

CONDUCTING AN INTERNAL INVESTIGATION

Training for L&E Practice Group

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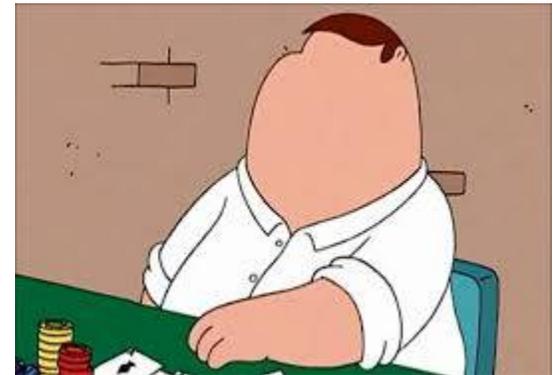
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ATTORNEYS AS INVESTIGATORS

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SPECIAL CONSIDERATIONS WHEN ATTORNEYS INVESTIGATE

- Essential to understand your role and be clear about it to witnesses
 - As advocate
 - As unbiased and impartial investigator
 - Consider privilege issues
- Different skills employed
 - Develop your poker face
 - No leading questions
 - Ignore the advice
 - “Don’t ask a question you don’t know the answer to”
 - Your job is to get the facts
 - The good, the bad the ugly
 - We can be intimidating, so need to temper this
 - But not be a pushover



HOW YOUR LEGAL SKILLS COME IN HANDY

- We are great at following up
- We are great at critical analysis
- We are great at reading between the lines
- We know what the key issues are and can avoid get mired in the weeds
- We are used to thinking on our feet
 - Think of that “hot bench” at oral argument
- We understand the importance of the written report
 - We are trained to review facts
 - Compare those facts to the law
 - Come to a conclusion based on both
- We understand the pitfalls of sloppy report writing -- or you will at the end of this presentation
- We know the value of preparation

QUALITIES OF AN EFFECTIVE INVESTIGATOR

- Impartiality, fairness, and objectivity
- Integrity and courage
- Analytical ability
- Empathy, sensitivity, perceptiveness, and general emotional intelligence
- Persistence
- Tough-mindedness
- Quickness
- Patience
- Common sense
- Be able to leave your ego out of it
- Subject matter and investigative expertise
 - Know what the federal, state or local laws and case law say about the subject matter of the investigation

WHAT WE WILL COVER

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TOPICS TO BE COVERED

- Understanding the purpose of the investigation
- Preparing for an investigation
- Conducting an effective interview
- Uncooperative witnesses
- Recording witness statements
- Confidentiality
- Common mistakes made during witness interviews
- Documentation of investigation
- Privilege Issues

DIFFERENCES BASED ON INVESTIGATION TYPE

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CRITICAL TO DETERMINE THE TYPE OF INVESTIGATION BEING PERFORMED

- What is the purpose of the investigation?
 - Internal investigation for a client pursuant to their workplace policies
 - Investigation in anticipation of litigation
 - Investigation after litigation commenced
- How will the investigation results be used?
 - To respond to workplace complaint and as basis for a corrective action, if appropriate
 - Self-audit
 - As a defense to potential legal proceeding
 - To assist in litigation
- The type of investigation is important as it may determine whether the results of the investigation are privileged or not

GOALS FOR ACHIEVING AN EFFECTIVE INVESTIGATION – BEST PRACTICES

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KEY CONCEPTS FOR AN EFFECTIVE INVESTIGATION

- Don't wing it!
- Planning and organization
- Yes you must be prompt – but you need to be strategic and plan
- Pre-investigation planning:
 - Assessment of the purpose and objectives of the investigation
 - Review of relevant employer policies and procedures
 - Review relevant personnel files
 - Identification of the questions to be resolved
 - Identification of order and timeline for interviews
 - Preparation of tentative list of questions and topics to cover
 - Create consistent opening statement for use with witnesses
 - Select quiet and private interview location
 - Document your planning in a “Preliminary Investigation Plan”

THE INVESTIGATION AS A DEFENSE TO A CLAIM

- Our case law says that to avail themselves of a defense to harassment the employer must
 - Have an anti harassment and discrimination policy
 - It must be widely disseminated
 - Have a complaint procedure
 - The policy must be EFFECTIVE
- How does the employer demonstrate effectiveness?
 - Its complaint process is accessible
 - Employees are not afraid to use the complaint process
 - The employer reasonably investigates complaints
 - The investigation is demonstrably thorough and fair to all
 - And the employer takes prompt remedial action

MEANS OF DEMONSTRATING EFFECTIVENESS

- Prompt:
 - U.S. Supreme Court instructed in *Meritor Savings Bank v. Vinson* that employers must take “prompt” and effective action to remedy sexual harassment
 - Juries want “promptness” in starting the investigation and concluding it
 - Consider whether you should recommend to the client to take interim measures before the investigation is complete to alleviate distress or for safety issues
- Thoroughness
 - Identify the witnesses and key facts
 - Do not ignore substantial contradictions
 - Review what you have done compared to your pre-planning

FAIRNESS CONCERNS

- Fairness in all aspects of the investigation and in corrective actions
- Does the punishment fit the crime?
- What about zero tolerance policies?
- Investigation must be accurate to be fair
 - Press for details: times, dates, places, and facts underlying “beliefs” or “feelings”
- Unbiased – do not pre-judge – keep an open mind throughout the investigation



OBJECTIVES IN CONDUCTING INVESTIGATIONS

- For an internal workplace investigation
 - Gather facts and relevant evidence, so that appropriate employment action can be taken
 - Act of investigating may assist the employer in avoiding liability
 - Demonstrate commitment of employer to its employment policies
 - Demonstrate the employer's seriousness in addressing issues of possible misconduct
- For litigation purposes
 - Pin witnesses to facts, before there is an opportunity to collaborate or to conform their stories to the evidence
 - Obtain information that may assist the employer in defending against employment claims
 - Provide a defense by insuring a prompt and effective investigation

OPENING STATEMENT FOR WITNESS INTERVIEWS

- Attempt to put the witness at ease
- Explain the reason for interview
- Explain the importance of truthful and complete information
- Explain the confidentiality rules that apply
- Explain the employer's rules against retaliating and the procedure for reporting retaliation

ORDER OF INTERVIEWS

1. The Complainant or Reporting Employee
2. Witnesses identified by the Complainant/Reporting Employee or known to the employer

Then ... Review tangible evidence relevant to the information that you have obtained (e.g. – time cards; emails; surveillance tapes)

3. The Accused/Responding Employee
4. Witnesses identified by the Accused/Responding Employee
5. Witnesses who may have contradictory information or where there is a need for clarification
6. The Complainant/Reporting Employee to review contradictory information or obtain clarification

INTERVIEWING THE COMPLAINANT

- Start with open-ended questions
- Ask specific questions designed to elicit specific details
- Drill down with pointed questions to elicit the response to core areas
- Ask for identification of witnesses or other persons with knowledge
- Ask for physical evidence – texts, emails, notes, voicemails, pictures
- Inquire into possible biases or motives to lie
- Ask if there is anything that the Complainant wishes to add
- Ask the Complainant to report any additional relevant information that he/she subsequently remembers
- Advise the Complainant that the employer will inform him/her of the results of the investigation
- Ask the Complainant to report any retaliation immediately

BRAINSTORMING

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BRAINSTORMING #1 – THOUGHTS ON INTERVIEWING THE COMPLAINING EMPLOYEE



ISSUES THAT ARISE WHEN INTERVIEWING THE COMPLAINANT – OR REPORTING EMPLOYEE

- Late reporting
 - We are accustomed to viewing late reporting as an indication of a lack of credibility
 - This is NOT always the case – psychologists and trauma specialists provide cogent reasons why there may be a delay and where the employee may even go on to act “normally” where you think there might be a more dramatic response
- Re-traumatizing the victim
 - Be sensitive to how you ask questions
 - Tone of voice
 - Nature of the question
 - Calling it an allegation, contention, claim may indicate you don’t believe him/her
- Do not over promise – be careful with what you convey as next steps

WHY IS THERE A DELAYED REPORT?

- Reporting employee may fear not being believed or suffering retaliation
- Reporting employee may feel shame and humiliation
- If the responding employee is within the same “social sphere” fear that others will side with him/her especially if there he or she is well-liked, respected member of the organization
- In-balance in the power hierarchy
- Fear of having to deal with the person or the organization going forward
- Depending on the severity of the conduct – changes to the body and the brain during trauma
 - Rational thoughts can be impaired
 - Memories can become fragmented
 - Body and mind’s protective response
- **BOTTON LINE** – many complicated factors that might make reporting delayed and why others join in after someone comes forward

INTERVIEWING THE ACCUSED – OR THE RESPONDING EMPLOYEE

- Start with open-ended questions
- Proceed to specific questions, based on the information already obtained
- Ask about motives for the Complainant to lie or to be confused about the issues
- Ask if there is anything that the Accused wishes to add
- Ask about witnesses
- Ask for physical evidence – texts, emails, pictures, notes, voicemails
- Ask the Accused to report any additional relevant information that he/she subsequently remembers
- Instruct the Accused not to discuss the investigation with others
- Repeat the admonition against retaliation

HYPOTHETICALS

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HYPO #1 – I DON'T WANT TO BE INTERVIEWED

You have identified Tom as a possible witness in the investigation of the sexual harassment allegations against Jim. Tom and Jim are buddies. You call Tom in for an interview. Tom tells you that he is not a “snitch,” and Tom refuses to answer your questions.

What should you do?

- A. Don't let Tom leave the conference room until he spills the beans
- B. Force Tom to speak to you on threat of termination
- C. Try to persuade Tom to speak to you

BRAINSTORMING #2

- Discussion of ideas to assist reluctant witness in cooperating in the investigation



DEALING WITH AN UNCOOPERATIVE WITNESS

- Ask the employee why he or she is refusing to cooperate
- Attempt to alleviate the employee's concerns
- Discuss the policy and how it works – dependent upon employee cooperation and engagement
- Discuss confidentiality – need to know -- will not attribute specific information to specific individuals
- Advise the employee of the consequences of continued non-cooperation
- Instruct the employee to cooperate
- Document the event if there is continued lack of cooperation

HYPO #2 – WHEN THE ACCUSED IS UNCOOPERATIVE

You bring Jim in for an interview. He is aware that you are investigating sexual harassment allegations against him. He says that he hasn't done anything wrong, but that he doesn't believe that he will get a "fair shake" in the investigation, because employers "always believe the woman when a man is accused of harassment." He tells you that he has decided to invoke his Fifth Amendment privilege not to speak. He also says that he wants to have his attorney present before you speak with him further.

What should you do?

- A. Do not allow Jim to assert his Fifth Amendment privilege, and do not allow him to have his attorney present
- B. Allow Jim to assert his Fifth Amendment privilege, but do not allow him to have his attorney present
- C. Do not allow Jim to assert his Fifth Amendment privilege, but allow him to have his attorney present
- D. Allow Jim to assert his Fifth Amendment privilege, and allow him to have his attorney present

LEGAL RIGHTS OF THE ACCUSED

- No Fifth Amendment privilege against self-incrimination
- No right to legal representation
- No Miranda rights
- Weingarten right to representation by union or fellow employee, if the employer is unionized
- Weingarten right to representation by a fellow employee, even if not unionized, where discipline may be imposed

BRAINSTORMING #3

- Discussion of ideas to assist the Accused/Responding Employee to cooperate



INTERVIEWING THE UNCOOPERATIVE ACCUSED

- If the Accused invokes the Fifth Amendment
 - Advise him/her that the Fifth Amendment prohibits only the government from compelling testimony
 - Advise him/her that an employer may discipline or discharge employees for refusing to provide information
- If the Accused demands legal representation
 - Advise him/her that there is no right to legal representation
 - Do not grant the request for legal representation
- If the Accused refuses to answer or is evasive
 - Tell the accused that it is in his/her best interest to cooperate, as a failure to do so will leave the allegations unrebutted
 - Warn the Accused that he/she could be subject to discipline or discharge, for insubordination, for refusing to cooperate

SHOULD YOU RECORD THE INTERVIEW?

- Advantages
 - Preserves the witness' statement, in his/her own words
 - Minimizes the likelihood of allegations that the witness' statement was coerced
 - Helpful to law enforcement, if criminal charges are filed
- Disadvantages
 - May cause the witness to be less forthcoming
 - Requires the witness' consent, in many jurisdictions
 - May result in the recording of unrelated information that the employer may not wish to record

SHOULD YOU OBTAIN WRITTEN STATEMENTS?

- Advantages
 - Preserves the information provided by the witness
 - Assists with further interviews
- Disadvantages
 - Witness may be less forthcoming, if asked to put facts in writing
 - Can slow down the investigation
 - Creates discoverable record of potentially harmful evidence
 - Less candid responses – can be wordsmithed to produce a more favorable impression

CONFIDENTIALITY

- When interviewing, ask the witness to maintain the confidentiality of the information discussed during the interview
- Explain why confidentiality is important
- Do not promise that the employer will maintain the confidentiality of the investigation
- Explain that the employer will attempt to maintain confidentiality, but that the employer may need to reveal certain information in order to conduct a proper investigation
- Reveal information to witnesses only to the extent necessary to obtain information from them
- Reveal information to management only on a need-to-know basis

WHAT ABOUT THE NLRA

- Employees are entitled to talk about the terms and conditions of their employment and to do so collectively
- What impact does this right have on your request for witnesses to maintain confidentiality?



- Can the employer discipline employees who disclose information?

COMMON MISTAKES DURING INVESTIGATORY INTERVIEWS

- Doing the interview alone
 - Sometimes mixed gender interviews are preferred
 - Preferable to have two interviewers – one taking notes, the other questioning
 - This avoids “I said vs. investigator heard”
- Approaching the interview with a closed mind
- Disclosing the evidence before questioning the witness
- Making admissions harmful to the employer
- Promising confidentiality or making other promises about the anticipated outcome
- Demonstrating bias

HYPOTHETICALS

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HYPO #3 – SEARCHES

Based on information that you have obtained during witness interviews, you suspect that Jim has pornography in his desk. You also believe that there are e-mails on the Company's email system that corroborate that he has made sexually-inappropriate comments. Jim keeps his desk locked and has the only key. The Company informs employees that their emails may be monitored, but Jim has changed the password on his computer so that you cannot access his e-mail.

What should you do?

- A. The Company may not search Jim's desk or examine his emails, because he has an expectation that the contents of his desk and his emails are private
- B. The Company may search his desk, but not examine his emails
- C. The Company may not search his desk, but you may examine his emails
- D. The Company may search his desk and examine his emails

WORKPLACE SEARCHES

- The employer should put employees on written notice that personal property may be searched
- Advise employees that they should not expect privacy with regard to items in their lockers, desks, purses, backpacks, and briefcases
- Maintain a written policy advising employees that the Company will search Company property and personal belongings, where appropriate in furtherance of Company investigations
- Search only when there is a compelling business reason to do so
- Conduct the search in the least intrusive manner possible
- Document the circumstances, the need to search, and the steps taken to minimize intrusion

THE ELECTRONIC WORKPLACE

- Investigating computer activity is often essential
- Factors in determining whether an employee has a reasonable expectation of privacy regarding his/her work computer
 - Whether the employer maintains a policy banning objectionable use
 - Whether the employer has placed the employee on notice that the employer monitors employees' computer usage, or the employee was otherwise aware of the monitoring policies
 - Whether the employer actually monitors employees' computer usage
 - Whether the Company's IT Department or outside vendors have the right of access to the employee's computer
 - Whether the employee has consented to the inspection of his/her computer, either through a signed acknowledgment or notification

THE DETERMINATION

- Review all of the evidence
- Consider the type and quality of the evidence (e.g.- personal observations v. mere rumor or gossip)
- Consider the quantity of the evidence
- Assess witness credibility
- Consider biases and motives of the witnesses
- Proof to an absolute certainty or beyond a reasonable doubt is not required
- Make the best judgment that you can based on the information obtained and on your own experience and intuition

DOCUMENTATION OF THE INVESTIGATION

- Maintain legible notes of any interviews conducted (work product)
- Maintain any witness statements obtained
- Maintain any evidence obtained
- Document communications made during the investigation regarding confidentiality and non-retaliation
- Document any corrective or other remedial action that was taken or recommended
- Document the report that was made back to the Complainant
- Consider possible preparation of a final investigatory report
- Maintain documents, other than disciplinary documents, relating to the investigation in a file separate from personnel files

INVESTIGATORY REPORTS

- Should a report be prepared in all cases?
- Should the report be written or oral?
- Should the report include only facts and conclusions, or should it also include recommendations?
- Is there a difference when the investigation is pre-litigation?



PREPARING THE REPORT FOR WORKPLACE SEARCHES

- The person preparing the report should be mindful of the fact that the report could be used by or against the Company in litigation
- The report should contain
 - Background information
 - An explanation of the situation prompting the investigation
 - An explanation of actions that were taken to investigate
 - Identification of the witnesses interviewed
 - Identification of the documents reviewed
 - Significant, relevant documents should be attached



THE REPORT CONTINUED ...

- The report should include statements and conclusions that are supported by the facts, reasonable inferences from the facts, tangible evidence
- Avoid assumptions
- Avoid “opinions”
- Avoid pejorative statements
- It is okay to assess credibility – but explain why you have assessed credibility the way you did



PREPARING THE REPORT CONTINUED...

- The report should identify the date and author of the report
- The report should be prepared in a manner that would educate a person who has little familiarity with the Company or with the employees involved in the investigation
- The report should not include admissions
- The person preparing the report should consider attorney-client privilege issues



LET'S PRACTICE – THE REPORT

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THE REPORT – SPOT THE ERRORS

- Report: The complainant, Mary, wore a revealing shirt with low cleavage to the interview. The manner in which the complainant dresses may have led to the comments by George about how sexy she looks at work.
- Any Better? The complainant, Mary, was not wearing appropriate business attire for work. No wonder George commented on her appearance and said she looked like she was going to the club.
- How about now? The complainant, Mary, was not wearing appropriate business attire for work. Our policy prohibits female employees from wearing tank tops or other revealing dress in the office.
- Why? Why does the report address Mary's dress? Does this "fact" go to any of the issues in the complaint? If so, include it. If it is extraneous, exclude it.

THE REPORT AND LEGAL CONCLUSIONS

- Report: Based on my interviews of Mary, the complainant, and the accused Tom, and witnesses Sally and Sam who corroborated Mary's version of events, I conclude that Tom sexually harassed Mary.
- What's wrong with this picture?
- How do we say this better?

REPORT REVISITED

- Report: Based on my interviews of Mary, the complainant, and the accused Tom, and witnesses Sally and Sam who corroborated Mary's version of events, I conclude that Tom sexually harassed Mary.
- Is this better? Based on my interviews of Mary, the complainant, and the accused Tom, and witnesses Sally and Sam who corroborated Mary's version of events, I conclude that Tom violated our company's workplace policy.

AVOID LEGAL CONCLUSIONS

- Keep in mind that your report may be evidence
 - To show effective anti discrimination and harassment policy
 - Effective complaint procedure
 - Your company's commitment to its workplace policies
 - Took prompt action to investigate
 - Took corrective action to remedy the problem
- Do you really want your report to admit to sexual harassment?
- Sexual harassment is a legal determination
 - Elements of harassment must be met
- Your investigation is to determine if there is a violation of company's policy and whether corrective action is required

DESCRIBING YOUR CREDIBILITY DETERMINATION

- Report: Mary and Tom had two different versions of what happened at the bar following the meeting with a client. I believe Mary because men always lie when they are married and hit on other women.
- Okay?
- Report: Mary and Tom had two different versions of what happened at the bar following the meeting with a client. I believe Tom because Mary admitted that she had three glasses of wine and I think she was probably tipsy. Tom said he only had one beer, although Mary said he had four beers, but she was tipsy so I do not think she can be accurate.
- Any better?

CREDIBILITY

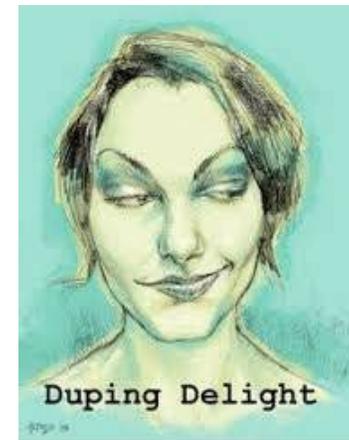
- Report: Mary and Tom had two different versions of what happened at the bar following the meeting with a client. Mary was able to provide details of the events such as where they were sitting, others present, topics of discussion, what they each were drinking, the name of the bartender, and when the client left. I questioned Mary two times and her version of events was consistent. Tom could not provide any details. I interviewed him twice and his version of events differed during the two interview sessions. In the first session, Tom denied touching Mary at all. In the second session, Tom admitted to touching Mary's arm a few times and commenting on her perfume.
- Based on the manner that Mary and Tom responded to interview questions, Mary was more credible. She provided details and was consistent. Tom could not provide details and his version of events materially differed, including admitting to conduct that Mary complained about.
- Thoughts?

LYING – HOW CAN YOU TELL?

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HOW TO DETECT LYING

- Research says generally we are terrible at detecting lies
- Purpose of our discussion is not to make us experts at detection, but to generate awareness
- Article from Dr. Paul Ekman gives us some insights
- Sign #1 – Duping Delight



- Speaker has “microexpression” such as a smile or excited fidgeting that results from anticipation of a successful lie. Feeling like he/she got away with something gives the liar a thrill of pleasure. Look for half-suppressed smile at the end.

DUPING DELIGHT REVEALED

[A Recent Example](#)

LYING

- Sign #2 – Gaze Aversion
 - Reducing eye contact, or breaking off eye contact.
 - Change in the character of eye contact
 - Went from averting eyes to staring
 - Looking forward to away



NON-CONGRUENT GESTURES

- Sign #3 – Non-Congruent Gestures
 - Words saying one thing, but the body is unconsciously gesturing something else
 - Example: No, I did not send her a naked picture, paired with a subtle nod of the head.



MORE ON DETECTING LYING

- Sign #4 – A story in strict chronological order
 - Liars memorize or rehearse their story. To check, ask the witness to tell the story from the end to the beginning and mix it up.
- Sign #5 – Story is convoluted or overly complicated
 - The suspected liar uses way too many words or overly formal phrases to explain



MORE LYING - DISTANCING

- Sign #6 – Distancing
 - A truth teller names “names” where a liar uses impersonal phrases or pronouns
 - Doesn’t refer to the person by name: “its he, she, etc.”
 - Other examples are physically distancing from the examiner

FAMOUS EXAMPLE OF DUPING AND DISTANCING

What did he just say?

CONCLUDING THE INVESTIGATION

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ENDING THE INVESTIGATION

- Be clear what your role is in concluding the investigation
- Just reporting the events that occurred and your conclusions based on the investigation?
- Are you tasked with making recommendations for discipline or other remedies?
- Are you the decision-maker with respect to remedies?

REMEDIES

- Advice on remedies
- Be consistent in the application of policies and practices
 - What has the organization done in the past
 - Is this the Accused/Responding Employee's First infraction
- If issuing discipline, remember that the purpose of disciplinary action is to
 - Deter the employee and others from engaging in similar conduct in the future
 - Establish a basis for more severe discipline, if the employee engages in further misconduct
 - Communicate to employees that certain types of conduct are unacceptable
 - Demonstrate employer commitment to its workplace policies
 - Help the employer avoid liability, if the employee should engage in further misconduct

QUESTIONS/COMMENTS?

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RESOURCES

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SAMPLE FORMS

- L&E Practice Group Directory in Forms Sub-Folder
 - #219586132 – Checklist for investigations
 - #2195686140 – Checklist for assessing credibility
 - #219586162 – Investigation pre-planning worksheet
 - #219586175 – Checklist for preparation of the report

THANK YOU!



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