

Tips For Conducting Interviews for Internal Investigations

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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?

A Typical Day at the Office

At an exit interview an employee says she knows a physician who is overcoding, taking kickbacks from a device company based in San Diego and having an affair with a another colleague.



Employee Certification

- An annual certification can pay huge dividends.
- Even absent that, a good exit interview is worth something.

Questions to Consider

- Do you need to investigate all of the allegations?
- Who should do it?
- Do you care about privilege?
- How should you do it? Are you flying out to San Diego?

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.

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.

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 new 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?

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

What Documents Should One Use?

- Risks and benefits of “refreshing recollection.”
- One goal of interviews is education.
- Anything you show may be discoverable, so beware of using privileged documents.

Interview Tips

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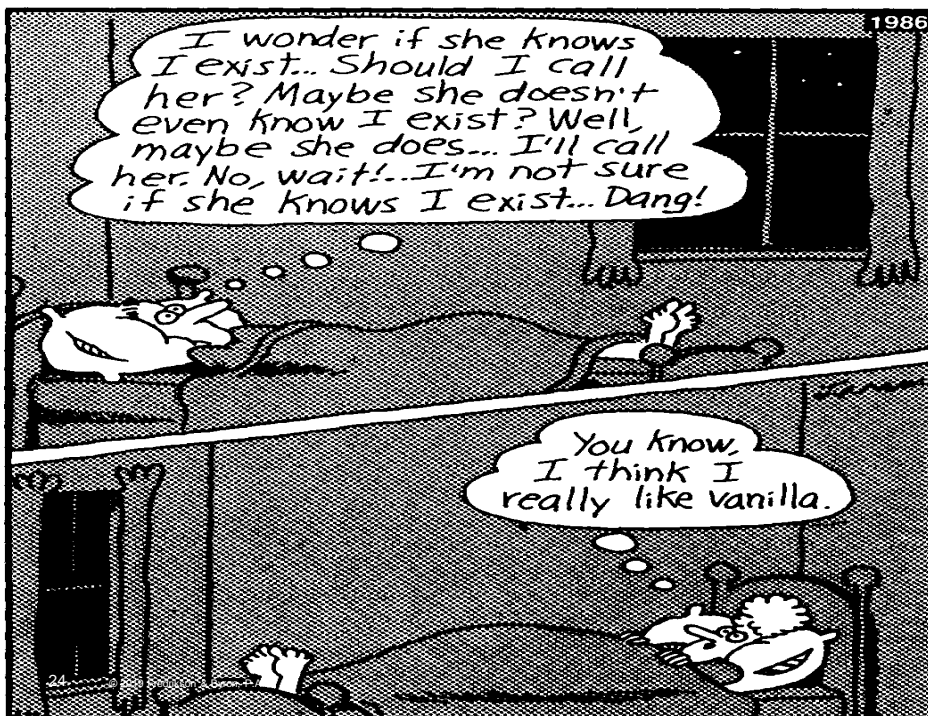
Ineffective tools of persuasion

Interview Tips

- Make people comfortable.

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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.
- Phone interviews can be great when documents aren't important.

Logistics

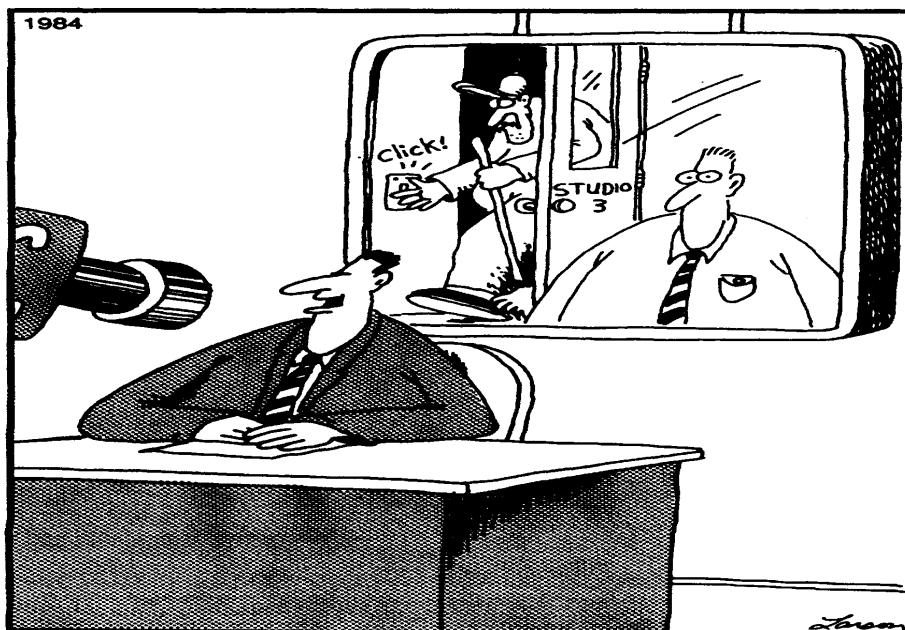
- Where?
- How long?
- Who do you talk to first?
- Do you write out questions?
- Would you ever do a sting? Use hidden cameras? If so, do you tip your hand in the interview?

Possible Questions from EEs

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

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"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?

My 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.

Something to Ponder

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"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.
- Speaking of relationships...

How Do You Approach This?

One day, a patient who was treated by the very productive president of your group calls and complains she was billed for a complete physical, but she never removed any clothes.

Do You Need To Interview?

A review of that physician's appointment book reveals that the physician worked from 9-3, took lunch, and saw 67 patients; 6 of the visits were billed as comprehensive physicals. The documentation supports all but 5 of the visits. (There is a comprehensive physical documented for the woman who called.)

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?
- Repeat request for confidentiality.
- Provide contact info.
- Let them ask questions.

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

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

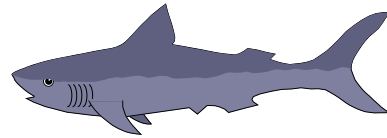
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Preparing For Trouble

- CMS
- OIG
- FBI
- MFCU
- Postal Inspector
- IG Railroad Retirement Board
- DCIS
- Licensing boards
- NRC
- FDA
- DEA
- Patients



Beware Of:

- Personalized correspondence.
- Medicare bulletins.
- Overpayment letters.
- Frequent denials.
- “Routine audit”/survey.



Office of Audit Services
Region I
John F. Kennedy Federal Building
Boston, MA 02203
(617) 565-2684

Dear Dr. [REDACTED]

The Office of Inspector General of the Department of Health and Human Services is currently conducting an audit of payments for clinical laboratory services under the Medicare program. In this regard, we need your assistance to confirm that you (1) requested the services provided and billed to the Medicare program by a laboratory and (2) received and considered the test results in the treatment of your patient. Your response will be vital in assisting our efforts to ensure that Medicare dollars are appropriately spent on deserving beneficiaries.

As part of this audit, we are reviewing Medicare payments to laboratories for additional automated hemogram indices that were billed with hematology profiles (CBCs or other hematology profiles). Examples of additional automated hemogram indices include red cell distribution width (RDW), mean platelet volume (MPV), red blood cell histogram, platelet histogram and white blood cell histogram. These indices are in addition to the "standard" indices which are part of a CBC: the mean corpuscular volume (MCV), the mean corpuscular hemoglobin (MCH), and the mean corpuscular hemoglobin concentration (MCHC).

1. Did you order a complete blood count (sometimes referred to as a "CBC") or other hematology profiles for this patient on this date?

_____ Yes _____ No

2. Did you specifically request any of the additional automated hemogram indices referenced above for this patient on this date?

_____ Yes _____ No

4. If you answered “No” to question 2, please answer questions 4a through 4e below.

4a. Did you receive the additional automated hemogram indices as part of the test result provided from the laboratory?

____ Yes ____ No

4b. Were the additional automated hemogram indices routinely provided as part of your request for the hematology profiles?

____ Yes ____ No ____ Not Applicable

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4c. Did the laboratory notify you that these additional automated hemogram indices were automatically included as part of hematology profiles?

____ Yes ____ No ____ Not Applicable

4d. Were you aware that these additional automated hemogram indices or other indices were billed separately under the Medicare program?

____ Yes ____ No ____ Not Applicable

4e. If you received the additional automated hemogram indices as part of the laboratory results, were the indices useful to you in the treatment of the Medicare patient?

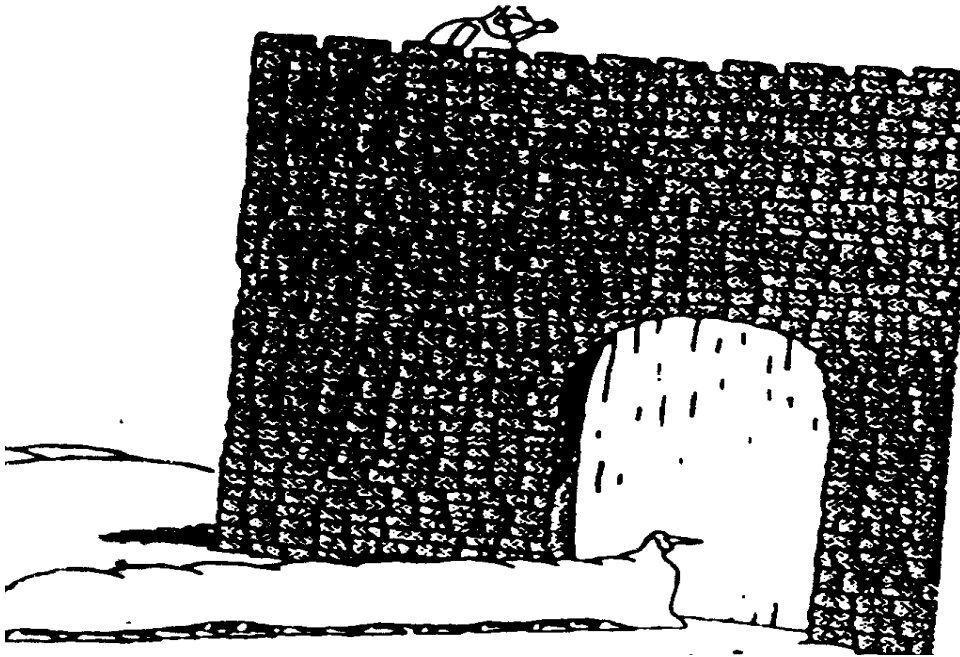
____ Yes ____ No ____ Not Applicable

NOTE: If available, please provide an example copy of the laboratory requisition form.

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“Open the gate! It’s a big weiner dog!”

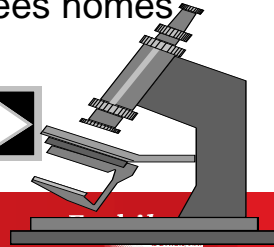
Beware Of:

- Contact from the carrier or OIG.
- Sudden delays in reimbursement.
- Complaints from patients.
- Complaints from employees.

You're Under The Microscope If:

- Medicare requests multiple medical records. (Don't worry about individual prepayment reviews.)
- You receive an overpayment letter.
- The carrier or Office of Inspector General contacts you with specific questions or seeks a meeting.
- Armed agents pop up at employees homes (or maybe office).

You are here →



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Prep Work is Key

- You need to inoculate your employees.
- The half life of the vaccine is very, very short.
- An emergency plan must include how to contact people at odd hours.

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The Subpoena

You get a grand jury subpoena from Atlanta that says "The United States Attorney requests that you do not disclose the existence of this subpoena. Any such disclosure would impede the investigation being conducted and thereby interfere with the enforcement of the law."

Interacting With Auditors

- Be friendly.
- Keep them in a room where you know what they have.
- Make sure they don't get any originals.
- Keep them in a low trafficked area.
- Take advantage of any exit conference. Involve your counsel if possible.

Telephone Calls

- Get the caller's name.
- Find out what they are talking about.
- Call the person back. This will allow you to verify the caller's identity, and gather your thoughts.

Armed Agents At the Door

- If they have a warrant, let them in.
- Do not talk to them.
- Get I.D. and call a lawyer.



Dealing With Investigations

- Agents want you to talk. They will use your:
 - Fear.
 - Confidence.
- Your biggest weapon:
 - Silence.
- Be especially wary of saying “my lawyer told me it was ok.” You will have waived the attorney-client privilege.

The Agents Are Not Your Friends:

- Don't try to convince the agent "It is all a misunderstanding."

Remember two key points:

- Medicare rules are complicated. You may have violated one without knowing it.
- To many investigators - there is no such thing as an "innocent mistake."

Know Your Rights

Agent:

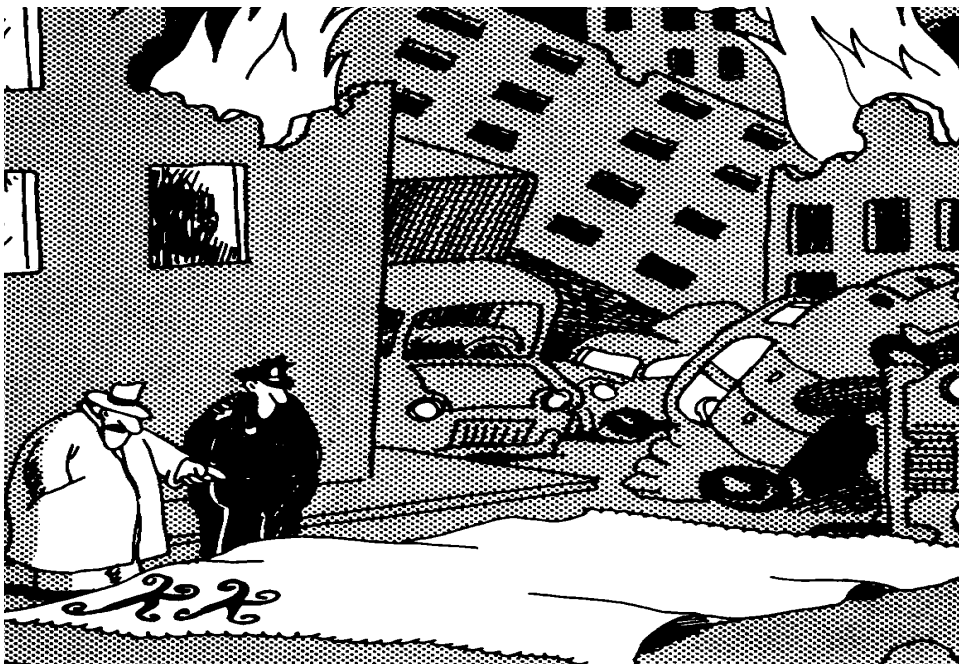
- Can't require anyone to attend interview.
- Can't obtain documents without a warrant or subpoena.
- Can't obtain privileged information.
- Can't prevent you from talking about the interaction.

Know Your Obligations:

- Cannot prevent employees from talking.
- If you talk, you must tell the truth.
- Never destroy/hide documents.

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"Take this handkerchief back to the lab, Stevens. I want some answers on which monster did this - Godzilla? Gargantua? Who?"

QUESTIONS?



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