Conducting Effective Investigations/
A How-To and Tales From the Trenches

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Bottom Line Up Front

• A thorough, objective, well-executed investigation can keep a potentially bad situation from getting worse while:
  ➢ Controlling the situation to the extent possible
  ➢ Restoring public trust
  ➢ Minimizing negative impact
  ➢ Protecting sources/whistleblowers
  ➢ Involving necessary parties
  ➢ Focusing on the best interests of the university
  ➢ Allowing the university to move forward
**Overview**

- Investigation techniques
  - Planning the investigation
  - Witness interviews
  - Writing the report
- Tales from the trenches

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**Investigation Planning**

- Who needs to know
- Choosing the right investigator
- Initial contact
- Investigation plan
- Setting selection
- Threat assessment

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**Who Should You Tell?**

- General Counsel
- Board of Trustees, the President, and/or Chancellor
  - Coordinate with counsel to determine how and when to make the initial notification and any updates
- Public Relations
  - In cases involving alleged serious misconduct or senior people, don’t get caught without a pre-planned public response and spokesperson
- Law Enforcement
- State’s Inspector General or other Regulators
  - Considering the topic and depth of evidence, self-reporting requirements should be evaluated
Choosing the Right Investigator

- Make sure your investigator has the skills necessary to conduct the investigation
- Effective investigations require investigators who are independent
- An investigation will not be credible unless it is both actually and perceived as independent
  - A subordinate cannot investigate his/her boss and preserve the appearance of independent judgment, even if their judgment is, in fact, independent
  - Sometimes that means looking outside the university for the investigator

Employing External Counsel

- Using external counsel to investigate in senior cases:
  - Facilitates internal and external acceptance of the outcome, whatever it might be
  - Offers the protections of attorney-client privilege with respect to information that might be included in the report or supporting documents
- External counsel can contract with independent subject matter and technical experts
  - Their work product and analysis is then protected under the umbrella of attorney-client privilege

Role of the Investigator

- The investigator must be objective and not be an advocate for the University
  - Clearly communicate the expectation for an objective, accurate investigation based on the facts compiled during the inquiry
  - Require recommendations on how to:
    - Address any issues raised by the investigation
    - Mitigate, to the extent possible, any negative internal and external impact
Investigation Plan

Determine investigation scope and develop a plan of action

- Identify investigation timelines/deadlines
- State allegations with precision
- Identify key witnesses and what interview method will work best
- Assess need for subject matter experts and other resources
- Identify/preserve/protect available evidence
- Determine the audience for the investigative report
  - Public institutions consider state FOIA laws
  - Anticipated litigation may impact investigation methods and final report

Setting Selection

- Consider time and location carefully
  - Safety
  - Proximity of interview site to workplace
  - Time of day
  - Privacy concerns
  - Neutrality
  - Comfort of the interviewee

Threat Assessments

- Safety must be a priority
  - Assess for potential of targeted violence
    - Severity and immediacy
    - Develop behavioral profiles
    - Red flags
    - Tipping points
  - Engage threat assessment team early and often
  - Safety plan!!
Witness Interviews

- Planning interviews
- Whistleblowers
- Conducting interviews
- Admonitions
  - Confidentiality
  - Privacy issues
  - Legal notices/warnings
  - Retaliation
- Questions
  - Framing
  - How-to

Planning Interviews

- Chart the order for the interviews
  - Interview the whistleblower and other witnesses first
  - The subject is usually the last person interviewed
- Understand what evidence you have and what you need, so you’ll know what questions to ask
  - Write out questions in advance, otherwise you’ll forget to ask something and you will look unprepared
  - Be objective in formulating and asking your questions and questioning – don’t approach the witnesses with preconceived conclusions
- The interviewer should have experience conducting interviews in complex cases or if senior witnesses are involved

Whistleblower Laws

- A “whistleblower” is an employee who reports a violation of the law by his or her employer
- In order to qualify for protection, a whistleblower generally must:
  - Have a good-faith belief that the employer or its employees are in some way violating the law; and
  - Report the violation to the individuals set out in the statute, typically the employer or an outside agency; or
  - Assist in the official investigation of the alleged violation
- Whistleblowers may be protected under both federal and state law

Rule #1 – Protect Whistleblowers!
Working with Whistleblowers

- Work with your source to obtain and preserve evidence:
  - Dates, times, locations, documentation, copies of emails, etc.
  - Meet off campus, after hours, whenever the person might be most comfortable
  - Don’t risk your own safety - we recommend meeting in pairs with the whistleblower
  - Have the whistleblower walk you through the information that led them to come to you

Conducting Interviews

- Recording vs. taking notes
  - Interview transcripts vs. interview summaries vs. signed statements
- Use the investigator and an assistant to conduct interviews
  - The assistant can take notes and serve as a witness to what was said during the interview
  - We prefer interviewing the complainant, the subject and other key witnesses in person, but interviews by telephone or video teleconference are okay
- Without counsel, ask the interviewee to keep the interview low key so as to not impact the integrity of the investigation or identify themselves as being involved
- Lawyers & union representatives
  - If the interviewee brings a lawyer, postpone until general counsel can participate
  - If the interviewee wants a lawyer or union representative before proceeding, allow him/her a reasonable opportunity to obtain one
  - If the interviewee says he/she has a lawyer but the lawyer is not present, consult with general counsel before proceeding and consider ethics rules if you are an attorney

Confidentiality

- Inform the witnesses and subject(s) that your inquiry is confidential and privileged (if that is the case) so you do not waive any privilege
- Request that those being interviewed keep the interview low key so as to not impact the integrity of the investigation or identify themselves as being involved
  - Subjects must be free to speak with counsel, union representatives, or others to address the allegations
  - NLRB - Employees have a right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers
  - Before requiring confidentiality, employers must first determine whether witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated and there is a need to prevent a cover-up
Legal Notices – Garrity

• Garrity warnings vary by state, but they generally tell a public employee at the start of an interview:
  ➢ The investigation is for administrative disciplinary purposes, not criminal
  ➢ The employee must answer the investigator’s questions or face possible disciplinary action, up to and including termination
  ➢ Because they are being forced to answer the questions, their answers cannot be used against them in a criminal proceeding
• These warnings highlight the importance of investigation planning – assess up front whether criminal prosecution is a possible outcome

Legal Notices – Weingarten/Spielbauer

• Spielbauer (Spielbauer v. County of Santa Clara, 199 P.3d 1125 (Cal 2009))
  ➢ Challenge to Garrity
  ➢ Employee refused to answer employer’s questions, arguing immunity can only be granted by prosecutor under court order
• Weingarten Rule (NLRB v. J. Wiengarten, Inc. 420 U.S. 251 (1975))
  ➢ Request requirement
  ➢ Employer response

Retaliation

• Retaliation harms the university’s reputation for integrity, degrades employee trust, and discredits ethics & compliance programs
• Inform witnesses, subjects and management that retaliation is prohibited by law and university policy and will be addressed if it occurs
  ➢ In Illinois, violation of the Whistleblower Act is a Class A misdemeanor
  ➢ The university may be liable for damages, including legal fees
• Employ investigation techniques that minimize opportunities for retaliation
  ➢ Protect the name of the complainant to the maximum extent allowed by law
  ➢ Speak only in terms of the “source” or “whistleblower”
  ➢ Watch he/she pronouns – offices are small and often rumor plagued
  ➢ Preserve the original whistleblower communication and immediately de-identify the information for investigative use
How to Question Witnesses

• Develop a comprehensive list of questions that begin easy and build
• Establish a rapport with the witness by creating a communicative environment
• Be pleasant, ask questions you already have the answers to, allow the subject to educate you, maintain eye contact, nod, thank the interviewee for responses, etc.
• Use open-ended questions
• Avoid leading questions

• Observe demeanor
• Push and back off in ways that allow the discussion to continue
• Witnesses have the right to not answer questions (although there may be consequences for not doing so, e.g., Garrity warning)
• If the witness confesses or says something inconsistent, repeat the response in question format to confirm

Credibility Assessment

• Standard for judging credibility
• Credibility factors
  ➢ Corroboration
  ➢ Opportunity to observe
  ➢ Consistency
  ➢ Prior bad acts
  ➢ Plausibility
  ➢ Motivation to lie
• Consider the weight you give demeanor

Reliability of Evidence

• Rules of evidence for investigations
• Primary considerations should be:
  ➢ Relevance
  ➢ Reliability
• Strive for best evidence
  ➢ Original documents, photos, recordings, etc.
  ➢ Use best efforts to authenticate
• Know when to call in a forensics specialist
Writing the Report

• Purpose and end-users of the report determine form and content
  ➢ Litigation – counsel may want facts only
  ➢ Disciplinary action – facts and recommendations, but not on specific sanctions (so hands aren’t tied)
  ➢ Internal only – may want comprehensive recommendations
  ➢ Public release – write so public will understand

• Consider interim reports or press release opportunities:
  ➢ Helps assure interested parties the matter is being handled properly and in a timely fashion

Typical Report Format

• Report format
  ➢ Executive Summary
  ➢ Background
  ➢ Allegations
  ➢ Response
  ➢ Evidence
  ➢ Analysis
  ➢ Findings

Write with the Intended Audience in Mind

Review and Follow-Up

• Before delivering your report of investigation, do a thorough review for accuracy
  ➢ High visibility investigations will be scrutinized by the media or the subject’s attorneys
  ➢ Make sure the facts are supported by evidence and that any opinions and recommendations have a valid basis
  ➢ Do not speculate or use loaded language – be objective

• Investigations are not fire and forget
  ➢ You must have an effective means of tracking the completion of any approved recommendations or you will likely face the situation again
Public Relations

- Keep Public Relations informed throughout the investigation process
- Work with Public Relations to identify who/which office will address media inquiries on the particular matter
- Develop bullet points for administrators to have in the event they need to comment
  - Tell the investigation story yourself to promote accurate reporting, preserve credibility, and to have a say in the final message

Tales from the Trenches

- Dealing with difficult parties
  - Reluctant participant
  - Overly helpful participant
  - Hostile participant
  - Difficult representatives
  - Intrusive management
  - Defective subject

Questions

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