the interviews as to how the interviewees should be approached and what procedures should be followed to ensure that the interviewee understands that the investigation is being conducted by the organization and use of information provided during the course of the interview will be determined solely by the company (i.e., waiver of privilege and disclosure to third party); and

   (f) Care should be taken when utilizing in-side counsel because a party seeking disclosure may claim that inside
counsel functioned as a non-lawyer when he or she obtained certain information or that inside counsel obtained the information in the ordinary course of business. *See Teltron, Inc. v. Alexander*, 132 F.R.D. 394 (E.D. Pa. 1990). Thus, serious consideration should be given to retaining outside counsel to conduct the internal investigation.

3. Generally, a corporation can use, as it deems appropriate, any information that it obtains through an internal investigation, including information obtained through employee interviews. Under ordinary circumstances, it is not necessary to provide explicit warnings to an employee as to the uses to which his or her statement may be put. Absence special circumstances, an employee does not have a reasonable expectation of confidentiality as to his or her communications with company counsel so long as counsel makes it clear they are the lawyer for the company, not the employee. *See United States v. Furst*, 886 F.2d 558 (3rd Cir. 1989).

But where counsel has credible evidence indicating that the employee is engaged in wrongdoing, counsel should recommend that the employee be advised of:

(a) Their right to consult with counsel prior to cooperating with the organization’s internal investigation; and

(b) The consequences of failing to cooperate with the internal investigation.

4. If the client has made a decision to cooperate with the government, or if the results of the investigation may be turned over to the government at some point in time, a decision must be made as to whether there will be a written or oral presentation of findings to the government and what impact this may have upon waiver of the attorney/client and work product privileges.
G. Conclusion

1. The completion of the internal investigation will then move the engagement into a phase of determining the extent of culpability for the organization and any current or former employees and what type of negotiations (if any) should be conducted with government representatives regarding resolution of culpability for the organization or these individuals.

2. The organization, along with the attorneys directing the investigation and the investigative team, should consider whether to make a presentation of the facts to the government.

   (a) It may be more useful for other counsel to negotiate any resolution of issues with the government based on the facts disclosed from the internal investigation which:

   1) Preserves the objectivity of the investigative findings; and

   2) Bolsters the credibility of those findings as a basis to negotiate a settlement with the government.

3. There is nothing completely identical from one internal investigation to the other and the scope, methodology and strategy behind internal investigations will differ from client to client and case to case.

4. However, an internal investigation is an increasingly useful and necessary tool to deal with the onslaught of government scrutiny and investigations and potential liability associated with violations of the health care fraud and abuse laws.

5. If used in an appropriate manner, it can be utilized successfully in resolving issues which otherwise could cause considerable disruption and/or destruction of a health care organization.

6. The company must avoid any action that could be construed as obstruction of justice. See 18 U.S.C. §§ 1503, 1505, 1510, 1512, 1514, 1516, 1517 and 1518. Section 1512(c)(2) makes it a crime to “harass” another person, thereby dissuading such
person from testifying or providing information to law enforcement officials. Section 1512(b)(2) makes it a crime to corruptly persuade a person with intent to delay or prevent communication to law enforcement officials of information relating to a federal offense. Section 1518(a) makes it a crime to willfully prevent the communication of information relating to a federal health care offense to a criminal investigator. Thus, counsel or company officials generally should be wary of instructing corporate employees not to speak to government agents during an investigation. *But see United States v. Farrell*, 1997 U.S. App. Lexis 26281 (3rd Cir. Sept. 24, 1997) (Section 1512(b)(2) does not encompass a request for a co-conspirator not to cooperate and provide information to authorities absent evidence of corrupt intent).

II. ISSUES TO CONSIDER IN ASSISTING THE CLIENT DURING THE GOVERNMENT INVESTIGATION

A. Identify The Investigators/Government Agencies Involved

1. Verify the credentials of the investigator. A third party/competitor/potential litigant may be attempting to obtain information about the provider by representing himself/herself as an authorized investigator.

2. The identity of the investigator may:
   
   (a) Provide an initial assessment of the potential exposure of the organization; and

   (b) Determine, to some extent, the material to which the investigator is unquestionably entitled, and the material to which the investigator is not entitled.

3. The scope of seriousness of the investigation can be measured to some extent by determining the office conducting the investigation.
B. **Ascertain The Extent Of The Client’s Exposure**

1. An organization can be subject to criminal, civil and/or administrative penalties and/or sanctions, or all of the above simultaneously.

2. It is crucial to ascertain the true purpose of the investigation in order to determine a client’s immediate exposure.
   
   (a) The agent or auditor may be willing to disclose the reason for the investigation or inquiry as well as the objective.

   (b) No matter what the response never assume that the investigation or audit is routine.

   (c) If the investigator is unwilling to disclose the purpose of the inquiry, assume the worst and prepare for a criminal defense until you determine otherwise.

3. If the investigation is being conducted by an attorney, counsel for the organization should contact and meet with the attorney as soon as possible to determine how seriously the matter may be viewed by the investigating agency. This information can:
   
   (a) Help determine the organization’s strategy in the investigation; and

   (b) Help in planning an efficient internal investigation into the matters under investigation.

C. **Take All Steps Necessary To Minimize The Client’s Exposure**

1. From the moment the government investigator arrives, all communications between employees and investigators should be severely restricted.

2. The organization should be in control of all information given and obtained by the investigator. An organization should never turn over a document to an investigator unless it has been reviewed by counsel and both counsel and the organization
understand the document and the consequences it may bring and any privileges that may apply to it.

3. If present employees are to be interviewed, provision should be made for a representative of the organization to be present.

4. The organization should maintain a log of the name, address and employing agency of each investigator, the dates and times of his visits, and a brief summary of each discussion.

5. After assessing the objectives of the investigation, counsel for the organization must become familiar with all pertinent laws and regulations — each element of all potential offense or violation — to be aware of the reasoning behind an investigator’s request for information.

6. Counsel for the organization should gather information and make its own assessment of the facts by conducting interviews with all employees involved in the matter.
   (a) Counsel should make every effort to gain the employees’ trust.
   (b) The organization’s employees are essential to helping counsel understand the provider’s operations and any documents at issue.

7. The employees should be informed of the nature of the investigation and their respective rights.

8. Once the nature of the inquiry is ascertained, it is critical to understand the organization’s business priorities in order to make strategy decisions with the client.

D. Maintain Client’s Credibility With Law Enforcement Officials

1. Maintaining credibility with law enforcement officials involved, i.e., the United States Attorneys’ Office, the OIG and/or the Federal Bureau of Investigation (“FBI”) is crucial because the client’s economic survival may depend upon quickly and credibly preparing and presenting a defense. A
credible explanation of the conduct under investigation, which is consistent with innocence, may preclude the return of any formal criminal charges, which in turn could prevent other consequences such as de facto suspension from the Medicare and Medicaid programs.

2. Internal review of records and interview of individuals should be conducted in a manner that would parallel the approach of an investigator to enhance his/her confidence in counsel’s findings, i.e., consider use of sampling guidelines where there is a high volume of items, such as Medicare or Medicaid claims, to be reviewed.

E. Maximize the Use Of Attorney/Client Privilege In all Communications Relating to The Investigation

1. If attorney/client and work product privileges are to be maintained, counsel for the client needs to direct, coordinate and supervise any internal review activities regarding the investigation. Counsel’s assistance or investigation must be authorized by the Board of Directors or Senior Management.

(a) Such authorization should include a specific direction to counsel to conduct a confidential investigation for the purpose of providing legal advice in anticipation of litigation.

(b) Senior management should direct employees to cooperate and communicate with counsel in strict confidence.

(c) Counsel should direct and control the investigation.

1) Any company personnel involved in the investigation should act only at the direction of counsel and directly report to counsel; and

2) Other company officials should be discouraged from non-privileged fact gathering.

(d) All interviews should be conducted in private and employees should be told that the interviews are for the purpose of providing legal advice to the company.
2. All documentation should be strictly controlled to protect the privilege.
   
   (a) All documents should be marked attorney-client privilege/attorney work-product.
   
   (b) Any employee writings should be directed to counsel and/or documented as done at the direction of counsel.
   
   (c) Strict controls for dissemination and storage of documents should be implemented (i.e., documents should be stored in a secure location and distributed only to those individuals acting at the direction of counsel or to senior management).
   
   (d) Any report should be drafted carefully in case the resulting attorney work product is disclosed.
   
3. Assume that, despite your best efforts, the results of an investigation may become public and act accordingly.

4. Only counsel should directly retain any outside consultants i.e., auditors, to maintain confidentiality.

5. Auditors should submit any work-product directly to counsel for the client.

6. Establish specific file(s) for confidential and privileged communications, memorandum, etc., subject to the attorney/client privilege.