

 Council on Licensure,
Enforcement and Regulation


2010 Annual Educational Conference - September 23-25

Is It Really All About Me? – Protecting
your Investigations from Allegations
of Impropriety or Incompetence

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Promoting Regulatory Excellence

CLEAR 2010
Annual Conference  September 23-25
Nashville, Tennessee

“Investigators and the
investigation process is
under greater scrutiny
now than ever before”

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Why?

- New investigation techniques
- Greater complexity in cases
- Continuing evolution of rules and legislative requirements
- Sometimes there is little or no defense on the merits of the case
- Investigators are human & make mistakes

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Key Areas of Concern

- Bias
- Conflict of Interest
- Breach of confidentiality
- Misrepresentation
- Incompetence
- Misconduct


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Reflect


- Take a look at your practice and ask yourself:
 - Do I cut too many corners
 - Have I dodged a lot of bullets
 - Do I worry when some of my cases are being reviewed for prosecution
 - Am I lazy sometimes


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Allegations of Bias





WHILE DOING THE RESEARCH, KEEP IN MIND THERE ARE ONLY TWO KINDS OF FACTS... THOSE THAT SUPPORT MY POSITION... AND INCONCLUSIVE.


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<h3>Allegations of Bias</h3> <ul style="list-style-type: none">• Racial profiling• Gender profiling• Influenced by past history• Language bias• Failure to consider alternative theories• Aligning yourself with the position of a particular party		


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<h3>Case Study - Bias</h3> <ul style="list-style-type: none">• At a hearing the defense attorney attempts to make a motion that the case should be thrown out since it was referred for a hearing based on skewed and biased information provided by the investigator		

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<h3>Case Study - Bias</h3> <ul style="list-style-type: none">• The lawyer goes on to point out several excerpts from the report:<ul style="list-style-type: none">- "Mr. Jones admitted he didn't like the complainant"- "Mr. Jones laughed at the victim"- "Mr. Jones has a history of aggressive behaviour"- "There is clear evidence to demonstrate the complainant's allegations"- "The investigator questioned Mr. Jones again as his credibility was in question"		

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<h3>Case Study - Bias</h3> <ul style="list-style-type: none">• The defense attorney then gets the investigator on the stand to go over his handwritten notes from the subject interview and asks for commentary on the following:<ul style="list-style-type: none">- "He's lying"- "yeah right"- "dirt bag" (this one is crossed out but can be read if the paper is held up to the light)		

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<h3>Avoiding Real or Perceived Bias</h3> <ul style="list-style-type: none">• Note taking in interviews - avoid comments or your own thoughts• Avoid comments that could be misconstrued• Ask questions near the end such as, "is there anything else you can tell me that might help me better understand the situation"		

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<h3>Avoiding Real or Perceived Bias</h3> <ul style="list-style-type: none">• Always document what you did do as well as what you didn't do and why• Be very careful of the language you use in reports		

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Conflict of Interest

A conflict of interest arises when a person has competing interests or loyalties that either are, or potentially can be, at odds with each other. A conflict of interest may cause a person to experience a struggle between diverging interests, points of view, or allegiances.

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Conflict of Interest



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Allegations of Conflict of Interest

- Failing to declare potential conflicts
 - E.g. A party to the process is a former colleague
- Allegation you are bought and paid for
- An in house investigator assigned to investigate another in house staff person or committee member

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Case Study - Conflict of Interest

- A defense lawyer in cross examination asks you who pays your salary or your invoices and then implies you are biased since only a "successful investigation" will ensure your future employment and or success

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Avoiding Real or Perceived Conflict of Interest

- Ask yourself if you can be objective
- If you have any doubt about a conflict report it to the appropriate person
- Remember it doesn't have to be real to be a problem. It's about perception as much as anything
- Be prepared to be challenged if you testify

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Breach of Confidentiality

- Providing inappropriate information about the subject with other witnesses
- Providing confidential documents to others
- Losing documents or failing to secure them properly
- Allowing others to hear what is being said
- Attempting to obtain information that may not be relevant to your case

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Case Study - Confidentiality

- Hooper v. College of Nurses of Ontario, [2006] O.J. No. 2696 (Div. Ct.)
- Elaine Hooper was terminated from her employment related to incidents of professional misconduct
- The investigator requested her Occupational Health File and it was provided
- The member argued there was no authority to provide the file

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Case Study - Confidentiality

- The court disagreed with the member and stated the investigator had the authority based on:
 - Her powers of investigation under the statute
 - The fact that the documents sought were relevant to the investigation
 - That disclosure in the public interest takes precedence over protection of a person's personal health information

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Avoiding Allegations of Breaching Confidentiality

- Know all the various privacy legislation that applies to your investigative work
- Understand your organizations interpretation of that legislation and how your powers of investigation may be impacted
- Know what can and cannot be shared in the course of your duties

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Avoiding Allegations of Breaching Confidentiality

- Consider a personal policy of sharing information on a "need to know basis"
- Ensure the appropriate level of privacy when interviewing
- Keep information appropriately secured
 - Evidence and other materials

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Misrepresentation

An investigators career is dependent on maintaining their integrity and credibility in the eyes of others

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Allegations of Misrepresentation

- Concealing facts or evidence
- Concealing facts about evidence
- Manufacturing evidence
- Lying in a report
- Lying to a client or supervisor...
- Perjury

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Case Study - Misrepresentation

- An investigator writes a report and in it states that there were no other witnesses who corroborated the statement of the subject
- The investigator missed one witness who was unknown at the time of the investigation
- Defense counsel later produced that witness and alleged the investigator lied in his report and purposely withheld the one person who supported the subject

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Avoiding Allegations of Misrepresentation

- Don't lie. This is a no brainer right?
- There is rarely a reason to lie as part of an investigation with two exceptions
 - Undercover
 - Interrogation (rare in most regulatory investigations)

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Avoiding Allegations of Misrepresentation

- Always ask other interviewees (including the subject) if they are aware of other potential witnesses that may help you understand the facts
- Be careful and aware of how and what you write. It may be subject to "spin" later
- Avoid being in a position where you feel the need to cover your tracks

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Allegations of Incompetence

- Poor Record keeping & note taking
- Poorly handled evidence
- Inaccurate or unclear report writing
- Failure to consider all the sources of information
- Timing - Unnecessary Delays

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Case Study - Incompetence

- Investigator completes a case and submits his report
- 1.5 years later at a discipline hearing a witness testifies the investigator never spoke to her.
- The notes of the interview were lost along the way (not sure by whom)

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Case Study - Incompetence

- The interview took place on the telephone
- Telephone records are checked and the witnesses number was there
 - Good thing it was LD
 - What if interview was in person
 - How could you prove you conducted the interview

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Avoiding Allegations of Incompetence

- Understand your mandate and powers and stay within them at all times
- Try to take notes legibly
- Implement appropriate evidence procedures and follow them!
- Stay organized and use some form of case management

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Avoiding Allegations of Incompetence

- Ensure you have a backup for documentation in the event of it being misplaced:
 - Scanning
 - Extra copies
 - A log to enter all interviews and documents gathered


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Misconduct

Insert Video Here

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<h3>Misconduct</h3> <ul style="list-style-type: none">• "There is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice ..."• - <i>U.S. v. Jannotti</i>, 673 F.2d 578, 614 (3d Cir. 1982)		


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<h3>Allegations of Misconduct</h3> <ul style="list-style-type: none">• Coercion• Threats• Extreme prejudice (knowingly being biased)• Intimidation• Surveillance abuse		

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<h3>Case Study Misconduct</h3> <ul style="list-style-type: none">• An investigator is on the stand and being cross examined• The defense counsel asks, "Isn't it true that you threatened my client and said if he didn't come clean - you would bury him"• He goes on to say, "but when that didn't work you then convinced my client that if he just admitted his involvement the whole thing would go away"		

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Avoiding Allegations of Misconduct

- Obviously don't do things that you know are questionable
- Consider taping interviews to protect against false allegations
- Be careful when asked questions such as:
 - What is the likely outcome of all this
 - Am I in big trouble here
- Never make promises of any kind


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Avoiding Allegations of Misconduct

- Understand the laws and your organizations policies regarding surveillance
- Establish some standard responses to questions you know you will receive frequently
- Be consistent in your approach as much as possible
- Seek advice when questionable moments arise


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Report Writing

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Key Objectives for Reports

- Objective
 - Neutral presentation of the facts only
- Clear
 - Easily understood with no potential for misinterpretation
- Thorough
 - Includes all information needed to reach a decision

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Key Objectives for Reports

- Accurate
 - The content reflects the facts as gathered
- Professional
 - Speaks to the credibility of the investigator

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Style and Tone

- Simple
 - Avoid using language that overcomplicates the information
- Direct
 - The reader should be able to readily recognize and find the relevant facts
- Neutral
 - Avoid colourful or judgmental language

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Word Choice

- Language should reflect that used by the organization e.g., licensee, member or registrant
- Understand the commonly accepted terms and phrases of the organization
- Avoid jargon
- Include commonly used acronyms, but explain them first



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Writing Example

Mr. Jones was asked about his use of profanity in the presence of the child. While he denied using foul language, he admitted he was loud and intimidating.


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Writing Example

Mr. Jones was asked if he used any profanity in the presence of the child. He stated he did not use profanity, but was "loud" and "may have been intimidating."


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Testifying

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Tips For Testifying

- Speak slowly and clearly
- Don't be afraid to think before you answer - Don't rush
- Look at the triers of fact when answering questions
- Be yourself but avoid using jargon or slang

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Tips For Testifying

- Be cautious with technical terms or acronyms
- Provide succinct answers that are responsive
- Remember the cornerstones of your role:
 - Neutrality, impartiality, objectivity, and professionalism

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Tips For Testifying (Cross Examination)

- Don't be defensive
- Don't lose your temper
- Be aware of your facial expression
- Listen carefully to what is being asked
- Don't be afraid to say "I don't know," "I don't recall," or "I don't understand the question," if that is the case

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Tips For Testifying (Cross Examination)

- Provide succinct answers that are responsive
 - Don't over answer the question
 - Don't try to anticipate where the questioner is going
 - Don't slip in the "dirt" if the question does not call for it
 - Remember - If necessary the prosecutor will get to re-examine you.

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Summary

- Six areas of vulnerability:
 - Bias
 - Conflict of Interest
 - Breach of confidentiality
 - Misrepresentation
 - Incompetence
 - Misconduct

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<p>Summary</p> <ul style="list-style-type: none">• Be aware that the investigator can be investigated• Reflect on your practice and your limitations• Work at improving in those areas• Consider peer review where possible• Remember we are all human and we make mistakes. Own up to them. Don't jeopardize your integrity & credibility		

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 BENARD + ASSOCIATES Thank you for your time! Dean Benard 1-888-733-2226 519-880-0722 dbenard@benardinc.com www.benardinc.com		
