# **COVID-19 Edition**

# Investigations: What Compliance Officers Need to Know

Christie Moon Senior Counsel, Investigations Sutter Health

HCCA Orange County June 12, 2020





# **Poll Question**

As a compliance investigator investigating during a Pandemic, I.....

- A. ... will be happy if I never see Zoom or Microsoft Teams again
- B. ... love the idea of video interviews safer, less germs
- C. ... worry about effectively investigating now
- D. ... am ready to learn to do things differently

# I. Attorney Client & Other Privileges in Investigations

- Attorney Client Privilege
- Attorney Work Product Doctrine
- Waivers and Protecting Privileges
- Corporate Attorney-Client Privilege (Upjohn)
- Quality Assurance Privilege (Evidence Code §1157, federal law)

# **Attorney Client Privilege**

#### The Basics:

Attorney-Client Privilege requires:

- 1. Communication oral or written
- 2. Made between a person who is a client and their counsel (a lawyer)
- 3. In confidence (should label and keep confidential)
- 4. For the purpose of seeking, obtaining, or providing legal advice

**REMINDER:** Client must be seeking legal advice (not just telling a secret to an attorney.)

**Note:** There is a CRIME FRAUD exception. Using an attorney client relationship to perpetrate or shield a crime eliminates the ability to assert this privilege.



## **Poll Question**

Attorney client privilege issues are applied and discussed in my organization:

- A. ... as needed and in accordance with our policies
- B. ... never
- C. ... only rarely in the VERY important cases
- D. ... only when our legal department pushes the issue

## **Attorney Work Product Doctrine**

Not as strong as attorney-client privilege but broader in scope.

Limited to preparations for litigation (or in anticipation of litigation)

Three elements required:

- 1. Documents and tangible things (such as an investigative report),
- 2. Prepared at the direction of counsel in anticipation of litigation or for trial, and
- 3. By or for a party or that party's representative.

**REMINDER:** Just because someone has a law degree (JD) after their name does not mean they can establish or assert these legal privileges.

Person must be serving the organization <u>as legal counsel</u> in order to initiate a privileged investigation.

7

# <section-header><section-header><section-header><section-header><section-header><section-header><section-header><section-header><section-header><list-item><list-item><list-item><list-item><list-item><list-item><list-item><list-item><list-item><list-item><list-item><list-item>

## **Corporate Attorney Client Privilege**

The attorney client privilege extends to corporations and organizations. This would apply to a compliance officer investigating on behalf of a health care entity when it is decided to investigate under privilege in order to provide legal counsel with the information necessary to give legal advice to the organization.

#### Elements:

- The communications were made by employees to corporate counsel who were providing legal advice to the corporation;
- The communications were made at the specific direction of corporate superiors;
- The communications concerned matters within the scope of the employees' corporate duties;

 The communications were made by the employees who were made sufficiently aware that they were being questioned by attorneys for the purpose of allowing the corporation to receive legal advice;

– And the communications were at all times treated as highly confidential when made and thereafter kept confidential by the company.

Upjohn v. United States, 449 U.S. 383, 394-95 (1981)

 $\rightarrow$  Consider Using Upjohn Warnings to establish these elements in high risk matters

9

# Privileged and Confidential Investigation Files

When an investigation is designated as privileged, investigative files should be labeled

#### "Confidential and Privileged"

- ✓Internal access, including access to the portion of the file retained in your case manageme system, should be limited to authorized individuals.
- $\checkmark$  Additional access should be limited to authorized individuals solely on a need-to-know bas
- Access to investigative files or materials by third parties should be approved by the attorney directing the investigation.

**HOT TIP:** If any investigative information is shared with a third party such as a regulator or law enforcement, an exact copy of what was shared, and all related communication should also be separately and carefully maintained in the investigative file. This should also be discussed and approved by counsel as this sharing may waive privilege for all.

All legal advice and/or attorney client communications shall be labeled and maintained as privileged and confidential.

HOT TIP: Don't do careless things that waive privilege. Be careful with "reply all" or posting on a "shared drive."

# **HOT TIP:** Quality Assurance Related Privileges

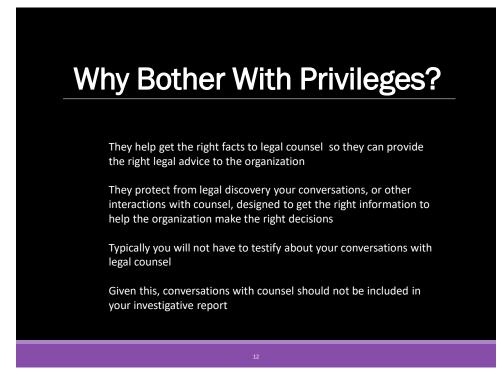
If the issue being investigated also involves patient care with possible adverse patient impact, BE SURE to loop in your risk and quality partners.

There are separate, additional privileges in this venue with additional rules and requirements.

**Example:** A drug diversion case with false charting where patient does not get pain meds as prescribed and charted.

CDPH Reportable Adverse Events - 5 days Cal. Health & Safety Code, Section 1279.1 (b) (6) (6) Criminal events, including the following: (A) Any instance of care ordered by or provided by someone impersonating a physician, nurse, pharmacist, or other licensed health care provider. (B) The abduction of a patient of any age. (C) The sexual assault on a patient within or on the grounds of a health facility. (D) The death or significant injury of a patient or staff member resulting from a physical assault that occurs within or on the grounds of a facility.

11



# **Privilege Takeaways**

#### D0:

13

- DO: email the attorney directly (use the "to" field not the "cc" field). Copy non-attorneys who need to stay informed.
- D0: be thoughtful when emailing both attorneys and non-attorneys. Consider separate emails or clearly separate legal and business questions.
- DO: state that you are seeking legal advice.
- DO: state when you are acting under the direction of counsel so that counsel can make a legal determination or provide legal advice
- DO: understand that the corporation can waive the attorney-client privilege.
- DO: mark requests for legal advice or documents created under the direction of legal counsel for the purpose of counsel providing legal advice as A/C Priv.
- DO: be thoughtful in what you mark as privileged or A/C Priv.

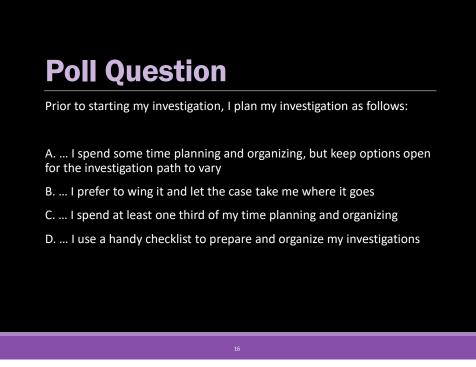
#### DO NOT:

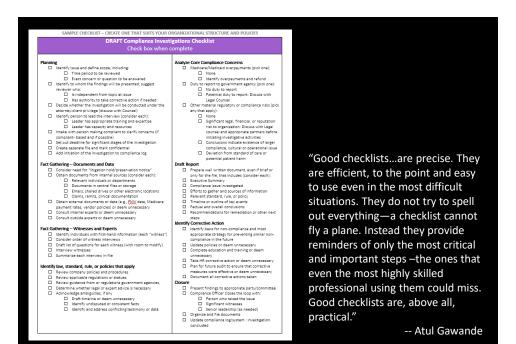
- **DO NOT:** widely circulate an attorney's email or copy multiple parties who do not need to know. Be thoughtful and analyze who should be included.
- DO NOT: disclose legal advice to third parties (e.g., "our attorney says..."). Instead just convey the company's position. This will help avoid inadvertently waiving privilege.
- DO NOT: feel you cannot copy attorneys on business/operations communications or ask attorneys for feedback on business/operational decisions, but understand privilege will not apply.
- DO NOT: forward an article or emails to a lawyer to "make" the forwarded information privileged.
- DO NOT: mark work privileged after the fact. There is no magic wand. These privileges must be initiated by an attorney or undertaken at the attorney's direction.
- DO NOT: fail to discuss requests from the government for privilege waivers with legal counsel



# Defining an Investigation

An investigation is a **fact-finding** endeavor. Investigations determine, to the best of the Investigator's ability and in good faith, what happened with respect to a particular incident – whether suspected conduct did or did not take place; what the circumstances were; who was involved; whether a violation of policy occurred.





17

# Case Study – Investigation in the time of COVID-19

Strictly Hypothetical Compliance Complaint–Investigation Needed

Anonymous person called the hospital compliance line and reported an incident at NoName Community Hospital (NNCH). Caller reports that employee Sam Smith, an RN at NNCH has allegedly stolen 44 cases of N95 Masks, and other Personal Protective Equipment (PPE) from the back loading dock at the materials management area for the hospital.

Caller alleges that the incident occurred early in the morning on Saturday April 11, 2020. There is video surveillance in that area at all times. The caller reports that this should be investigated because the nurses and first responders for the hospital badly need the PPE. Caller also offers to provide photographs of the theft event while it was occurring but seeks to remain anonymous. According to Supply Chain each case of 1000 N95 masks is currently worth \$7,000 making (total value of alleged N95 mask theft is approximately \$308,000.)

Initial review of Sam's employment status with NNCH reveals that Sam had just returned from a seven month workers compensation related disability leave on April 9, 2020, and on April 16, 2020, Sam went out on a new disability leave. Alleged cause of new leave and origin of injuries is currently unconfirmed, but Sam alleges he has a back injury related to lifting heavy boxes while at work. Sam is also employed as a Labor Representative for the California Nurses Association (CNA)/ National Nurses United (NNU) and is frequently seen on social media out protesting PPE shortages at various Orange County hospitals.

On April 20, 2020, CNA represented nurses at NNCH file a Cal OSHA complaint alleging that NNCH is failing to provide them with adequate PPE as needed to properly care for patients.

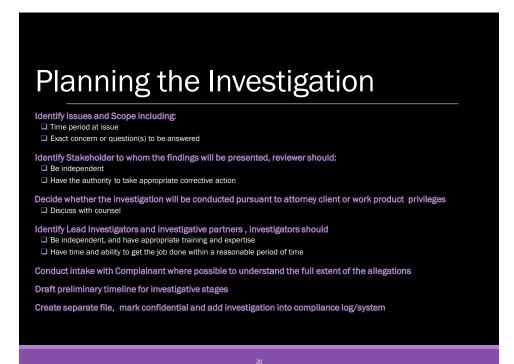
# Identifying the Issues and Scope of the Investigation

Identifying the Issues and Determining the scope of an investigation before you start investigating can help you focus and move smartly along.

Specifically, formalizing the scope of an investigation assists the investigator in gathering the appropriate information from appropriate sources.

Sample Issues:

- 1. Did Sam Smith RN steal hospital property in violation of policy (or code of conduct) when he took the 44 cases of masks and other PPE from the loading dock?
- 2. Is Sam Smith RN committing disability fraud?



# Conducting the Investigation

#### Witness Interviews

- $^\circ\,$  Establish a standard opening statement (general subject of the investigation, role of the interviewee in the investigation)
- Is there anything that would prevent you from truthfully participating in the interview today?
- Anticipate likely questions from interviewee
- $\circ~$  Be sensitive to the fact that being interviewed is generally stressful
- Try to listen more than you talk
- · Ask open ended questions initially and funnel down to specific questions
- Develop a standard closing

#### COVID-19 Tips:

- Try to conduct the background interviews via video conference where possible. But before you try this in an actual investigation, practice with a colleague.
- $^\circ\,$  Discuss in advance with the interviewee and seek to gain their confidence and comfort in your professionalism.

21

# COVID-19 Remote Interview SUGGESTIONS

If you are conducting remote interviews during COVID-19:

- 1. Practice with your interview venue or tool (Zoom, Microsoft Teams, etc.)
- 2. Discuss venue timing and process before the planned interview date/time
- 3. Expect technology glitches (face freeze, system failures, etc.)
- 4. Discuss recording rules that apply your organization and jurisdiction and whether recording will be allowed
- Discuss whether others (besides the cat) may be in the room during your interview and how interruptions will be handled.
- 6. If you will be going over documents, discuss that in advance (another reason to try video interviewing)
- 7. Start with a positive, kind icebreaker.
- 8. Address privacy and confidentiality concerns

## **Poll Question**

Since the Pandemic started in March 2020, my experiences with witness interviews include .....

- A. ... using a video option (Teams, Zoom, Skype etc.)
- B. ... interviewing by phone
- C. ... interviewing in person
- D. ... using all of the above methods.
- E. ... none yet but I'm getting ready if needed

23

## **COVID-19 Video** Interview Considerations

These will help you convey trust and professionalism

Make sure your camera and lighting put you in the best light

- Try sitting back a bit from the screen
- Make sure your lighting is good
- Avoid distractions (plan for the best but expect the worst)
- Periodically summarize what you've learned from the witness
- >Announce and formally include any partner or note taker
- Describe your actions while interviewing Note taking, phone use (don't) dropped pen

# Drafting the Investigation Report

How should it be structured?

- Beginning
  - Summary of issue(s) being investigated
  - Executive Summary of investigation
- Middle
  - Factual summary
  - Scope of the investigation
  - Evidence considered
  - Analysis of evidence
- The End
  - Findings of fact
  - Conclusions
  - Exhibits

25

# Drafting the Investigation Report

How to assess credibility

- $\,\circ\,$  Consider the following factors
  - Inherent plausibility
  - Timeline of evidence
  - Corroborating evidence (is there video tape of the incident? )
  - Actual knowledge
  - Objective factors

# Drafting the Investigation Report

#### How to reach defensible conclusions

Understand the appropriate burden of proof

- Generally, the organization has the burden to make a good faith determination based on reasonable grounds that sufficient cause existed for its conclusion
- The organization does not need to prove with absolute certainty that the events occurred, but it needs to show it acted in good faith with reasonable certainty
  - Reasonable certainty is measured by a preponderance of the evidence ... it was more likely than not to have occurred

Fifty Percent Plus a Feather

27

# Drafting the Investigation Report

Reach defensible conclusions based on facts and evidence

#### Types of conclusions

- **Substantiated:** The investigation revealed the evidence satisfies the burden of proof
- Not Substantiated: The investigation revealed the evidence did not satisfy the burden of proof
- Inconclusive: Unable to determine based on the available information (should be rare)

# Drafting the Investigation Report

Examples of conclusion phrases:

- $^\circ\,$  "A preponderance of the evidence suggests that the allegation is true."
- $^\circ\,$  "There is no evidence to support the accused took the PPE, therefore allegation is not substantiated."
- $^\circ\,$  "A preponderance of the evidence supports the employee violated Policy No. [XXX] by taking the PPE off campus. Therefore, the allegation is substantiated."
- "It was determined there is insufficient evidence to prove the employee misappropriated the PPE as alleged."

29

# Drafting the Investigation Report

#### What makes a good investigative report?

#### 1) Clear

- Clarity in language
- · Clarity in overall coherence and logic
- A good executive summary

#### 2) Complete

- · Documents all aspects of the investigation
- Addresses all issues
- 3) Concise
  - Succinct
  - Straightforward to read

# Key Takeaways for the Investigative Report

✓ Begin your investigation with an outline and use your checklist throughout your investigation

✓ Frame the investigation and your report based on the scope and policies at issue

✓ Start writing your report with background, scope and issues early in the investigation

 Strive to document your factual, timely, and thorough investigation in a clear, complete and concise report

✓Your investigation is only as good as the report you write and vice versa, your report is only as good as your investigation



# **Poll Question**

When partnering with other investigative teams in my organization, I.....

- A. ... prefer to stay in my swim lane unless I have no other choice
- B. ... stay alert for important crossover opportunities
- C. ... collaborate effectively with other teams
- D. ... worry that doing so will slow me down
- E. ... believe all of the above are true



# Example: Partnering with Other Investigative Teams

CDPH Reportable Adverse Events – 5 days Cal. Health & Safety Code, Section 1279.1 (b) (6)

(6) Criminal events, including the following:

(A) Any instance of care ordered by or provided by someone impersonating a physician, nurse, pharmacist, or other licensed health care provider.

(B) The abduction of a patient of any age.

(C) The sexual assault on a patient within or on the grounds of a health facility.

(D) The death or significant injury of a patient or staff member resulting from a physical assault that occurs within or on the grounds of a facility.



# **Understanding Investigative Partner Perspectives**





