

The Investigations Institute: Investigations Demystified



Best Practices - Phase One: Structure & Design

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Agenda

Best Practices for Investigations: Structure and Design

1 Privilege

2 In-house counsel involvement

3 Scoping

4 Initial Structure

5 Interim remedial measures

6 Who needs to be informed?

7 Documents/ESI

8 Confidentiality

9 Should investigation be remote?

Opening Thoughts

Key Objectives of any Investigation



Fair

Objectivity is key



Thorough

Define, plan, and
execute well



Effective

Reach well-reasoned
conclusions
Communicate with all
participants when done
Get back on track

Bad Behavior Pyramid



Intake and Planning

Is an investigation necessary?

Sometimes . . .

Behavior on low end of pyramid

No additional facts needed to resolve issue

Poor communication between complainant and supervisor

Misunderstanding by employee of company policy

May require monitoring to correct behavior

Be wary of “weaponizing” of reporting structures

Scoping/Initial Structuring

Who is making complaint?

Nature of the allegations

Can/should the investigation be privileged?

Who will conduct the investigation

Who likely needs to be interviewed or informed?

Risk of reputational damage/Is witness order critical?

What documents should you request/secure?

Do you need external resources?

Preserving Privilege (Basics)



The client is the Company
(and only the Company)



Only confidential
communications
are privileged



Only communications
necessary to providing
a legal opinion or
advice are privileged



Only the Company
holds the power to
waive privilege



It is the Company's
burden to establish
privilege

Is the Investigation Privileged?

Whether an investigation itself is privileged is unclear

Labeling it “privileged” is not enough

Depends on type/context

- Threatened litigation
- Mandated by policy
- Mandated by law

Is the Investigation Privileged?

- *Duran v. Andrew*, No. 09-730, 2010 WL 1418344, at **10-14 (D. D.C. April 5, 2010) (compelling production of documents when employer's motive in investigation included business purposes such as determining whether plaintiff should continue to be employed).
- *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007) (“It is often difficult to apply the attorney-client privilege in the corporate context to communications between in-house corporate counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises for which they work. . . . ‘As a result, courts require a clear showing that the attorney was acting in his professional legal capacity before cloaking documents in the privilege’s protection.’”)

Privilege-Practice Tips

Review applicable policies to ensure that they do not mandate the investigation.

Always assume reports and interview notes are discoverable

If law or policy arguably requires investigation, consider two reports:

- Factual investigation report (non-privileged); and
- Memorandum containing counsel's legal advice and (possibly) prepared in anticipation of litigation

Privilege-Practice Tips

Bifurcate “factual” investigation from legal conclusions/advice, and recommendations for remedial action

Investigator charged with substantiating (or not) the allegations

Counsel advises business on remedial action, next steps and litigation issues

Privilege-Practice Tips

Always give an “*Upjohn*” warning when counsel (and esp. in-house counsel is involved:

- Lawyer represents the Company, not interviewee
- Investigation is to gather information needed to provide legal advice to the Company
- Conversation is privileged (if applicable)
- Privilege is between the Company and its lawyers
- Company may decide to share with others without the interviewee’s permission
- Interviewee must keep the conversation confidential

Who Should Conduct the Investigation?

Internal Personal?

HR, Legal, Internal Audit,
Security or Compliance?



Advantages

- Cost
- Speed
- Familiarity with business
- Less interference with normal business



Disadvantages

- Appearance of bias
- Lack of independence
- Lack of efficiency

Who Should Conduct the Investigation?

External Resources?

Regular outside counsel, accountants, security consultants, HR outsource providers



Advantages

- Knowledge of business
- Speed/local (usually)
- Focus
- Skill/expertise



Disadvantages

- Cost
- Lack of independence
- Appearance of bias

Who Should Conduct the Investigation?

Other External Resources?

Other outside counsel, independent investigators or HR consultants



Advantages

Skill/expertise
More independence
Focus



Disadvantages

Cost
Paid gun

Skills of the Investigator



Ability to understand the issues



Effective interviewing skills

Rapport

Ability to press for admissions

Follow up

Understand interviewee

Getting the facts



Knowledge of company policies, procedures and culture



Credibility



Impartiality

Skills of the Investigator (cont'd)



Avoidance of advocacy



Ability to take accurate notes



Ability to maintain confidentiality



Effective as a witness, if needed

Interim Remedial Measures



Consider need to take steps to protect complainant

Administrative leave for accused

- Paid or unpaid

Other measures

- Temporary transfer of accused
- Monitoring
- Warning or no contact order

Avoid any appearance of retaliation or negative impact on complainant

Who Needs to Know?

Generally, best to keep the matter as confidential as possible



Avoid taint of informing witnesses or persons with influence, especially “allies” of accused or complainant

Audit or compliance may need to be informed

Senior HR leadership

Internal counsel

But, often best to leave “c-suite” out of it unless critical

Document Review



Possible documents to review:

- Email/Text Messages
- Telephone and Computer Records
- Notes/Diaries
- Letters
- Performance Evaluations
- Gifts/Cards
- Discipline Memos
- Employee Handbook
- Company Policy and Procedure
- Legal Complaints
- Personnel file documents
- Time Sheets
- Acknowledgement Forms
- Memos from HR
- Training Files
- Time Clock/Computer Log-in Records
- Cash Register Receipts or Records
- Calendars
- Loss Reports
- Social Media

Document Review (cont'd)



Preservation of documents

- Critical to preserve records
- If possible, use remote tools to mirror or save emails and other records
- Avoid lit holds or other tip offs, unless no other option

Confidentiality

Not to state the obvious, but maintaining confidentiality is important



Avoids rumor mill

Limits possibility of taint/coordination of testimony

Reduced risk of reputational damage to accused and accuser

Lowers chances of actual or perceived retaliation against complainant

Confidentiality instructions, however, may run afoul of NLRA

Should You Hold In-Person Investigation Meetings Now?

Most jurisdictions now allow in-person meetings now (or will in the not too distant future); but safety has to be paramount.

- Vaccine reporting helps clarify safety concern
- Masks, distancing, not sharing documents
 - Of course, masks reduce some of the effectiveness of in-person investigatory meetings.

Comfort level with Zoom/Teams etc. is high after 15 months, and speed/ease may suggest remote, even if safety concerns can be addressed.

Should You Hold In-Person Investigation Meetings Now?

Do not delay an investigation waiting for in-person meetings.

- Witnesses forget facts as time passes.
- Need for remedial action cannot be delayed.
- Law demands that investigations be prompt, thorough, and impartial.
- But, accommodating reasonable concerns benefits the process and gains trust.

Remote Investigation Advantages



Cost	Easier to increase the number or duration of interviews
Speed	Easier to accommodate other issues (local language, presence of supporter, opportunity to review record)
Privacy	
Scheduling flexibility	
Easier to include additional parties (translators, note takers)	Ease of recording, if appropriate

Remote Investigation Disadvantages



Zoom-specific challenges

Technological challenges

Possibility of “cheating”

- Notes
- Coaches
- Recording

Difficulty in establishing rapport

Credibility/demeanor harder to judge

- But, those are not always reliable, anyways.

What About An Old-Fashioned Phone Call?

Phone interviews are easier to deal with, and require less familiarity with technology

However, after 15+ months of a pandemic, most people have gotten pretty comfortable with video conferencing



And, while judging credibility visually is difficult and fraught with risk, a call is even more challenging

No ability to see what is happening with the interviewee as well

Notes? Someone else in room?

Choice depends on interviewee/type of investigation

Remote Investigation Checklist

✓ Be familiar with tech, especially screen sharing

✓ Establish rapport very deliberately

✓ “Admonitions”

- Exchange phone numbers for if technology challenges arise down
- Discuss recording
- No notes, cheat sheets, text, etc.
- Remember *Upjohn*
- An extra emphasis on confidentiality?
 - Beware NLRA implications on a demand for confidentiality

Judging Credibility?

Social science indicates that body language as an indicator of deceit is not reliable



Bond and DePaulo (2006)

Sporer and Schwandt (2007)

- 12 behaviors, such eye blinking, gaze aversion, postural shifts, etc. not correlated with deception

Wiseman et. al (2012)

- Eye movement not a useful predictor of lying

Talking to Strangers (Malcolm Gladwell) (2019)

- Study of computer v. judges on 500,000+ bail decisions
- Computer program, which could not rely on observations and impressions, resulted in release of defendants who were 25% less likely to commit a crime while on bail

What Hasn't Changed?

Credibility is still key

Credibility is best judged by things that **aren't** impacted by remote investigations

Consistency with documents, corroboration by other witnesses' recollection, detail in description of events, etc.

Judging credibility by whether a witness sweats, "looks you in the eye," looks away and to the right, is polite, or other similar criteria isn't reliable generally and is particularly suspect in a remote investigation.

But, don't forget that some conduct or reaction to certain types of questions *might* suggest reliability issues.



Other best practices
always apply

(i.e., note-taking, report writing,
interview techniques, etc.)

Remote Investigations

Takeaway



Remote interviews are a bit of a “stress test” for the investigation process.

Make sure you pick an investigator who is up to the task.

As a silver lining, the remote process may make it easier and cheaper to bring a junior investigator along (as a note taker or otherwise) to teach him/her how to conduct an investigation.

Thank you!

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