



California Lawyers Association

presents

Independent Workplace Investigations and The Attorney-Client Privilege

1.25 Hours MCLE; 1.25 Legal Ethics

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Speakers:

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Conference Reference Materials

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Independent Workplace Investigations and The Attorney-Client Privilege

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CALIFORNIA LAWYERS ASSOCIATION

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Investigations in the Public Eye – Public’s Misconceptions

Publicity about investigations can lead to misconceptions:

- An investigation should uncover and take account of something that occurred outside of work (sexual/social relationships, social media searches, prior criminal acts, etc.)
AKA: “Why aren’t you doing oppositional research?”
- An allegation shouldn’t be substantiated unless it is “proved” beyond a reasonable doubt.
- The meaning of due process.
- Shouldn’t the investigator consider the parties’ overall “character”?

Why Investigate?

- Part of an employer's duty to prevent and respond to harassment and discrimination under Title VII and FEHA. Cal. Gov't Code § 12940(k) (2022)
- When there are contested allegations, employers need findings before taking action.
- A fair & adequate investigation can prevent harm and reduce liability.
- It reinforces and supports employer policies and the law.
- It's the right thing to do! If done correctly, it can preserve workplace relationships and/or improve workplace culture.

An Inadequate Investigation can be Evidence of Pretext

Mendoza v. Western Medical Center of Santa Ana, 22 Cal App. 4th 1334 (2014)

Judgment for plaintiff upheld in part due to testimony by plaintiff's expert witness who testified to numerous shortcomings in the investigation conducted by defendants following plaintiff's complaint.



The Ethical Landscape

Independent Investigations – The Landscape

- Done by internal HR professionals, external attorneys (often in an AC relationship) or licensed PI's
 - (Cal. Bus. & Prof. Code § 7522; Lindsay E. Harris & Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, 25 Cal. La. & Emp. L Rev. 4, 1-7 (2011))
- Are usually done prior to litigation and for complaints that may or may not give rise to a legal claim.
- Are supposed to be conducted in a manner to respect/preserve confidentiality
 - (California Civil Rights Department Harassment Prevention Guide for California Employers, pgs. 7-8 (2017) and Association of Workplace Investigators, *Guiding Principles for Conducting Workplace Investigations* (2020))

Lawyer Investigators – The Ethics

- Lawyer Roles – Advisor, advocate, negotiation and evaluator – Model Rules of Professional Conduct Preamble Paragraph 2, R. 2.1 (ABA 2020). (Emphasis added)
- Different ethical standards apply (attorney as advisory should exercise independent professional judgment and render candid advice – comments to ABA R. 2.1)
- California State Bar has supported use of limited scope services. The limited scope can include acting as an impartial independent investigator to make factual findings.
- Investigator's Perspective: If retained to be independent, not being independent (being biased for example) would be a breach of the attorney's ethical duties.

Attorney Investigators – The Rule

While representing a client, a member shall not 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.

Rules of Professional Conduct, Rule 2-100

Barriers to Independence – Common Issues

- Conflicts of Interests (previous representation, being parties to events investigated, seeking unrelated business from the organization)
- Failure to understand the role of independence and how to deliver on that
- Lack of knowledge of the impact of bias
- Repeat player bias?
- Role of Privilege (more on this later!)



Thorny Issues...

Confidentiality

Investigator's Perspective:

Critically important to many complainants, respondents and witnesses. May be lack of cooperation and fall out in workplace without it.

However, investigators must explain the limited nature of confidentiality:

- If there is litigation, information may be subject to discovery and provided voluntarily or by court order.
- If Public entity and elected officials/high-ranking, employees involved could be subject to disclosure under Public Records Act.
- But could be redacted by court to protect witnesses.

Confidentiality

Plaintiff's Perspective:

- Many complainants seek full transparency. Who gets access to what information?
- Video or recording of interviews? Who gets access to this?
- Complainant and/or Respondent requests to bring counsel.
- How to engage trust in the process when Complainant feels left in the dark?
- If headed to litigation, WWJS (What Will the Jury Say)? Does the process and treatment of the Complainant and Respondent “feel” fair?

Confidentiality

Employer's Perspective:

- Many respondents also seek full transparency and want to obtain and/or disclose details including perceived motivations of the complaint or witnesses to clear their name.
- Typically more details are disclosed to respondents when allegations are sustained (especially when formal discipline is taken). What about allegations that are not sustained?
- Protecting against retaliation. To whom in the organization should get access to the report? Is it ever appropriate to share details related to the investigation? Is it ever appropriate to share witness statements?

Confidentiality

Considerations in a Unionized Workplace and Impact of Labor Laws:

- Union-represented employees have the right to have their representative present during an investigatory interview that the employee reasonably believes could lead to discipline. *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975).
- Union Requests For Information (RFIs): Balancing Test: Does Confidentiality/Privacy Outweigh the Union's Need for Information? *Piedmont Gardens*, 362 NLRB 1135 (2015); *Contra Costa Community College District* (2019) PERB Decision No. 2652.
- Union Collective Bargaining Agreement may include provisions that require prior notice to union, specify enhanced due process rights, require additional disclosure.
- Even in non-unionized workplaces, the employer must ensure any workplace rules (including rules about confidentiality) are grounded in legitimate and substantial business interests, are narrowly tailored to achieve those interests, and the wording of the rules is clear and unambiguous. *Stericycle, Inc. & Teamsters Loc. 628*, 372 NLRB No. 113 (Aug. 2, 2023).

California Public Records Act

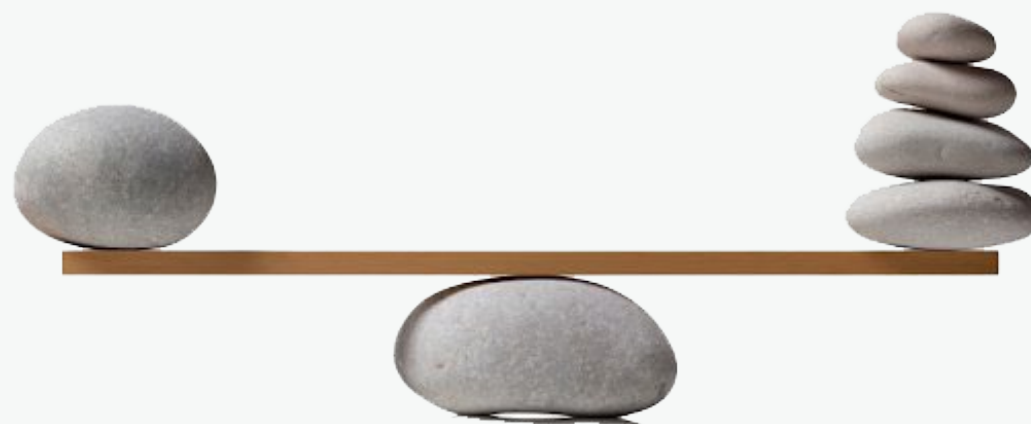
Essick v. County of Sonoma (July 2022)

Investigative report of complaint against elected Sheriff is subject to disclosure under CPRA allowing newspaper to gain access to the full report. Sheriff is not protected by exceptions that apply to employees and/or police officers.

(Note: However, under *Waters v. City of Petaluma* investigative report was not subject to disclosure in litigation due to attorney/client privilege. Query what the result would have been if Sonoma County claimed privilege.)

Confidentiality vs. Transparency

How do we balance them?



Investigations in the Public Eye – Claims of Defamation

Defamation lawsuits are increasingly used against employers enforcing their rules and as silencing tactics to keep targets and witnesses from speaking out.

Under U.S. law there are first amendment and public policy exemptions protecting institutions and individuals from liability for defamation.

On Oct. 1, 2021, a federal appeals court ruled in favor of **Pamela Lopez**, a lobbyist who was sued for defamation after speaking out about being sexually assaulted by former California lawmaker Matt Dababneh. The appellate court found that Lopez was protected by Fair Reporting privilege, which says individuals can't be sued for defamation if they are simply reporting on what was already said in specific contexts, such as reports to a legislative committee.



Attorney-Client Privilege Issues In Investigations

Purpose of the Attorney-Client Privilege in Investigations

- Uncover all the facts without fear of exposure of private information (such as medical information or sensitive personal information.)
- Encourages complainants and witnesses to speak up and provide full information without fear of a loss of privacy or control of their narrative.
- Better allows for a positive post-investigative work environment that is free from retaliation.

The employer has duties to all its employees – the complainant, respondent and witnesses – to fairness and to protect confidential and private information.

See Attorneys Conducting Impartial Workplace Investigations: Reclaiming the Independent Lawyer Role, Harris & Oppenheimer, California Labor & Employment Law Review, September 2022.

Pitfalls of the Attorney-Client Privilege in Investigations

- Attorney-client privileged investigations are inherently structured to benefit employers. See *Wellpoint Health Networks, Inc., v. Superior Court*, 59 Cal.App.4th 110 (1997) (attorney-client privilege and work product doctrine apply to attorney workplace investigations).
- “Repeat player bias” and financial dependency may encourage implicit or other bias.
- Employers may weaponize attorney-client-privileged investigations against the complainant including by selecting the investigator, influencing the scope and form of the investigation, and deciding whether or not to waive privilege.

View from the Plaintiff’s Bench: What Can Be Done to Encourage Impartiality and Level the Playing Field Within the Existing Framework?

See Attorney Workplace Investigations: Neither Impartial Nor Independent, Friedman & Abrams, California Labor & Employment Law Review, March 2023.

Reconciling the Attorney-Client Privilege with the Purposes of the Investigation

A Realistic Approach:

What Can Be Done to Make An Investigation More or Less Neutral?





QUESTIONS