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Surviving Healthcare Fraud Investigations: Best Practices for Managing Internal Investigations

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June 21, 2007

Conducting the Internal Investigation

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How investigation initiated determines course of action

- Compliance review or internal audit
- Patient/vendor complaint
- Fiscal intermediary/payor complaint
- Government (e.g., HHS OIG, State MFCU)

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Conducting the Internal Investigation *(cont'd)*

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First Steps:

I. Participants in Internal Review
   - Compliance officer
   - Consultants
   - Inside and/or outside counsel

II. Scope of Review
   - Define the "problem"
   - How far and where to look?

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Conducting the Internal Investigation *(cont'd)*

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Logistics:

I. Secure Data
   - Investigation/Litigation hold
   - Ensure integrity of electronic data
   - Ensure privacy/HIPAA requirements observed

II. Communication with employees:
   - Describe issues under review
   - Communicate investigation/litigation hold
   - Law enforcement/government auditor contacts

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Conducting the Internal Investigation *(cont'd)*

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Evaluate Compliance Program:

- Determine extent and nature of non-compliance (if any)
- Identify deficiencies (What went wrong?)
- Take prompt remedial measures and appropriate corrective action (without overreaction)
- Ensure proper communication and training regarding compliance with employees to ensure problem does not recur

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Privilege Issues

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Preserving privilege

- Does privilege attach?
  - Investigation started by routine audit or compliance review without counsel involvement?
  - In anticipation of litigation?
- Involvement of inside or outside counsel and at what stage?
- Drafts or initial reviews by compliance officers and/or consultants

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Privilege Issues *(cont'd)*

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Privilege waiver:

- Coerced waiver by the government (Ding, dong, the Thompson Memo is Dead)
- McNulty Memorandum treatment
  - Category I vs. Category II material
  - Application to civil DOJ or HHS OIG
- Collateral consequences of waiver
- When consider voluntary waiver

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Employee issues

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- Corporate Miranda/representational issues
- Separate counsel for employees
- Indemnification/advancement of fees
  - Voluntary/required by by-laws, contract, etc.
  - McNulty Memo treatment
  - KPMG case (U.S. v. Stein) and Olin/Dynergy
- Joint defense agreement

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Post Investigation Issues

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- Prepare report or other written record?
  - Determine audience (Board, Government, Auditors)
  - Ties into question of privilege waiver
- PR strategy, if any
- Corrective action and further review

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