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**After an allegation:
Conducting an
effective, efficient
internal investigation**

Rob Cepielik, Mike Little,
and Greg Garrison

by Rob Cepielik, Mike Little, and Greg Garrison

After an allegation: Conducting an effective, efficient internal investigation

- » When assessing the validity of an allegation, identify the issue as precisely as possible.
- » Decide early on the composition of the investigation team.
- » The initial investigative plan should include parameters for assembling, analyzing, and safeguarding documents.
- » Follow procedural guidelines when conducting interviews with witnesses and subjects.
- » Document an analysis of the findings and the actions that were taken at the conclusion of the investigation.

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Among the responsibilities of a health care entity's compliance officer are to ensure that the organization operates in an ethical fashion and complies with all regulatory obligations. Many laws and regulations, such as Sarbanes Oxley, the Federal Sentencing Guidelines, the Securities and Exchange Commission guidelines, require that management establish a mechanism to receive confidential and/or anonymous reports from concerned employees and other stakeholders, and to protect those "whistleblowers" from retaliation.

The current regulatory and enforcement environment has raised the stakes even higher for health care providers and payers. The Patient Protection and Affordable Care Act (PPACA) introduced new obligations regarding the effectiveness of an organization's compliance program, as well as accelerated self-reporting requirements. For example, one provision mandates that a provider

return any identified Medicare or Medicaid program overpayment within 60 days, with an explanation of the overpayment(s). Failure to do so renders the overpayment a false claim that could be subject to the federal False Claims Act and whistleblower provisions.

When information about an alleged impropriety comes to the attention of a health care provider's and/or payer's compliance officer (or department), it is important that the organization take appropriate and timely steps to analyze and investigate the situation, especially because it later may be required to demonstrate what actions it took in response to a complaint. As a compliance professional, you will often be asked to play an important role in an internal investigation. This article describes the anatomy of an investigation and cites leading practices that may benefit health care organizations in their investigative efforts.



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Assessing an allegation

When assessing the validity of an allegation, it is important to break it down and identify the issue as precisely as possible. Use the information that is available—whether from a hotline report (anonymous or named) or from internal data analysis—to ascertain whether the specific problem/complaint involves billing to government or commercial entities, financial reporting, contractual relationships with outside entities, or ethical lapses by employees or contractors.

Begin by identifying who has information relevant to the issue and where that information resides. Also assess whether there is a logical set of individuals who should be interviewed. Consider what resources will be needed to conduct the investigation, where those resources reside—both within and outside the organization—and how those resources can be obtained. Based on the information available up to this point, set a reasonable timeframe to conduct the investigation and consider the possible outcomes. Such consideration is important, because a self-disclosure to a government agency or a referral of potential criminal conduct by an employee or contractor to a law enforcement agency may significantly impact the investigation's urgency.

In conjunction with the above, a major consideration when embarking on an internal investigation is whether the investigation will be conducted under the direction of counsel. In most cases, the answer will be yes. This is especially true if the complaint, on its surface, seems to indicate a pattern of conduct that could result in potential overpayments to the government or a commercial entity, or indicates potential criminal behavior by an employee or contractor. Counsel's involvement at the earliest stage in the investigative process is critical and provides a number of benefits. In general, when working under the direction or supervision of counsel, communications and work product will be protected under the

attorney-client privilege and work product doctrine. It is important to note that such protection has limits, state laws differ, and court decisions may change interpretations; therefore, it is advisable that the investigative team be briefed by counsel at the onset.

Another early decision that should be made is whether in-house counsel should lead the investigation or if external counsel should be retained. This decision should be based on the nature and scope of the complaint and be made in consultation with in-house counsel and, potentially, senior management and the audit committee. Strive to avoid mistakes commonly made during an initial assessment—these include underestimating the allegation, not considering the full impact of the information received, and undervaluing the credibility of an information source.

Taken together, the components of the initial assessment will provide the platform for development of an investigative plan. The purpose of this plan is to provide a roadmap to resolving the issue expediently and with assurance that all appropriate avenues are explored while avoiding unnecessary blind alleys. In short, an initial assessment helps identify the “who, what, when, where, why, and how” of the issue at hand.

Composing the investigative team

After completing the initial assessment and making preliminary contact with the complainant (if that is possible or deemed appropriate), the compliance officer—in consultation with counsel (in-house or outside)—should determine the composition of the investigative team. The three most important considerations are:

- ▶ **Discretion:** The need for discretion is paramount. 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. Only those

individuals who understand this should be brought into the core team.

- ▶ **Capability:** Depending on the nature of the allegations, the investigative team should be composed of individuals with capabilities and experience in conducting competent interviews. Skill sets of team members could include clinical and/or coding credentials, forensic accounting, data analysis, and computer forensics, among others.
- ▶ **Credibility:** The investigative team must have credibility to withstand scrutiny from within the organization and from outside parties, including government regulatory agencies, the public, and investors. Often this credibility can be enhanced by bringing in outside resources, be they legal counsel and/or forensic accountants and investigators. The inclusion of outside resources is further indication that the organization takes the issue seriously and that the review will be competent, unbiased, and independent.

Another important item for consideration is the investigation's governance. Specifically, the roles of management and the audit committee should be agreed upon at the investigation's inception and modified as facts and circumstances emerge. As a "rule of thumb," many believe that the audit committee should take an active role in an investigation's governance when allegations relate to accounting or financial reporting and evidence suggests those allegations could be material; allegations could have a significant impact on the reputation of the company, including allegations of illegal acts; or allegations involve senior management of the company.

A thorough investigation begins with the iterative process of developing, assessing, and reworking a plan.

Conducting the investigation

A thorough investigation begins with the iterative process of developing, assessing, and reworking a plan. Typically, the investigation team will assess the original plan and re-direct efforts as necessary; specifically, it will assist in deciding what documents and records need to be assembled and analyzed, which individuals should be interviewed, and the appropriate interview sequence.

Assembling the documents

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. Required documents that are in hard-copy form should be obtained from their custodian with clear documentation of when they were obtained, from whom, and by whom. If the documents need to be retained by the investigative team, they should be kept in a secured location with limited and documented access.

Electronic records should be obtained from their custodian and provided in a format and media that protects and ensures data integrity. As is the case for hard copies, electronic documents should be maintained in a secure, limited-access environment.

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.

Analyzing the documents

In a typical health care setting, required investigative documents will be in one of three general categories:

- ▶ **Financial records**, which include, but are not limited to financial statements; supporting ledgers, including general, accounts payable, accounts receivable, sales, payroll, etc.; supporting payment information, including invoices, cancelled checks, and remittance advices; personnel records; and fixed asset and depreciation listings.
- ▶ **Contractual records**, which include contracts, mortgages, deeds, proposals, rental agreements, service agreements and subcontractor agreements. Also included could be 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 such as UB04s (CMS Form 1450), detailed hospital bill/statement, etc.

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. Also, be particularly careful if medical records are used: The Health Insurance Portability and Accountability Act of 1996 (HIPAA) contains provisions restricting the use and disclosure of documents containing protected health information.

Interviews

Documents can tell part of the story but are lifeless; witnesses can tell part of the story and give life to the documents. Interviews may be the most significant part of a forensic investigation. Witnesses can refute allegations by

providing logical explanations of things that appeared improper but, in reality, were not; conversely, they may verify and give credence to the allegations. There are several types of interviews, as well as suggestions for conducting them. First, the interview types.

▶ **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 assure that the freshest information is available and that the organization's intent to fully and objectively investigate their complaint is communicated. Be aware that the person might go outside the organization to file their complaint if they do not think that a fair investigation will be conducted. Also, do not assume anything with respect to the complainant; it is often easy to over- or under-estimate the information provided by an employee, based on their position or prior contacts.

▶ **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.

Procedural guidelines

Alternatively, the subject might purposefully misstate answers, be evasive, or completely refuse to answer questions. The following procedural guidelines apply to all three types of interviews, although the significance of the interview determines the level of the adherence to each.

- ▶ **Have an attorney present** — This may help keep the investigation under privilege to the greatest extent possible. An attorney's presence may also facilitate resolution of legal issues that could arise during the interview.
- ▶ **Prepare for the interview** — Interviews, especially those considered significant, should never be conducted on an ad hoc basis or 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) based on information known to date.
- ▶ **Select the proper setting** — In general, the interview location's size and space should be conducive to note-taking, document review, and accommodating the number of participants. 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 short cut 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.
- ▶ **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 also can be difficult to document which person provided what answer.

Concluding the investigation

When all the documents have been reviewed, all individuals interviewed, and all leads followed to their logical end, a picture of the results will develop. 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: The results must be communicated in the appropriate way—either written or verbally—to the key stakeholders. These stakeholders may include company management (Note: If any of the management team has been implicated in the findings, discretion must be exercised); the audit committee (especially if the allegations are significant or if the findings implicate a systematic failure or potential criminal violations); independent auditors (if allegations involve the integrity of financial statements, illegal acts, or the integrity of management); and law enforcement and regulatory agencies (if the investigation has disclosed instances of false billing to the government, any potentially criminal actions, or other circumstances).

Reporting

The selection of a written or verbal report of the investigation and its results will vary by situation. Of course, the investigative efforts' outputs—interview summaries and document analyses—are memorialized as the investigation progresses and need to be maintained. 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. 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 Resources department for further action.

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Final thoughts

Use of the following leading practices may assist health care organizations in conducting an efficient and effective forensic investigation.

1. **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.
2. **Engage in frequent communication with counsel** (internal and/or external), because it can assist the investigative team in navigating the legal intricacies 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. Similarly, periodically update the independent auditing firm.
3. **Do not make assumptions or leap to conclusions;** rather, rely on information that has been analyzed and verified. This is true at every stage of the investigation.
4. **Carefully document the investigative findings** to demonstrate the actions taken. 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 subjected to litigation.

5. **Make a timely decision to self-disclose or refer information** to appropriate authorities, if the investigation’s 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. ☺

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