



204: Conducting Effective Internal Investigations

Michael R. Booden

Attorney

United States Postal Service

Marc Gary

Vice President & Associate General Counsel

BellSouth Corporation

Daniel E. Karson

Senior Counsel, Executive Managing Director

Kroll Inc.

Charles Wm. McIntyre

Partner

McGuireWoods LLP

Gretchen A. Winter

Vice President and Counsel, Business Practices

Baxter International Inc.

Faculty Biographies

Michael R. Booden

Michael R. Booden is an attorney with the United States Postal Service concentrating in labor relations and employment-related litigation.

Prior to joining the United States Postal Service, Mr. Booden was the senior associate general counsel to the ABA in Chicago. In addition to providing counsel and advice to all levels of management with regard to labor relations and employment law, Mr. Booden has served as either first or second chair in a number of trials in state and federal courts and before administrative judges. He has also authored several appellate briefs and represented his clients before state and federal appellate tribunals. Upon graduation from law school, Mr. Booden served as a judicial clerk to Justice John J. Stamos, who formerly served on the Illinois Appellate and Illinois Supreme Court.

He is chair of ACC's Litigation Committee and president of ACC's Chicago Chapter. He has also served for several years as chair of the corporate law departments committee of the Chicago Bar Association.

Mr. Booden received his BS from Northern Illinois University and his JD from John Marshall Law School.

Marc Gary

Marc Gary is vice president and associate general counsel of BellSouth Corporation, a Fortune 100 telecommunications company headquartered in Atlanta. He is responsible for the company's litigation, antitrust, labor and employment, bankruptcy, and compliance matters. He is also the chief legal officer for the company's wholesale (interconnection services) operation.

Before joining BellSouth, Mr. Gary was a partner in the firm of Mayer, Brown & Platt, where he served as chair of the litigation practice in the Washington, DC office. He focused his practice principally in the areas of antitrust, securities, and professional liability litigation. In 1990, Mr. Gary served for two years as associate independent counsel in the Office of Independent Counsel, where he represented the United States in the investigation and prosecution of alleged criminal wrongdoing at the U.S. Department of Housing and Development.

Mr. Gary is a fellow of the American Bar Foundation and has served on numerous boards and commissions, including the President's Private Sector Survey on Cost Control in Government; the ABA Litigation Section Leadership Council (cochair, pro bono and public interest litigation committee); the ABA Task Force on the Delivery of Legal Services; and the advisory board of the Georgetown University Corporate Counsel Institute. He is a member of the board of directors of Boys & Girls Clubs of Metro Atlanta, the Georgia Justice Project, and the Atlanta Museum of Design.

Mr. Gary graduated from Northwestern University, summa cum laude, and earned his law degree from Georgetown University Law Center, where he was a member of the editorial board of the law review.

Daniel E. Karson

Daniel E. Karson, senior counsel and executive managing director of Kroll, has 21 years experience at Kroll, serving in several capacities, including as general counsel. He also advises Kroll's clients, directing investigations of business crimes and regulatory violations both in the United States and internationally. As Kroll's first general counsel, Mr. Karson established the corporation's compliance programs. He has composed guidelines and procedures for conducting internal corporate investigations. In 1986, he launched Kroll's European operations, opening its office in London and serving as its first counsel and managing director.

Prior to joining Kroll, Mr. Karson was general counsel and assistant commissioner of the Department of Investigation of the City of New York. He was the first director of the New York City Inspector General Program and directed investigations and determined policy for the internal investigating offices of 24 mayoral agencies. Previously, he worked as an assistant district attorney for Bronx County, where he served as chief of narcotics investigations.

Mr. Karson is the author of numerous published articles on conducting internal corporate investigations, due diligence investigations, and tracing concealed assets. He is a board member of ACC's Greater New York Chapter, as well as being active in numerous community organizations in his hometown of Mamaroneck, New York.

Mr. Karson graduated, cum laude, from Ithaca College, and now serves as a member of the college's board of trustees. He received a JD from the New York University School of Law.

Charles Wm. McIntyre

Charles W. McIntyre is a partner in the Washington office of McGuireWoods LLP. He focuses on accounting malpractice, antitrust litigation, and security litigation, including corporate investigations. He has conducted numerous internal investigations on behalf of both private and public companies. His experience includes addressing the nature of the legal relationship between in-house counsel and the employees being investigated, state bar ethical considerations, the attorney-client privilege, and structuring such investigations to ensure that companies preserve the attorney-client privilege and/or work product resulting from such investigations.

Mr. McIntyre is a former chair of the section of commercial litigation of the Virginia Association of Defense Attorneys.

Mr. McIntyre received his BA, magna cum laude, from the University of South Carolina and his JD, cum laude, from Northwestern University School of Law.

Gretchen A. Winter

Gretchen A. Winter is vice president and counsel, business practices, for Baxter International Inc. in Deerfield, Illinois. In that role, she is responsible for the company's award-winning global business ethics program, and she reports to the public policy committee of Baxter's board of directors.

Ms. Winter is vice chair of the Ethics Officer Association board of directors and a speaker at many ethics, corporate social responsibility, and legal programs within and outside of the United States. She recently completed two years as chair of the Conference Board's Global Council on Business Conduct, and she has served on ethics committees for the ABA and DePaul University. She also serves on a number of public and non-profit boards and committees.

She coauthored an article on "Breathing Life into Your Company's Code of Conduct" that appeared in the *ACC Docket* and another on "International Business Standards: The Competitive Imperative" that appeared in the *Thunderbird International Business Review*.

Ms. Winter obtained her BA from the University of Illinois at Chicago and her JD from the University of Chicago.

**ASSOCIATION OF CORPORATE COUNSEL
ANNUAL MEETING 2004
PROGRAM SECTION 204
CONDUCTING EFFECTIVE INTERNAL INVESTIGATIONS
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**THE RECOVERY OF EVIDENCE IN INTERNAL
INVESTIGATIONS**

Daniel E. Karson
Senior Counsel
Kroll Associates, Inc.*

When conducting an internal investigation in response to an allegation of misconduct or crime, corporate counsel must move swiftly. Counsel and investigators should determine quickly who should be interviewed and where evidence may be found.

In almost every internal investigation, important evidence is already in the possession and control of the corporation, but may not be readily apparent. The most common examples of such evidence include electronically stored documents, email, paper files and records of telephone calls.

The following is a list of steps and procedures designed to speed the search for evidence and prevent its intentional or inadvertent destruction. In all cases, original records intended to be used as evidence should be copied and preserved to prevent loss, and to establish a chain of custody. Counsel and investigators should work with copies whenever possible.

1. Electronically Stored Data

- a. Desktop and Laptop Computers. Take possession of company owned computers and handheld devices used by subjects of the investigation (hereinafter "subjects.") Immediately image the hard drives. Secure the machines and original hard drives to preserve chain of custody. Take possession of diskettes that may have been used by the subjects. Copy the diskettes and preserve the originals. Analyze content using the copies.

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- b. Suspend the scheduled deletion of email files on the company's server, so that email deleted beforehand by the subjects can be preserved. Make copies of the server tapes and preserve originals.
- c. Download voicemail (check with legal counsel first. Some companies provide prior notice that telephone calls may be monitored.)

[These operations should be performed by computer forensic specialists and not by company personnel, even IT or MIS specialists. Data can be deleted even by turning on a computer. Also, chain of evidence custody is best recorded and preserved by using data retrieval and data recovery specialists.]

2. Hard Copy Paper Files

Take possession of paper files maintained by the subject.

3. Telephone Records.

The subjects may have telephoned individuals and business entities that are relevant to the investigation. In cases involving the theft of intellectual property, telephone calls made to suspect parties, such as competitors or former employees, will be relevant.

- a. Take possession of company owned mobile telephones used by the subjects (but see 'e' below.)
- b. Retrieve the records of outgoing telephone calls made from the subjects' office telephone extension and mobile telephones. Some telephone systems can produce records of incoming calls as well.
- c. Examine the records of telephone calls made through company paid calling cards.
- d. Telephone message logs. Take possession of the records kept of the subjects' incoming calls. Messages may also be stored in an assistant's computer, in paper telephone logs, and in bound books containing imprinted duplicates.
- e. Consider **not** canceling mobile telephone and calling card accounts. Continued use by the subjects may provide evidence.

4. Card Access Records/Entry log records

- a. In cases where access to offices or restricted areas is relevant, examine electronic card reader records to determine if the subject attempted or obtained access to the building, certain offices or restricted areas. These records also can establish a subject's presence or absence at specific times.
- b. Examine hard copy "sign in/sign out" records kept by the building's management or by the company for evidence of entry.

5. U.S. Mail/Express Mail/Messenger Records

Determine if there are records of mailings and deliveries (including intra-company mailings and deliveries) made by the subjects. Examine these records to determine mailings to questionable addressees.

6. Transportation Records

Examine records of transportation used by the subjects via company paid taxis, car services, rental cars, aircraft and any other transportation.

7. Company Vehicles

Take possession of and inventory company motor vehicles used by the subjects.

8. Payroll and Expense Records; Company Credit Accounts

- a. Examine the subjects' expense account reports for questionable travel, expense and reimbursement.
- b. Retrieve and examine cancelled pay, bonus and expense checks. High dollar value checks that were endorsed over to unusual or questionable payees (check cashing agency, liquor store, co-worker, other investigative subject) may indicate serious debt or evidence of complicit conduct.
- c. Cancel company credit cards issued to the subjects. Examine the charges made on the cards.

9. Human Resources/Personnel File

Examine HR files. Relevant information in HR files includes: indications of wage garnishments, requests for loans, medical notes, frequent address changes, changes in beneficiaries, complaints, disciplinary actions and absenteeism.

10. Search the subjects' offices

Ascertain first that a search does not violate law or company policy. Re-key lockable offices of suspended and terminated employees immediately, whether or not a search is intended, so that evidence is preserved.

[It is best to have an office search carried out by a team of professional investigators. In cases where the investigation is confidential, the office should be photographed with a digital or instant camera beforehand, so that it can be restored to its pre-search condition. As with searches of computers, the chain of custody should be preserved for evidentiary purposes. The retrieval of evidence should be formally recorded as to date, time and location discovered.]

11. Obtain Corporate Vendor lists

In vendor fraud and purchasing fraud cases, where the subjects may have had the authority to purchase goods and services for the company, investigators should match a company vendor list against any business names known to be associated with the subjects, and also survey the vendor list for fictitious companies.

[The company should retain professional investigators to determine if a vendor may not be a legally established and/or operating entity, and if the vendor can be linked to the subjects.]

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Robert L. Haig, Editor in Chief
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Chapter 35. Internal Investigations

by, Thomas P. Hester, William H. Baker, and, Steven F. Molo

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§ 35:32. PRACTICE CHECKLIST

1. Before beginning any investigation, both counsel and management should have a clear understanding of what they hope the investigation will accomplish. (*See* § 35:2)

2. Avoid jumping to the conclusion that every allegation of misconduct must be investigated as if you were attempting to determine the reason for the crash of the space shuttle. Sometimes, allegations that may seem serious need not necessarily be investigated to the point of reaching a final "answer" if they involve conduct not truly material to the company's ongoing operations. (*See* § 35:2)

3. Be mindful of the effect on employees if they believe they are working in a corporate "police state." An organization can take compliance seriously without making employees believe that every decision that they make will be second-guessed and scrutinized for improper motive. (*See* § 35:2)

4. The corporation generally is best served by having the investigation led by a lawyer. Legal counsel will have greater sensitivity to potential liability issues. Moreover, having a lawyer lead the process enhances the likelihood that the investigation can be conducted under the protections of the attorney-client privilege and the work product doctrine. (*See* § 35:3)

5. Often the investigation will proceed most effectively with a team comprised of inside counsel, who know the company and may put employees at ease during interviews, and outside counsel, who may be experienced in dealing with similar issues for other companies and possess greater objectivity in assessing the facts and law. (*See* § 35:5)

6. Experts, whether from within or outside the company, can be a valuable resource in understanding complex issues quickly. (*See* § 35:5)

7. Outside counsel and any outside experts should be retained with an engagement letter. Usually, the investigation's start is memorialized with an *Upjohn* memo from management to in-house counsel. (*See* § 35:5, 35:34)

8. Given the sensitivity of most investigations, it is best to limit information within the organization: inform managers on a truly need-to-know basis; keep investigative materials secure; and remind those with whom information is shared of the need for confidentiality. (*See* § 35:7)

9. The attorney-client privilege and the work product doctrine provide the keys to maintaining confidentiality of investigation materials vis-à-vis third parties. Counsel must become familiar with how they operate in the context of internal investigations and try, as best as possible, to avoid undertaking any acts that might operate as a waiver. (*See* § 35:8)

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10. Documents -- both paper and electronic -- are sometimes the most important evidence considered in any investigation. Their collection, organization, and analysis should be planned carefully and undertaken with care. (*See* § 35:11)

11. Distribute a non-destruct memorandum directing employees to hold any potentially relevant records and suspending any standard document retention policies pending further instruction from counsel. (*See* § § 35:12, 35:35, 35:36)

12. Assemble a team of people knowledgeable about the organization and where relevant documents may be, to develop a plan for collecting the documents. (*See* § 35:13)

13. Where the investigation calls for collecting documents from a large number of sources, consider testing the methodology with a smaller group to identify and work out any problems. (*See* § 35:13)

14. Develop a checklist form to ensure employees review relevant files and collect responsive documents. (*See* § § 35:13, 35:37)

15. Consider organizing documents electronically if it is at all possible. While there are certain up-front costs associated with electronic organization, it is clearly the most efficient way to manage and use large amounts of information. (*See* § 35:14)

16. Before conducting an interview, prepare a witness file with documents relevant to the witness. Also prepare an outline of points to be covered and, if possible, circulate the outline to other members of the investigative team to obtain their thoughts. (*See* § 35:16)

17. Select the timing and place of witness interviews thoughtfully. These factors can impact whether a witness is comfortable, confident, and forthcoming. (*See* § 35:17)

18. Select the interview team for each witness with care. The gender, age, style, as well as the knowledge of the interviewers can impact whether a witness is comfortable, confident, and forthcoming. (*See* § 35:16)

19. When questioning a witness keep a few simple rules in mind: do not expect the witness to be cooperative if you begin with hard questions and difficult topics; try to ask non-leading questions that will engage the witness in a dialogue; understand that sometimes the witness will not know the answers to your questions; and try to empathize with the witness. (*See* § 35:19)

20. When interviewing employees or non-employees, take care to provide appropriate warnings to ensure that the witness is not misled about who counsel represents and who controls the confidentiality of the interview. (*See* § 35:20)

21. While every witness interview need not be reduced to a formal interview memo, if you choose to create memos, consider preparing them in the same format -- using headings as appropriate -- for the same types of witnesses to facilitate comparison and reference on specific topics. (*See* § 35:21)

22. Avoid saying or doing anything -- even in a joking manner -- that the witness could reasonably interpret as an attempt to influence him to say something other than the truth as he knows it. (*See* § 35:22)

23. To avoid any suggestion of obstruction of justice relating to documents, document the good faith efforts made to prevent destruction of documents and to comply with any subpoena for records that is issued. (*See* § 35:23)

24. Before firing an employee who might possess information critical to the investigation, consider whether alternative forms of discipline -- for example, administrative leave -- might be appropriate as an interim

measure until the investigative team is satisfied that it has obtained the relevant information from the employee. (See § 35:26)

25. While disciplinary decisions must be fairly considered and undertaken in light of many factors, do not lose sight of the fact that a fired employee is likely to be hostile toward the company. (See § 35:26)

26. While written reports of investigation were more common in the 1980s and early 1990s, the trend now appears to be against preparing detailed written reports given the propensity of regulators to request them and ultimately use them against the company -- perhaps taking portions of the report out of the intended context. The decision about whether to prepare a formal written report of investigation should be weighed carefully. Among the factors to consider are: whether a written report is somehow required by law; whether the report would be discoverable; whether the nature of the problems somehow would benefit from a written report; and whether a written report is worth the expense it will cost to prepare it. (See § 35:29)

27. If a clear conflict between the company and one or more employees exists, the employee should obtain separate counsel. Absent a clear conflict, it may be to the company's advantage to have an employee separately represented if it will enhance the employee's willingness to cooperate. (See § 35:25)

28. Do not leave the selection of separate counsel for an employee to chance. The company's counsel should suggest the name of experienced counsel who will be an asset to the team. (See § 35:25)

29. If separate counsel is obtained and the company decides to advance fees for that lawyer, the employee should be asked to sign an undertaking agreement. (See § 35:25)

30. In conducting interviews and writing any reports, care should be taken to avoid saying or writing anything that might give rise to an action for defamation. (See § 35:30)

31. When dealing with a former employee of another company, counsel should take care to avoid having that individual divulge confidential information protected by a privilege or confidentiality obligation and should be certain not to mislead that person about whose interests she represents. (See § 35:20)

32. Upon conclusion of the investigation, counsel should advise management of the potential consequences of the disclosure of information to any third parties, including regulators or prosecutors. (See § 35:31)

33. If the company decides to make a disclosure to a government authority, it should attempt to negotiate an agreement with the government authority which would enhance the likelihood that the privilege could be maintained as to any third party. (See § 35:31)

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§ 35:33. FORM: ENGAGEMENT LETTER FOR EXPERTS

Dear [expert]:

This will confirm the arrangement agreed to between our firm and you whereby you will assist us in rendering legal advice to our client, Stone Age Micro.com. You are authorized to send your bills directly to Madeline Alexander, Senior Vice President and General Counsel at Stone Age.

You have agreed that our firm will use the following individuals at the rates set forth below in connection with this matter:

[Insert Rates and Individuals]

You will work at our firm's exclusive direction in providing [expertise] services as may be relevant to our representation of Stone Age in the [describe matter] and will report to us. All communications between you and Stone Age, as well as communications between you and any attorney, agent or employee acting in its behalf, shall be regarded as confidential and made solely for the purpose of assisting counsel in giving legal advice to Stone Age. You will not disclose to anyone, without our written permission, the nature or content of any oral or written communication, nor any information gained from the inspection of any record or documents submitted to you; and that you will not permit inspection of any papers or documents without our permission. You will treat all material provided to you or generated by you in the course of this engagement as highly confidential.

All work papers, memoranda, charts, records or other documents, regardless of their nature and the source from which they emanate, shall be held by you solely for our convenience and subject to our unqualified right to instruct you with respect to possession and control. Work papers prepared by you, or under your direction, belong to this law firm.

You will immediately notify this law firm of the happening of any one of the following events: (a) the exhibition or surrender of any documents or records prepared by or submitted to you or someone under your direction, in a manner not expressly authorized by this law firm; (b) request by anyone to examine, inspect, or copy such documents or records; (c) any effort to obtain any theories, opinions, facts, data, information or other materials within your possession, custody or control which have been disclosed or provided to you or generated by you in connection with this engagement; (d) any attempt to serve, or the actual service of, any request for production of any documents or records. Upon request you will immediately return all documents, records and work papers to us.

Nothing in this agreement shall be construed as prohibiting a disclosure pursuant to a court order.

Please indicate your acceptance of the terms of this letter by signing one of the enclosed copies and returning it to me. [FN1]

Very truly yours,

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Counsel

Accepted by:

[Expert]

[FN1]. See Dan K. Webb, Robert W. Tarun, Steven F. Molo, *Corporate Internal Investigations* § 10.04[4] (1993).
See also Chapter 72 "Environmental Law" at *infra* § 72:48 for an illustrative engagement letter for a consultant.

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§ 35:34. FORM: *UPJOHN* MEMORANDUM

Privileged and Confidential

Attorney-Client Communication

MEMORANDUM

TO: Madeline Alexander

Executive Vice President and General Counsel

Stone Age Micro.com

FROM: Julia Allison

Chairman and CEO

Stone Age Micro.com

RE: Legal Advice Regarding Sales Practices

Stone Age Micro.com has learned of certain allegations concerning the possibility of sellers of microprocessors conspiring to fix prices. These allegations have arisen in connection with litigation concerning other corporations. Management is in need of legal advice regarding this matter.

In view of the foregoing circumstances, I ask that you conduct a confidential internal investigation to develop factual information to provide management with legal advice. Management should be advised as to appropriate action in light of the potential for litigation posed by these circumstances.

The investigation should be conducted by our Law Department at your direction. To the extent you deem necessary, outside counsel should be engaged to assist you in this effort. All employees should cooperate fully in carrying out this investigation.

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§ 35:35. FORM: NON-DESTRUCT MEMORANDUM

To: All Western Group Marketing and Sales Associates

From: Madeline Alexander

Senior Vice President and General Counsel

Stone Age Micro.com

Re: Preservation of Records

As you are aware, the United States Department of Justice is conducting an investigation into marketing, pricing, and distribution practices in connection with the sale of microprocessors to the manufacturers of home appliances. We have received a subpoena calling for us to provide the government with certain records. The company is cooperating with the government.

It is imperative that we comply completely with the government's subpoena. Failure to do so can be a crime. Accordingly, all associates are directed to not alter or destroy any paper or electronic records that relate in any way to the marketing, pricing, or distribution of microprocessors to manufacturers of home appliances during the years 1999 to the present. The company's standard practice of destroying certain electronic or paper records after two years is hereby abandoned until further notice.

We are in the process of discussing the scope of the subpoena with the government and developing a system for the efficient retrieval of documents from all of our associates. You will be contacted within the next two weeks with the details of what is needed from you. In the meantime, do not alter or destroy any marketing, pricing, or distribution records relating to our sales to manufacturers of home appliances.

Stone Age Micro.com is committed to doing business in accordance with the law and appropriate ethical standards. We are confident that the government's review will make this abundantly clear. We appreciate your cooperation in this effort and your ongoing commitment to making our organization a worldwide industry leader.

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§ 35:36. FORM: SHORTER NON-DESTRUCT MEMORANDUM

To: Quality Assurance Team

Topeka Facility

From: Rocky Flatz

QA Manager

Re: Quality Assurance Improvements

We are in the process of reviewing several issues relating to improving our quality assurance practices over the past several months. To assist in this effort, we need to review all of our daily logs, calibration records, and maintenance logs for the past nine months. Please hold all of these records in whatever form they are kept -- electronic or paper -- until further notice from me. Also, do not destroy any records relating to these topics until advised otherwise.

Thank you for your cooperation.

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§ 35:37. FORM: DOCUMENT COLLECTION QUESTIONNAIRE

Privileged and Confidential

Attorney-Client Communication

Please use this form as a checklist when searching for documents. **This form must be returned whether or not you have any documents** to ensure that a thorough search has been conducted.

1. Place a check mark in each box to indicate all areas that you have searched.

- Desk Top/Desk Drawers

- File Cabinets
- Storage/Archive Facilities
- Computer Hard Drive
- Computer Diskettes
- Laptop
- Secretary Files
- Support Staff
- Central/Group Files
- Electronic Mail Devices (GroupWise or Other)
- Reading Files
- Briefcase
- Homes Files
- Notebooks/Calendar (Appointment Book)
- "Personal" and "Confidential" Files
- Other _____

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2. Do you have any documents from the above areas?

NO YES

3. If you circled "YES" to #2 above, make a copy of this form and place a copy of this form attached to each stack of collected documents or place in each box of collected documents.

4. Please read, complete and return the original signed form to:

NOTE: Current direct reports are to deliver their collected documents, with a signed FORM _____, to their Officer.

Harry Jones

Senior Counsel

Stone Age Micro.com

1313 Mockingbird Lane

Bedrock, CA 90211

I certify that I have made a complete and thorough search of all the above areas for documents. I also certify that I have produced all documents, if any, as instructed by the Law and Regulation Department.

Print Name: _____ Employee #: _____

Title/Dept.: _____ Phone #: _____

Address: _____

Signed: _____ Date: _____

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