

Did That Really Happen?

Lessons Learned From Investigations

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Speakers



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Agenda

- Did That Really Happen?
 - What Needs to Be Investigated?
 - How Do the Issues Arise?
- When Should You Involve an Attorney and Why?
- What Is Key to Conducting an Investigation?
- Piecing It Together: How to Report Your Findings



When Should You Involve an Attorney and Why?



When Does a Complaint Warrant Attorney Involvement?

- Train HR to contact legal department — there is no “one size fits all.”
- When the complainant or accused has counsel
- When law enforcement is involved
- When investigative confidentiality may be required
- When the investigation is likely to be the subject of litigation
- When the investigation may impact an impending business transaction
- When you are outside your comfort zone

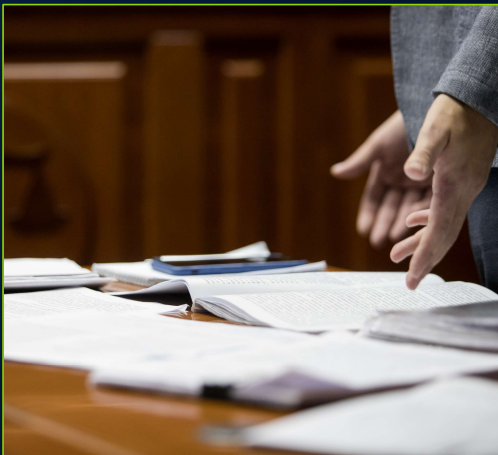


When Is an Investigation Privileged?

To be privileged, an investigation must:

1. Be for the purpose of providing legal advice; and
2. The information must be intended as, and kept, confidential.

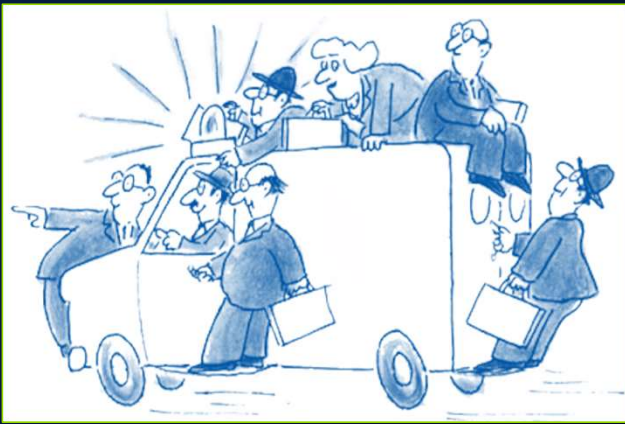




Good Hygiene: Maintaining Privilege

- Mark documents as attorney-client privileged/ work product.
- Restrict privileged information to a “need to know” control group.
- Communications shared with third parties may result in waiver.
- Draft documents carefully.





When Should You Hire Outside Counsel to Conduct an Independent Investigation?

- When inside counsel has conflict
- When you are outside your comfort zone
- When law enforcement are or may be involved
- When it's likely to be the subject of litigation
- When it may impact an impending business transaction
- When you need guidance in an unfamiliar jurisdiction
- Allegations of criminal conduct
- When you want the umbrella of attorney-client privilege
- When you need independence from management





Advantages and Disadvantages of Investigation by In-House Counsel

Advantages:

- Familiarity with the company's operations
- Less disruptive and less expensive

But:

- Conclusions may be given less weight.
- Business communications are not covered by attorney-client privilege.





Relationship Between In-house Counsel and Outside Counsel

Designating a Primary Point Person for Outside Counsel

- This person will assist with:
 - Document retention and collection process
 - Coordinating interviews
 - Monitoring costs
 - Information sharing and management updates
- If the legal department is conflicted, the point person should be outside the legal department.



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Relationship Between In-house Counsel and Outside Counsel

- Reporting lines in an independent investigation must also protect the privilege.

Example:

- The general counsel delegates oversight of the investigation to another employee, such as the chief compliance officer.
- The general counsel should document that the employee is acting at the direction of the general counsel to assist in providing legal advice to the company.



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Relationship Between In-house Counsel and Outside Counsel

Periodic Updates:

- When providing updates, an important caveat is that they are interim conclusions and susceptible to revision.
- Oral updates are preferable where there is a risk that the investigative record will be produced in subsequent litigation or to the government.



What Is Key to Conducting an Investigation?



Initial Considerations

- Whom Should You Interview?
- Order of Witnesses
- The Legal Standard
- Timing Is Everything
- Consequences If You Get It Wrong





Be Objective at the Outset!

- The human element involves our own bias and points of view.
- Investigations should be done when the issues could negatively impact the company or the company's culture.
- Do not rely on your perspective of the reporter.
- Collect any relevant documentation before beginning witness interviews.





Provide and Document *Upjohn* Warning

- Carefully document *Upjohn* warnings in interview memoranda.
- A summary notation that counsel “provided an *Upjohn* warning” may be insufficient to prove that the interviewee was properly admonished.
- There can be serious consequences for failure to provide and document adequate *Upjohn* warnings. It may:
 - Jeopardize the privilege attaching to the interview.
 - Limit or restrict the company’s ability to report the interview results to a government entity or third party, and thus impede the company’s attempt to cooperate.
 - Cause the attorney conducting the interview to be subjected to criticism and discipline.



Assessing Witness Credibility

Question:

If your investigation involves a “[s]he said / [s]he said” situation where only two people were present when something happened and there are no other witnesses or corroborating evidence, how do you proceed?



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Assessing Witness Credibility

- Pursue as much relevant information as possible.
- Credibility contest:
 - Active listening
 - Observation of the witnesses' demeanors
 - Careful assessment of other circumstances



'I swear to tell my truth.'



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Assessing Witness Credibility

- Evaluate completeness and consistency of memory.
- Watch for cues of deception.
- Avoid:
 - “Confirmation bias”
 - “Othello error”
 - Overlooking cultural and generational differences
 - Unconscious stereotyping



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Assessing Witness Credibility

Additional Considerations:

- Did the person's chronology of events match or contradict others?
- Does the person's version of events make sense?
- Has the person made conflicting or contradictory statements?
- First-hand or hearsay?



Everybody Is Human

Keep in Mind

- We tend to remember things selectively, often reinforcing existing (possibly biased) views and memories.
- Certainty and sincerity does not equate to accuracy.
- The strength of the witness's conviction is relevant — but look past that, and drill down on the other credibility factors.



Documenting the Investigation

What happens when an employee asks whether they need a lawyer?

- Best practice is to respond that you cannot provide advice on that issue and that they need to make that decision for themselves.

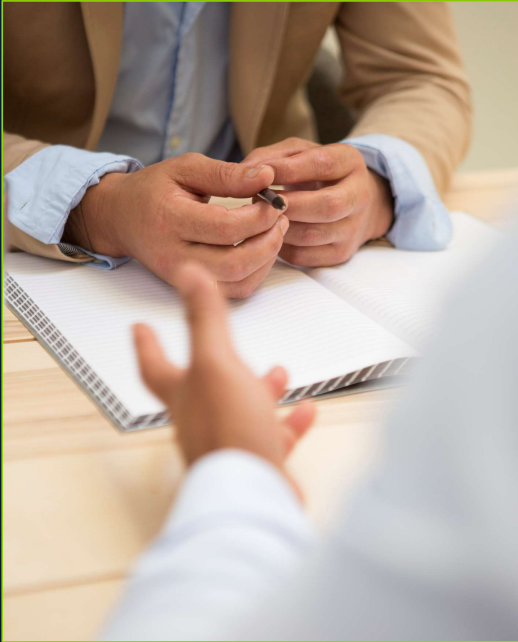


Concluding Employee Interviews

Concluding the interview

- Ask the employee to keep the contents of the interview confidential.
- Document requests to keep interviews confidential, along with the interviewees' affirmative response.
- Remind employees of their ongoing obligations to preserve documents.
- Advise interviewees that they may be contacted by government authorities.





Documenting the Investigation Employee Interviews

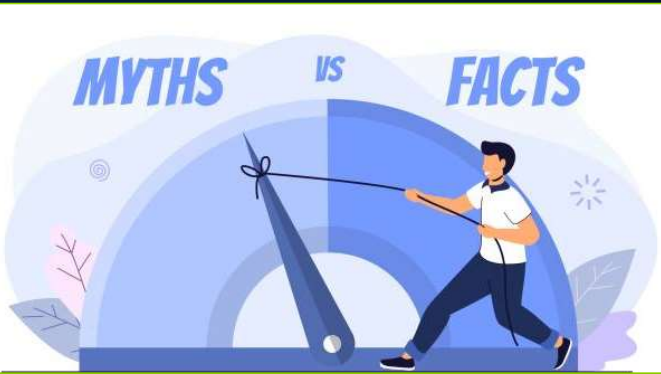
Tips for Drafting an Interview Memorandum

- Do not attempt to create a verbatim account of the interview.
- Include counsel's mental impressions, opinions, subjective analyses and conclusions concerning the interviewee's statements.
- Formatting the interview as a transcript may increase the chances of losing work-product protection.
- Don't be afraid to include other details such as witnesses' demeanors.



Now, Evaluate the Facts

- Reach your own conclusions based on the facts and **credibility** of the story presented.
- For each witness, review:
 - Opportunity to observe / firsthand knowledge
 - Demeanor
 - Internal consistency
 - Admissions/denials
 - Motive
- Differentiate personal knowledge from hearsay.
- Document what you conclude likely happened, and the bases for those conclusions.



Piecing It Together

How to Report Your Findings: Best Practices



Sharing Results of the Investigation

Many companies choose to forego a written report in favor of an oral presentation.

Written Reports:

- Helpful in persuading certain government agencies
- Helpful to explain the reasons for employee discipline
- Note the scope and limitations of the investigation

Oral Reports:

- Harder to use the contents of an oral report in parallel civil proceedings
- Written reports need significantly more detail, which can lead to second-guessing.
- Easier to control discovery of the conclusions



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Sharing Results of the Investigation

Who Should Receive the Report?

- Disclosure should be limited to those within the client control group (management, legal, the board, etc.) and who have a reason to receive it.
- Disclosure to third parties may constitute a waiver.



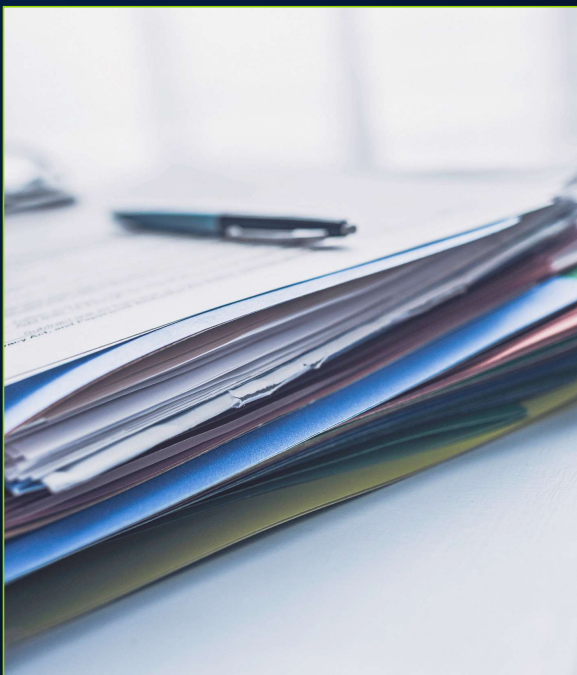
The Investigation Summary May Include:

- The reason for the investigation
- Summaries of relevant witness statements
- List of documents and other evidence
- The limitations of the investigation
- Conclusions and rationales
- Recommended or agreed-upon remedial actions (if applicable)
- Documentation of feedback to complainant



The Investigation Summary — Reporting:

- Complaint Summary
 - What did the employee allege?
- Investigation Summary
 - What did the employee allege?
 - What did the investigator do to investigate?
 - What was the outcome?
- Investigation Notes
 - What did the employee allege?
 - What did the investigator do to investigate?
 - What were the facts learned that led to the outcome?
- Actions to Be Taken
 - If unsubstantiated, no action to be taken.
 - If substantiated, what does the investigator recommend to remedy the complaint?



Don't Be Shy!

Be direct. Avoid euphemisms. Report key witness statements directly.

- **Details matter:**
 - Not: “He got handsy.”
 - Instead: “As they were sitting beside each other in a booth in the bar, he allegedly put his arm across her body and ran his hand up her outer leg, outside of her skirt, from knee to hip, before she pushed him away and told him to stop.”
- **Be Precise:**
 - Not: “She used the ‘f’ word.”
 - Instead: “She then told Supervisor Smith that he was a ‘fucking asshole’ for telling her....”



But Do Be Mindful of Confidentiality

Consider maintaining particularly personal evidence in a separate file with password protection:

- Sexual or offensive
- Confidential medical information



Keep the Reader in Mind

Even if the investigation is privileged, write the summary in a way that would be understandable to an outside third party.





Questions?