An Attorneys' Guide to Workplace Investigations

Prepared By:

Sue Ann Van Dermyden, Esq. and

Justin Kochan, Esq.

Van Dermyden Maddux Law Corporation

for

12th Annual ABA Section of
Labor and Employment Law Conference

November 7-10, 2018

San Francisco, California

VAN DERMYDEN MADDUX

Investigations Law Firm

An Attorneys' Guide to Workplace Investigatios[1]

By Sue Ann Van Dermyden and Justin Kochan

It is Friday night and you are finishing up at the office. The phone rings. You answer. On the other end of the line is the Human Resources Director of one of your Law Firm's largest clients. He is in a panic, having just received an email from his company's Vice President of Marketing claiming the Company's Chief Operating Officer sexually harassed her at last week's Company retreat. While Human Resources typically handles these types of investigations in-house, your client says he wants nothing to do with this. He tells you that the allegations are far too serious, and he would not feel comfortable investigating his boss. Instead, he asks that you take the lead on the investigation.

Anyone who has conducted a workplace investigation will acknowledge that it is not an easy task. The issues are challenging, the legal guidance sparse, and the stakes can be high, particularly in a C-Suite investigation like this one. And for attorneys accustomed to advocacy, it can be challenging to take on the role of "impartial investigator," a role that is critical to an airtight investigation.

This article summarizes the major issues an attorney is likely to encounter when undertaking a workplace investigation. It includes a discussion of when an investigation should be conducted, the benefits of a workplace investigation, who should be retained as the investigator, and how to conduct investigations of this kind.

1. When To Conduct An Investigation?

As a general rule, an employer should initiate a workplace investigation when it has reason to believe that one or more of its employees is engaging in conduct that violates the employer's policies and/or the law. This could include minor issues like tardiness, or major issues like harassment, discrimination, retaliation, theft, or workplace violence. The goal of an investigation is to address allegations of misconduct, resolve disputed issues of fact, and make relevant policy findings. The scope of the investigation is

[1] This article has been adapted to California law from an article entitled, "An Attorney's Guide to Workplace Investigations" appearing in the upcoming February 2017 issue of the Nevada Practitioner's Journal of Labor and Employment Law. Special thanks to Erich Knorr, Ameet Nagra, Carolyn Gemma, and Megan Miller for assisting with the revisions.

entirely dependent on the seriousness of the allegations. An investigation into tardiness may be limited to a conversation with the employee, while an investigation into disparate treatment may involve dozens of interviews and the retention of a statistician.

While the initiation of an investigation is a sound response to a complaint, it is important to note that there are instances where an investigation may not be necessary. One example would be when an employee brings allegations that have already been addressed in a prior investigation. While an employee may disagree with the investigator's findings, the employer is under no obligation to reinvestigate identical allegations. However, should the employee's complaint include additional allegations that were not addressed in the prior investigation or provide relevant evidence that was not previously known, the employer should initiate an investigation limited in scope to the new allegations or evidence.

Another example is when an employer receives a complaint from an employee where the allegations, even if sustained, would not violate the employer's policies or the law. These types of complaints often include personal and professional disagreements with colleagues, differences in opinion with management, and frustration over low staffing and heavy workloads. While it would be wise to speak with complaining employees in an attempt to address their concerns, these types of allegations do not warrant an investigation unless the employer has reason to believe they may be based in a protected characteristic or activity. Decisions of whether or not to investigate allegations must be consistent and not discriminatory themselves and should be documented in either event. While the matter being investigated may not directly lead to liability, it may become evidence of equal treatment in a subsequent matter.

2. Why Conduct An Investigation?

Workplace investigations are disruptive, time consuming, and expensive. Despite the downsides, when faced with an employee complaint, a workplace investigation may be one of the best investments your client can make.

a. It is Required

Both federal and state law require employers to conduct workplace investigations in certain circumstances.

The Equal Employment Opportunity Commission ("EEOC") is the federal agency responsible for the processing and investigation of harassment, discrimination, and retaliation complaints made by employees against employers. The EEOC requires employers to initiate an investigation when they become aware of allegations of harassment, discrimination, or retaliation, regardless of how the employer became

aware of the complaint.[2] EEOC Guidance explicitly states, "When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing."[3]

The EEOC's position is consistent with federal courts, who have held that employers have a duty to investigate when they know, or should know, of allegations of harassment, discrimination, or retaliation.[4] By way of example, in *Malik v. Carrier Corp.*, the plaintiff alleged his employer was negligent in its decision to investigate retracted allegations of sexual harassment that had been brought against him by a female colleague.[5] The Court held that the employer's decision to pursue the investigation was warranted, given that an employer's investigation of a sexual harassment complaint was not a "gratuitous or optional undertaking."[6] Indeed, the Court stated that under federal law, an employer's failure to investigate "may allow a jury to impose liability on the employer."[7]

California law imposes a similar mandate to investigate through the Fair Employment and Housing Act (FEHA). Its regulations, which are promulgated by the Department of Fair Employment and Housing (DFEH), require employers to take "reasonable" steps to affirmatively prevent and correct workplace discrimination and harassment.[8] All complaints under FEHA must be followed by an impartial, thorough, and timely investigation conducted by "qualified personnel."[9] California courts have held that an employer's failure to conduct an investigation or conducting an inadequate investigation may be evidence of pretext.[10] This is so regardless of whether an adequate investigation would have justified the employer's action against the employee, if the jury believes the employer's subjective intent in conducting the investigation was to justify that action.[11]

---

[2] EEOC's Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors* (issued on June 18, 1999) at subsection V.C.1.
[3] *Ibid.*
[4] *See, e.g. Nichols v. Azteca Restaurant Enterprises, Inc.,* 256 F. 3d 864 (9th Cir. 2001); *Fuller v. City of Oakland*, 47 F. 3d 1522 (9th Cir. 1995); *Bator v. State of Hawaii*, 39 F. 3d 1021 (9th Cir. 1994).
[5] *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir.2000).
[6] *Malik v. Carrier Corp.*, 202 F.3d at 105.
[7] *Ibid.*
[8] C.F.R. section 11009(b)(4).
[9] C.F.R. section 11023(b)(4)(C).
[10] *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243.
[11] *Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 334.

b. Limit Damages and/or Avoid Liability

Even when a workplace investigation is not required by law, in some situations the employer can use the investigation as a tool to limit damages and even establish a defense to liability.

The *Faragher-Ellerth* Defense

In *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Supreme Court held that employers are subject to vicarious liability for the unlawful sexual harassment undertaken by their supervisors.[12] However, the Court also held that when the supervisor's harassment does not culminate in a tangible employment action, the employer may avoid liability or limit damages by asserting what has become known as the *Faragher-Ellerth* defense.[13] A tangible employment action includes "discharge, demotion, or undesirable assignment."[14] Although both *Faragher* and *Ellerth* focused on allegations of sexual harassment, lower courts have extended the Supreme Court's holdings to include other forms of harassment, like race, color, creed, religion, and national origin.[15]

The *Faragher-Ellerth* defense has two elements. First, the employer must have "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[16] Second, the complaining employee must have "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[17] The standards are meant to both encourage employers to prevent and correct harassment and to encourage employees to limit the harm from harassment.[18]

What is considered "reasonable care" under the first prong of the *Faragher-Ellerth* defense depends upon the particular factual circumstances. What might be reasonable for a relatively trivial issue might be far too casual for a more serious allegation. But generally, the EEOC has interpreted "reasonable care" to require that the employer

---

[12] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).
[13] *Ibid.*
[14] *Ibid.*
[15] *See, e.g., Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 n.9 (4th Cir. 2001).
[16] *Faragher,* 524 U.S. at 807; *Burlington Industries,* 524 U.S. at 745.
[17] *Ibid.*
[18] See *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2006) (a cursory investigation focused on the complainant's performance, rather than the harasser's conduct does not establish an affirmative defense); *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999) (affirming summary judgment for the employer on the Title VII claim where the company had a policy prohibiting sexual harassment and acted promptly to address the harassment complaint).

establish, disseminate, and enforce an anti-harassment policy, maintain a complaint procedure, and take reasonable steps to prevent and correct harassment.[19] While there are multiple components to an effective complaint procedure, industry standards require a prompt, thorough, and impartial investigation into complaints of harassment.[20]

What constitutes a "prompt", "thorough", or "impartial" investigation is case specific. Courts typically expect an employer to initiate an investigation immediately upon becoming aware of the allegations, and for the investigation to be completed within a reasonable time.[21] A prompt investigation demonstrates that the employer takes potential policy violations seriously, provides the employer the opportunity to address the allegations directly, and prevents further harm against the complainant. Further, the less time that passes between the complaint and the investigation, the less likely it is that relevant evidence – like digital files and witnesses' memories – will become unavailable.

A thorough investigation typically includes in-depth interviews with the complainant, respondent, and relevant witnesses, as well as the collection and analysis of any and all relevant documents.[22] What constitutes a thorough investigation depends entirely on the severity of the allegations and the availability of the evidence.

---

[19] EEOC's Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors* (issued on June 18, 1999) at subsection V.C.

[20] *Id.*at V.C.1.

[21] See *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001) (investigation just three days after management learned of alleged grabbing incident constituted prompt action); *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999) (Employer took only 11 days to complete its investigation and thereby exercised reasonable care to promptly correct sexually harassing behavior); *Bennett v. New York City Dept. of Corrections*, 705 F. Supp. 979 (S.D.N.Y. 1989) (four-week delay before interviewing complainant and co-worker not deemed prompt); *Sorlucco v. New York City Police Dep't*, 971 F.2d 864 (2d Cir. 1992) (interview of the complainant and witnesses four months after the complaint and interview of the respondent eight months after the complaint is insufficient); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994) (Failure to seriously investigate the complaint until after a charge is filed with a state agency is inadequate).

[22] See *Pollard v. E.I. Dupont De Nemours Co.*, 213 F.3d 933 (6th Cir. 2000) (investigation inadequate when the employer formed a list of questions answerable by yes or no, and when each employee denied knowledge of the incidents, no further questions were asked); *Smith v. First Union National Bank*, 81 FEP Cases (BNA) 1391 (4th Cir. 2000) (investigation inadequate where investigator failed to ask whether accused made sexually harassing remarks, had never previously investigated a sexual harassment claim, investigation focused on complaints about management style and ignored allegations of sexual harassment); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (D. Colo. 1978) (company liable failed to investigate plaintiff's complaints of sex discrimination other than to call the accused for verification or denial).

An "impartial" investigator is one who has the skill and experience to objectively gather and analyze all of the evidence, and come to a fair and well-reasoned conclusion. Any overt conduct by the investigator that suggests bias necessarily undermines the impartiality of the investigator. It is also important to consider the potential conflicts of interest and the perception of bias, particularly when the investigator reports directly or indirectly to either of the parties.[23]

The California Standard: *Cotran v. Rollins Hudig*

California law provides a defense similar to *Faragher-Ellerth* in protecting employer's from wrongful termination liability. In *Cotran v. Rollins Hudig Hall International, Inc.*, the California Supreme Court held that employers are not liable for wrongful termination when the jury determines that the employer based its decision on objectively "fair and honest reasons regulated by good faith," versus reasons that are "trivial, arbitrary, capricious, unrelated to business goals, or pretextual."[24] An employer's conclusions must be reasonable, meaning based on "substantial evidence gathered through an adequate investigation" that provides respondent with notice and an opportunity to respond.[25] Inadequate investigations do not protect employers from liability and, as noted above, may be evidence of pretext.[26] The employer must produce the investigation in order to rely on it as a defense in litigation.[27]

What constitutes an "adequate" investigation is case specific and depends upon a totality of factors. Generally, adequate investigations must be conducted by an independent investigator,[28] who has been trained in how to properly conduct workplace investigations.[29] An actually or apparently biased investigator taints the investigation from the start.[30] The investigator must also generally interview all necessary and

---

[23] *Quela v. Payco-General American Credits, Inc.*, 82 FEP Cases (BNA) 1878 (N.D. Ill. 2000) (investigation of sexual harassment allegations was tainted by personal bias and self-interest where the investigator held a high managerial position and the person who aided in the investigation was the business partner of accused); *Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002) (if the ultimate decision-maker was influenced by others who had retaliatory motives, the investigation was not impartial).

[24] *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93.

[25] *Ibid* (emphasis added).

[26] *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243.

[27] *Wellpoint Health Networks, Inc. v. Superior Court (McCombs)* (1997) 59 Cal.App.4th 110, 130.

[28] *Reeves v. Safeway* (2004) 121 Cal.App.4th 95 (investigation involving cat's paw liability inadequate, explaining, "If a supervisor makes another the tool for carrying out discriminatory action, the original actor's purpose will be imputed to the tool.").

[29] *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256.

[30] *Nazir* (explaining that investigations conducted by or under the control of a person who has, or reports to someone who has, an "axe to grind" are inherently not credible).

available witnesses,[31] and do so in a location that does not taint the credibility of the witness statements given.[32] The investigator's method of recording and memorializing witness interviews must also be accurate, complete, and trustworthy.[33]

c. Positive Impact on the Workplace

Aside from the legal benefits of an effective investigation, the resulting investigative report can be a valuable tool in the employer's decision-making process.

Once the employer conducts an investigation and reaches factual findings, it can take action. If the investigator sustains the allegations, the employer can discipline the respondent appropriately and take steps to prevent future misconduct. If the investigator does not sustain the allegations, the respondent can be exonerated and employees can feel confident that the employer responded appropriately to the complaint. In the end, whatever the findings, the employer has put its managers, supervisors, and employees on notice that it takes its policies seriously.

As an ancillary benefit, other issues affecting the culture and climate of the workplace may come to light through the investigative process. A skilled investigator will establish rapport with interviewees, whose statements can provide a window into the workplace. The employer can then use this information to proactively address conflicts that might be bubbling under the surface, thereby increasing employee morale and reducing costly turnover. Likewise, an investigation may reveal other potential legal liabilities and provide an opportunity to address these problems.

3. Who Should Conduct The Investigation?

Several considerations inform the selection of the investigator. To ensure impartiality, the investigator should have no stake in the outcome of the investigation.[34] This standard can be met internally by assigning the investigation to a Human Resources Officer, an EEO Officer, a manager in a different department, or the employer's in-house counsel.[35] However, an actual or perceived conflict of interest may result in a finding

---

[31] *Nazir* (misconduct investigation inadequate where investigator failed to interview all potential witnesses); *Silva* (holding misconduct investigation "adequate" where the investigator interviewed fifteen employees over a one-month period and found no evidence supporting pretext).

[32] *Mendoza* (investigation inadequate where complainant and respondent interviewed together and in location where others could observe the interview, and investigator not trained in conducting workplace investigations).

[33] *Silva*.

[34] EEOC's Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors* (issued on June 18, 1999).

[35] It is important to note that the California Private Investigators Act, discussed below, provides an exception for internal investigators employed by the employer. Specifically, under California

that the investigator was not impartial at the outset. When there is not an impartial investigator within the company, or where an internal investigation may negatively impact the workplace, it is advisable to engage either an outside attorney or other investigator. It is therefore critical to consider the different laws applicable to each.

a. The California Private Investigator Act

Like many states, California regulates private investigators and limits their activities, including workplace investigations, to those licensed by the state.[36] The licensing of private investigators is managed by the Director of Consumer Affairs.[37] While this statute is restrictive, it does contain an exemption for "An attorney at law in performing his or her duties as an attorney at law."[38] This exemption is often referred to as the "attorney exemption," and is a common feature of most state private investigator licensing laws.[39]

Under California's Private Investigator Act, the attorney's status as an attorney alone is not enough to exempt them from the statute's requirements. Instead, the attorney must be functioning as "an attorney at law [who is] performing his or her duties as an attorney at law."[40] For this reason, it is incumbent upon the attorney to clarify that although they are not operating in an advocacy role, they are still providing legal services that are limited in scope to an impartial investigation. The attorney should express this clearly in his or her engagement letter.

Considering the repercussions of violating California's Private Investigator Act, it is important for both the employer and the investigator to follow it closely. For the employer, retaining an unlicensed investigator to conduct the investigation could result in the opposing party challenging the investigation itself or a court finding the investigation inadmissible because the employer conducted it unlawfully. For the investigator, conducting an investigation without a license is a misdemeanor punishable by a fine of up to $5,000 and/or imprisonment up to one year.[41]

Business and Professions Code section 7522 (a), the California Private Investigators Act does not apply to "A person employed exclusively and regularly by any employer who does not provide contract security services for other entities or persons, in connection with the affairs of such employer only and where there exists an employer-employee relationship if that person at no time carries or uses any deadly weapon in the performance of his or her duties."

[36] Cal. Bus. & Prof. Code § 7520.

[37] Cal. Bus. & Prof. Code § 7515.

[38] Cal. Bus. & Prof. Code § 7522 (e).

[39] See Arizona Revised Statutes section 32-2409; California Business and Professions Code section 7522(e); Revised Code of Washington section 18.165.020.

[40] Cal. Bus. & Prof. Code § 7522 (e).

[41] Cal. Bus. & Prof. Code § 7523 (b).

b. Choosing the Investigator

When an employer decides to retain an outside party to conduct a workplace investigation, it has two choices. The first choice is the retention of a non-attorney investigator, like a Human Resources consultant or a licensed Private Investigator. The second choice is the retention of an attorney-investigator – either the employer's regular outside counsel or an attorney who specializes in workplace investigations. Of these options, employers should always consider retaining an outside attorney who specializes in workplace investigations for the reasons outlined below.

i. Non-Attorney Investigators

Employers often utilize their in-house Human Resources team to conduct workplace investigations, and rightfully so. Human Resources employees typically have both skill and training to competently conduct workplace investigations. However, there is no exemption within the California's Private Investigator Act that permits external Human Resources consultants to conduct workplace investigations. As noted above, an employer's unlawful use of an unlicensed and nonexempt investigator could result in the investigation being found inadmissible, thereby losing the *Faragher-Ellerth* defense.

Retaining a licensed private investigator to conduct a workplace investigation, as opposed to an attorney, also presents several disadvantages. First, workplace investigations are often legal in nature and require an understanding of complex employment laws. EEO issues, for example, have certain legal elements and burden shifting that are important to fully understand when one is navigating a harassment, discrimination, or retaliation claim. It is unlikely that a licensed private investigator will have the familiarity necessary to competently navigate these issues as they arise. Second, investigative reports are legal documents that must be able to withstand scrutiny in a legal proceeding. While most licensed private investigators have experience in law enforcement, the skills of an attorney – including writing and analysis – will translate into a stronger and more defensible report. Finally, investigations conducted by licensed private investigators, which includes the investigative reports, will not be protected under the attorney-client privilege or the work product doctrine.

ii. Attorney-Investigators

When an internal complaint necessitates an outside investigator, employers have long turned to their regular outside counsel to conduct the investigations. However, as laws and best practices have evolved, there has been a strong shift towards the retention of an outside attorney who specializes in workplace investigations for the following reasons.

First, if the complaint were to escalate to litigation, the attorney who conducted the investigation would be unable to represent the employer. The California Rules of Professional Conduct ("CRPC") prohibit an attorney from acting as an advocate at a trial in which the attorney will be called as a witness.[42] An employer would be in a difficult position if their defense attorney was disqualified from representing them because he or she was likely to be called as a fact witness to support the investigation.

Second, an employer who uses its regular outside counsel to conduct an investigation risks waiving the attorney-client privilege. When an employer retains an attorney to conduct a workplace investigation, they often do so with the expectation that their conversations, the evidence, and the investigative report are cloaked under the attorney-client privilege.[43] However, should the complainant turn plaintiff, it would likely be in the employer's best interests to raise the *Faragher-Ellerth* defense in its responsive pleadings and argue that it promptly initiated a thorough and impartial investigation into the plaintiff's allegations. The investigation would then become the cornerstone of the employer's "prompt remedial action" defense, the attorney who conducted the investigation would become a critical defense witness, and the employer would need to waive the attorney-client privilege.[44]

Finally, there is an understandable perception of bias when an employer uses its regular outside counsel to conduct an investigation. When the employer raises the *Faragher-Ellerth* defense, the plaintiff is likely to attack the integrity of the investigation in an attempt to have the investigation excluded from evidence. In doing so, the plaintiff would argue that it is impossible for the employer's regular defense counsel to conduct a fair and neutral investigation because no matter what they claim, they are the employer's advocate. They would further argue that rather than providing an unbiased assessment of the evidence, the investigator's goal was to protect the employer by focusing on the evidence in its favor and finding against the complainant.

Given the three drawbacks described above, the trend has shifted towards the employer or their counsel retaining a separate attorney for the limited purpose of conducting workplace investigations. These attorneys often specialize in workplace investigations and have both the training and experience that comes from conducting hundreds of

---

[42] CPRC 5-210. This rule also applies to attorneys who know or should know that they should be called as a witness.

[43] See *United States v. Rowe* (9th Cir. 1996) 96 F.3d 1294, 1297 (Fact finding which pertains to legal advice is considered "professional legal services."); *Harding v. Dana Transport, Inc.,* 914 F. Supp. 1084 (D. N.J. 1996) (Outside counsel conducting a workplace investigation is acting in their legal capacity and therefore the attorney-client privilege and work product doctrine apply).

[44] See *Brownell v. Roadway Package Sys., Inc.* (N.D. N.Y. 1999) 185 F.R.D. 19 (The employer waived its right to invoke the attorney-client privilege by asserting the adequacy of its investigation as a defense to the plaintiff's allegations of sexual harassment).

investigations. With a limited-scope agreement and no-stake-in-the-outcome impartiality, their work is more difficult to challenge and there is less concern with waiving the attorney-client privilege should the employer need to use the report as a defense. Furthermore, an employer who retains a separate outside attorney who specializes in investigations ensures that their defense counsel will not be disqualified after being pulled into trial as a witness.

4. How Should The Investigation Be Conducted?

Once an employer decides that conducting an investigation is necessary and it has selected the appropriate investigator, the next question is, how should the investigation be conducted? When an attorney-investigator is preparing to conduct an investigation, they must consider multiple factors. These factors, discussed below, include: understanding how his or her ethical obligations as an attorney intersect with the investigative process; putting together an investigative plan; addressing issues unique to public sector investigations; determining whether issuing confidentiality admonitions would be appropriate; utilizing proper interviewing techniques; and, determining how best to draft the investigative report.

At the outset, it is important to emphasize that while there are standard practices, there is no "right way" to conduct an investigation. For that reason, the tips and techniques discussed below should be viewed as guidelines, rather than the rule. Because each and every investigation is unique, it is critical to approach them as such and remain flexible.

a. Ethical Considerations

Although an attorney-investigator is functioning as an investigator during the course of the investigation, they are also necessarily acting as attorney – albeit with a limited scope. Given this unique role, it is important to understand how the CRPC apply in the contexts of a workplace investigation.

First and foremost, it is prudent to consider the CRPC requirements that focus on the client-attorney relationship – like client communication, competence, maintaining confidentiality, and representing organizations – and how these rules come into play during a workplace investigation.

- ***Communicating With The Client.*** The CRPC requires that attorneys keep their clients "reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information . . . ."[45] As attorneys, we are a service-oriented profession. However, as investigators, we must walk a tight rope by advising on

[45] CRPC 3-500

issues related to the investigation, including the investigative process, our scope, and the protections of privilege, while remaining vigilantly impartial and refraining from offering any information or legal advice that could negatively impact our impartiality.

- ***Acting Competently As An Investigator.*** Attorneys are required to provide "competent" representation to a client, which requires applying "the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary" to perform the legal service.[46] An attorney who conducts investigations must understand the elements of a strong investigation – prompt, thorough, and impartial – and incorporate these standards into each of their investigations. Other more detailed best practices and industry standards for conducting a competent workplace investigation can be found in the Association of Workplace Investigators' Guiding Principles.[47]
- ***Confidential Information Of A Client.*** The CRPC also prohibits attorneys from "revealing information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client," unless the attorney "reasonably believes" they must disclose information to prevent a criminal act that the attorney reasonably believes will result in death or substantial bodily harm.[48] California Business And Professions Code ("CBPC") section 6068(e)(1) requires attorneys to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[49] This requirement is broad, and includes any information related to the representation of the client, regardless of its source.[50] When an investigation is conducted under privilege, the attorney-investigator should treat the investigation and the evidence gathered the same as they would treat the information resulting from an attorney-client representation. One consideration, however, is that investigations are usually conducted with the expectation that waiver of the attorney-client privilege will be necessary to support the investigation. Therefore, it is important for the attorney-investigator to remind the client that while they will do everything in their power to maintain confidentiality, any conversations between them, in-house counsel, Human Resources, and/or executives within the organization are not necessarily confidential and may be discoverable or disclosed at a later date.

[46] CRPC 3-100
[47] See: http://www.aowi.org/assets/documents/guiding%20principles.pdf
[48] CRPC 3-100
[49] CBPC section 6068(e)(1).
[50] *In Re Jordan* (1974) 12 Cal.3d 575, 580.

- ***The Organization Is The Client.*** When an organization retains an attorney to conduct a workplace investigation, it is important for the attorney to keep in mind that they have been retained to represent the organization as a whole, and not any of its individual employees.[51] This rule underscores the importance of providing the organization with an impartial and accurate investigation, regardless of the outcome. Even if an attorney is investigating allegations of misconduct against the organization's highest ranking officer, their obligation to the organization requires them to provide it with a well-reasoned investigative report that includes an honest and unbiased assessment of the allegations and potential liabilities.

Professional conduct rules regarding communications with represented witnesses and parties also affect the interview process during an investigation.

- ***Communicating With A Represented Witness/Party.*** Occasionally, parties or witnesses are represented by counsel. Under the CRPC, an attorney cannot "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."[52] This prohibition is clear, and applies to witnesses as well as parties. Therefore, when a complainant, respondent, or witness notifies the attorney-investigator that they are represented related to the investigation, the attorney-investigator is required to end the conversation and speak directly with their attorney. In order for the interview to proceed, their attorney must be present, unless the attorney-investigator has the attorney's consent to proceed with the interview in their absence. The attorney-investigator should obtain the attorney's consent in writing and include it as an attachment in the investigative report.

b. Pre-Investigation Considerations

As soon as the employer has decided to initiate an investigation, it is important for the investigator to begin developing an investigative plan. This plan does not need to be overly detailed or exhaustive. Instead, it should be thought of as a roadmap for how the investigator envisions the investigation proceeding. At a minimum, the investigative plan should include the following:

- The date of the initial contact.
- The scope of the investigation.
- The allegations.

[51] CRPC 3-600
[52] CRPC 2-100

- The relevant policies.
- A list of potential witnesses, including the interview order and allotted interview times.
- A list of potentially relevant documents and/or files.
- A timeline for anticipated events.

The investigator should update the investigative plan throughout the investigation, and may eventually build it into the investigative report.

c. Public Sector Investigations

Investigations conducted in the private and public sector are similar in many respects, but do have nuanced differences. In an at-will employment state such as California, a private employer can terminate an employee for any reason, unless that reason violates a state or federal statute or the employee's contract.[53] However, the majority of public employees have a property interest in their job, which affords them due process rights. These rights provide employees with a host of protections, some pertaining to the investigative process.

For example, the Public Safety Officers' Procedural Bill of Rights Act ("POBR") and the Firefighters Procedural Bill of Rights Act ("FBOR") provide "public safety officers" and "firefighters" with numerous procedural protections for investigations that could lead to punitive action.[54] These protections include the employee's right to notice of the "nature of the investigation" and the right to have a representative present during the investigative interview, among others.[55] In addition, with some exceptions, POBR and FBOR require a public agency to complete its investigation within one year of the public agency's discovery of the act, omission, or misconduct at issue.

d. Confidentiality Considerations

Traditionally, during a workplace investigation, the investigator has instructed witnesses to keep their participation in the investigative process confidential and not to discuss the investigation with others for the duration of the investigation. This instruction protected the privacy rights of the parties and witnesses, particularly when the allegations were embarrassing or had the potential to negatively impact the professional reputation of those involved. This instruction also protected the integrity of the investigative process by preventing witnesses from comparing notes and aligning stories prior to their interview with the investigator.

---

[53] *See Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317; see also *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.
[54] Government Code § 3300 et seq.; Government Code § 3250 et seq.
[55] Government Code § 3303; Government Code § 3253

However, a 2012 decision by the National Labor Relations Board ("NLRB"), *Banner Health Systems*, prohibits private employers from issuing blanket confidentiality admonitions.[56] In *Banner*, the NLRB held that a private employer's efforts to protect the integrity of its internal investigations by instructing witnesses to retain confidentiality violates an employee's right to engage in protected concerted activity.[57] Thus, investigators can no longer issue "blanket" confidentiality admonitions to witnesses in a private sector investigation.

Under *Banner*, in order to issue a confidentiality admonition, an employer must show that it has a legitimate business justification that outweighs an employee's right to engage in protected concerted activity.[58] According to the NLRB, to justify an admonition, the employer is required to make an individualized assessment of each investigation to determine whether:

1. Any witnesses need protection;
2. Evidence is in danger of being destroyed;
3. Testimony is in danger of being fabricated; or,
4. There is a need to prevent a cover up.

In 2014, the Public Employee Relations Board ("PERB"), which governs public sector employees, came to a similar ruling.[59] While PERB adopted the *Banner* ruling prohibiting blanket confidentiality admonitions, it did not explicitly adopt *Banner's* four prong test, nor did it provide examples of situations in which the employer would be permitted to require confidentiality.[60] Although PERB acknowledged that employers may have a right to require confidentiality during an investigation under certain circumstances, it stated that the burden "is squarely on the employer to demonstrate that a legitimate justification exists for a rule that adversely impacts employees' protected rights."[61]

It is important to note that it is not the outside investigator's decision whether confidentiality admonitions are warranted. Instead, the investigator must work closely with the employer and the employer's counsel, and provide them with the information necessary for them to determine whether confidentiality admonitions would be appropriate.

---

[56] Banner Health System d/b/a Banner Estrella Medical Center, 362 NLRB No. 137 (June 26, 2015).
[57] *Ibid.*
[58] *Ibid.*
[59] Los Angeles Community College District (2014) PERB Decision No. 2404.
[60] *Ibid.*
[61] *Id.* at 13.

Because confidentiality is a two-way street, it is common for parties and witnesses to ask the investigator whether the information they share will be kept confidential. It is important for the investigator not to overstate the limits of their ability to keep witness information confidential. The investigator should never guarantee confidentiality. Instead, the investigator should emphasize that during the investigative process, the information shared by parties and witnesses will be provided to others strictly on a need-to-know basis. It is also helpful for the investigator to explain that they will likely draft an investigative report that they will present to the decision-makers within the organization, that this report will summarize the evidence relied upon, that the decision-maker may decide to release some or all of its contents, and that this decision is outside of the investigator's control.

e. The Interview Process

One of the most challenging aspects of a workplace investigation is the interview process. In preparing to conduct witness interviews, it is important to consider the logistics of scheduling the interviews, how to manage represented parties and witnesses, and how to conduct the interviews themselves.

When scheduling interviews with parties and witnesses, the investigator should meet with each interviewee individually and in a private location. Individual interviews make it more difficult for parties and witnesses to align their stories, allows those who may disagree with their colleagues to speak freely, and increases the confidentiality of the investigative process. With respect to interview location, interviews should be scheduled in a private location, consistent with the confidential nature of the investigation. This could include the investigator's office, an out of the way office at the employer's place of business, or a rented conference room.

In unionized environments, employees often request that a union representative attend their investigative interview. In *NLRB v. J. Weingarten, Inc.*, the Supreme Court held that under the National Labor Relations Act, an employee is entitled to a representative during an investigative interview that the employee reasonably believes could result in disciplinary action.[62] Therefore, under the letter of the law, only the respondent is entitled to a representative. However, practically speaking, the majority of union representatives understand the investigative process and provide minimal if any disruption. Therefore, as the investigator, there is little reason to deny a request for representation and run the risk of a claim that you have violated an employee's *Weingarten* rights. It is also important to note that an employee who does not make a clear request for representation waives their *Weingarten* rights. But again, practically speaking, asking an employee during the scheduling process whether they will have a

[62] *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975).

representative present avoids last minute *Weingarten* requests that could disrupt the interview schedule.

Additionally, it is not uncommon for a complainant, respondent, or even a witness to be represented by an attorney. As attorneys, we have an ethical obligation not to communicate with a represented person about the subject of their representation without that person's attorney being present. Practically, this means that a party or a witness who has retained an attorney has the right to have their attorney present during the investigative interview. Most attorneys understand the investigative process and are cooperative – even helpful – during the investigative interview. However, an attorney who represents a party or a witness must understand that an investigative interview is not a deposition. For this reason, they cannot object to the investigator's questions, speak for their client, or otherwise obstruct the investigative process. If an attorney continues to obstruct the investigative process after the investigator reminds them of their role, it is within the investigator's rights to terminate the interview.

With respect to conducting the interview, attorneys who are functioning as investigators are often accustomed to adversarial proceedings and may mistakenly treat the investigative interview like a deposition. The investigator should approach the interview from a collaborative perspective. Their role is to assist the parties and witnesses in offering their version of events and not to build a case for one side or the other. During this process, it is important to ask open-ended questions and let the interviewee talk. For reticent witnesses, silence can be an effective tool to elicit information. It is also important to be flexible during the interview process and follow the facts where they lead you. For example, if witnesses express concerns of retaliation, explore the source of these concerns. Towards the end of the interview, it is appropriate to ask more closed-ended questions to sew up discreet issues like names, dates, witnesses, and documents.

At the interview's conclusion, it can be useful to ask each interviewee several open-ended questions to obtain any information they may not have had the opportunity to share. These questions might include, for example:

1. Is there anything I did not ask about that you feel would be relevant considering your understanding of the scope of the investigation?
2. Are there any documents you feel might be relevant to the allegations?
3. Are there any witnesses you feel it would be helpful for me to speak to? What information do you anticipate them providing?
4. What is the best way to reach you if I have follow-up questions?

f. Drafting the Report

After the witnesses have been interviewed and the documents collected, the investigator turns to the final phase of the investigation: drafting the investigative report. There is no concrete rule on what to include in the investigative report. Given the variety of allegations brought by complainants, each report is necessarily unique in both structure and content. However, the following elements are common to most reports.

- ***Introduction.*** The Introduction is typically brief, and provides general background information. For example, it might include the date of the complaint, the date of retention, a sentence summarizing the allegations, the names of the parties, and the scope of the investigation.
- ***Summary Of The Findings.*** The Summary Of Findings outlines both the allegations and the findings with some degree of specificity. It is a valuable tool for the employer because it distills what could be 100 pages of dense information down to one or two pages.
- ***Investigative Background.*** The Investigative Background summarizes the procedural aspects of the investigation. It typically includes a list of witnesses, a list of attachments, the policies considered, the evidentiary standard, and an explanation of any delays in the investigative process.
- ***Factual Background.*** The Factual Background, while not essential, is helpful to provide relevant context to the allegations. This could include employment histories, the complaint history, prior investigations, or a timeline of relevant events.
- ***Allegations.*** The allegations will be obtained from the written complaint and/or the complainant's interview. When drafting this section, it is important to include as much information as possible, including dates, witnesses, and relevant details. How the allegations are organized sets the structure for the remainder of the report. There are multiple ways to organize the allegations, which range from chronologically, by incident (i.e. inappropriate touching, termination, etc.), or by type of allegation (i.e. retaliation, discrimination, harassment, etc.).
- ***Responses.*** It is critical to provide the respondent with the opportunity to respond to each of the allegations made by the complainant(s). This should be clear from the investigative report, as a well-organized report will make any gaps in responses apparent.
- ***Additional Evidence.*** In almost every investigation, there is some evidence aside from the allegations and the responses that can be useful in determining whether the allegations have merit. For allegations of harassment or discrimination, it may be helpful to speak with similarly situated employees to

determine whether the respondent may have subjected them to similar treatment. For allegations of financial fraud, it may be relevant to review financial records and email communication to determine whether the evidence is consistent with a finding of fraud.

- ***Analysis And Findings.*** One of the most important aspects of the investigative report is the Analysis and Findings. This is the part of the report where the investigator has the opportunity to "show their work," so to speak. A well-reasoned and thoughtful analysis is the hallmark of a thorough investigation. While not every reader may agree with the findings, they should agree that the investigator was fair, impartial, and considered each perspective.

As attorneys, it is rare that we are hired to investigate the proverbial "slam dunk" investigation. This might be an investigation where there is video evidence, email evidence, or the facts are undisputed. Employers typically – and reasonably so – conduct these investigations in-house. For that reason, party and witness credibility will generally be at issue to some extent.

According to EEOC Guidelines, it is permissible for the investigator to assess the credibility of parties and witnesses in determining whether the alleged conduct occurred.[63] When assessing credibility, factors to consider include:

- ***Direct Corroboration.*** Is there eye-witness testimony of the incident? Is there physical evidence, like written documentation, that directly corroborates the party's testimony? For example:

  "Six witnesses observed…"

  "There is no direct evidence to corroborate her version of events."

- ***Circumstantial Corroboration.*** Is there testimony from witnesses who saw the person soon after the alleged incidents? Is there testimony from witnesses who discussed the alleged incidents with him or her around the time the incidents occurred? Is there physical evidence that indirectly corroborates either of the party's testimony? For example:

  "The complainant contemporaneously documented the event."

  "The complainant immediately thereafter told her two closest friends what had occurred."

  "The email exchanges between the two of them suggest that the two have a closer relationship than respondent would admit."

[63] *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Notice 915.002 (June 18, 2009).

"No other witness, including the females interviewed, attributed any sort of gender bias to him. To the contrary, they believed he treated them fairly."

"The timing suggests a connection between the complaint and the disciplinary action. Supervisor issued it within one calendar week of his complaint to Human Resources."

- ***Inconsistencies.*** Is the testimony consistent with other witnesses' testimony? Is the testimony consistent with the interviewee's prior testimony? For example:

  "The two witnesses at the meeting saw it differently…."

- ***Inherent Plausibility***. Is the testimony believable on its face? Does it make sense? For example:

  "The conduct could easily have occurred as described. The floor area measured 5 feet 11 inches at the point nearest the desk, allowing for her 5-feet-6-inch frame to lie down fully extended as alleged."

  "Two witnesses described behavior directed at them that was similar in nature."

- ***Bias, Interest, Motive.*** Did the party or witness have a reason to lie? For example:

  "The respondent was unable to explain why the complainant would fabricate charges against her."

  "Every witness believed the respondent to be credible, but raised significant concerns about the complainant's motives."

  "This witness may be motivated to share facts more favorable to the complainant, who is by her own admission, her best friend."

- ***Past Record.*** Did the alleged harasser have a history of similar behavior in the past? For example:

  "The evidence demonstrates that this is the first complaint of this nature that Human Resources has received against the respondent in his 21-year career."

  "The record demonstrates that the complainant has received negative performance evaluations even before her complaint to Human Resources."

- ***Comparator Information.*** Have other witnesses experienced similar treatment? For example:

  "Similarly situated witnesses likewise believed they were treated unfairly based upon their age."

- ***Statistics.*** Do the relevant statistics lend support to the testimony? For example:

  "As a whole, the employer employs a proportionate number of individuals who are over the protected age of 40."

  "Of the last five employees terminated in the department, four were under the age of 40, and one was over the age of 40."

- ***Legitimate Business Reasons.*** Can the respondent provide a legitimate business reason that explains the motive behind the allegedly improper action? For example:

  "Respondents articulated legitimate business reasons for the decision to terminate the complainant. Specifically…"

The EEOC notes that no one factor is determinative as to credibility.[64] The EEOC writes, "For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again."[65] The investigator should be wary, however, of relying on physical cues to determine credibility. While cues like sweating, stammering, fidgeting, and looking up to the right could be interpreted as signs of dishonesty, the opposite may be true. Witnesses might simply be nervous about being questioned by an attorney, or they could have a medical condition of which the investigator is unaware. Further, the majority of investigators are not experts in behavioral analysis and would have difficulty supporting these assessments when testifying to support their findings.

Finally, in discussing the investigative report, it is worth noting that the investigator almost always uses the preponderance of the evidence standard to make his or her findings.[66] This standard requires only that the conduct more likely than not occurred and is sometimes described as a "50% and a feather" standard. Such a low standard of proof is useful in "he said, she said" cases, where it is uncommon for there to be direct or conclusive evidence.

---

[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*

5. Workplace Coaching

Following the conclusion of the investigation, workplace coaching can be a helpful tool to address misconduct. There is no "one size fits all" when it comes to workplace coaching. Workplace coaching can be as minimal or extensive as an employer desires and may depend on the nature of the conduct and how long it has been going on. Some employers require employees to complete at least several two-hour sessions with a workplace coach, with assignments to complete independently between sessions. These assignments can include reading articles or watching videos and writing a reflection, or completing quizzes. Other employers may only require an employee to attend one session of workplace coaching.

Workplace coaching typically proceeds in a series of several steps. First, the workplace coach will get to know the employee to build trust and rapport, and will provide them an opportunity to share their perspective. In many cases, this is an opportunity for the employee to share information about the personal difficulties that led to their behavior at work. If the employee is unwilling to share such personal information, the workplace coach can still discuss what led to the employee's misconduct, as well as the employee's thoughts about their work environment.

Second, a workplace coach would explain the importance of a unified team and offer solutions to address the sustained allegations of misconduct. For example, if the employee had a reputation as a bully, the workplace coach could discuss best practices for communicating with his colleagues in a calm and respectful manner.

Third, a workplace coach would review the company's Employee Handbook with the employee. This review might include a discussion about the Code of Conduct, and the importance of aligning their conduct with the company's values.

The logistics of engaging a workplace coach differs from engaging a workplace investigator. Some workplace coaches state in their engagement letter that information shared by employees will be held confidential, subject to any limits provided by the law. The workplace coach would provide the employer with only basic information, like the content of the coaching sessions, a confirmation that the employee has completed the coaching sessions, and a verification that the employee has participated in good faith. Including language about confidentiality can help facilitate a more productive discussion.

6. Recent Case Law – *The City Of Petaluma*

As a relatively new area of practice, the development of cutting-edge case law in the field of workplace investigations is not uncommon. One such example is the June 2016

case *City of Petaluma vs. Superior Court*, which concerns whether the doctrine of attorney-client privilege even applies to attorney-investigators.

In *City of Petaluma vs. Superior Court*, the California First District Court of Appeal held that an Investigative Report was protected by the attorney-client privilege and work-product doctrine because outside counsel was providing a "legal service" by conducting a factual investigation.[67]

Plaintiff Andrea Waters was a firefighter and paramedic for the City of Petaluma ("City"). She filed a charge with the United States EEOC alleging that she was subject to sexual harassment and retaliation during her employment at the City. Ms. Waters resigned shortly afterwards. The City Attorney expected Ms. Waters to sue and retained the Law Offices of Amy Oppenheimer to investigate Ms. Water's charge with the EEOC.

Ms. Waters sued the City under California's FEHA for "hostile environment harassment, discrimination based upon sex, retaliation in violation of FEHA, and failure to prevent harassment, discrimination, and retaliation from occurring." Among the affirmative defenses the City raised, it stated that Ms. Waters had "unreasonably failed to take advantage of any preventative or corrective opportunities or to otherwise avoid harm," or the "avoidable consequences doctrine."

Ms. Waters sought Ms. Oppenheimer's Investigative Report and related materials in discovery. The City objected that it was protected by attorney-client privilege and work-product doctrine. Ms. Waters filed a Motion to Compel, which the trial court granted. The trial reasoned that Ms. Oppenheimer's Investigative Report was not protected by the attorney-client privilege or work-product doctrine because it was not a communication between an attorney and client. The trial court noted that Ms. Oppenheimer specified in her engagement that she would "not render legal advice." The trial court also stated that any applicable attorney-client privilege had been waived because the City placed the Investigative Report at issue by asserting the avoidable consequences defense.

The Court of Appeal reversed. The Court of Appeal found the Investigative Report was a communication between attorney and client because an attorney can be retained to provide "legal service or advice" under Evidence Code section 951. The Court of Appeal stated that Ms. Oppenheimer was retained to provide a legal service "because she was hired to act as an attorney in bringing her legal skills to bear to assist the City in developing a response to Water's EEOC complaint and the anticipated lawsuit."

[67] *City of Petaluma v. Superior Court* (Cal. App. 1st Dist. June 8, 2016, No. A145437).

The Court of Appeal found it significant that Ms. Oppenheimer's engagement included the following: (1) specified an attorney-client relationship; and, (2) Ms. Oppenheimer would use her expertise in employment law to reach findings based on her "professional evaluation of the evidence." The Court of Appeal contrasted Ms. Oppenheimer to someone who was "merely a fact finder whose sole task was to gather information and transmit it to the City."

The Court of Appeal also decided that the City did not waive the attorney-client privilege or work-product doctrine by asserting the avoidable consequences defense. The Court of Appeal stated Ms. Waters had left her employment at the City when Ms. Oppenheimer began her investigation. As a result, the City could not rely on the investigation to show it took corrective measures as a result of the investigation.

City of Petaluma is a relief for employers who rely on outside counsel to conduct workplace investigations. However, it also demonstrates the importance of including appropriate language in an engagement with outside counsel for such purposes. Employers should also be cautious while relying on the avoidable consequences defense for current employees if they seek to protect the investigative report from disclosure. The Court of Appeal emphasized the Investigative Report was protected from disclosure because Ms. Waters was a former employee of the City.

7. Conclusion

Despite every employer's best intentions, people are people, and conflict is often inevitable. This conflict could manifest as sexual harassment, race discrimination, or simply a personality conflict between coworkers. The laws and best practices for how employers manage these conflicts are complex and constantly evolving. However, despite the challenges, a skillfully conducted workplace investigation continues to be a valuable tool for employers and provides benefits well beyond a defense in litigation.