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EMPLOYERS AND LAWYERS,  
WORKING TOGETHER

*The Top Workplace Investigation Mistakes—  
and How to Avoid Them*

ACC

Association of  
Corporate Counsel

Gregg Lemley &  
Jim Paul

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**The Purpose of an Investigation**

The purpose of an investigation is to gather facts so that the "decision maker" can make a credible determination about what happened in a given situation and whether a policy violation occurred



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- No "one size fits all" formula for internal investigations
- All situations are different (but general guidelines apply universally)
- The quality of an internal investigation will have both legal and practical implications – both in the present and the future
- **Reminder:** It's better to know about a potential problem/issue now rather than being told about it later in a lawsuit

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Gregg M. Lemley and James M. Paul  
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# Seven Common Workplace Investigation Mistakes





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- Not choosing the right investigator
- Not planning the investigation well
- Not taking the right steps regarding privilege
- Not maintaining, citing, and following the right policies
- Not investigating thoroughly enough
- Not properly documenting the investigation
- Not closing the loop (taking—and communicating—appropriate corrective action)





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# Choose the Right Investigator





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### Inside vs. Outside Counsel?

- Investigations by outside counsel are more likely to be protected than those conducted internally
  - Easier to point to a shift from "normal course of business" to "anticipation of litigation"
  - Easier to show purpose of communication was to secure legal advice vs. business advice



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### Tips for Choosing an Investigator

- Be very aware of perception of bias, which may be there when complainant's supervisor is the investigator
- Consider leaving investigations to HR, Legal, or a third party (depending on circumstances)
- Use only trained investigators
- Remember the appearance of neutrality
- Not one-size-fits-all: Is this the right investigator for *this* matter?



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### Create a detailed Investigation Plan



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### Create a Detailed Plan

- List the allegations, known facts, and source of evidence
- Determine who will be the investigator or investigation team
- Create an investigation timeline
- Review relevant policies and procedures and determine what potential violations/issues may be "in play"
  - Consider whether there are any potential criminal violations or regulatory issues



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### Plan for Documents and Evidence

- Identify and review relevant documentation
- Take necessary steps to preserve relevant evidence
  - May be legally obligated to issue formal legal hold directive
- Consider whether any interim or remedial measures need to be taken (i.e., employee safety, production, suspension) (monkey wrench)



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### Documents for Review:

- Relevant company Policies and Procedures
- Written complaint
- Personnel files
- Prior investigation files
- Prior complaints
- Physical evidence (i.e., videos, timecards, e-mails, safety logs, prior corrective actions, social media posts, etc.)



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Plan for Interviews

- ✓ Identify potential interviewees
  - ❑ Complainant, supervisors, alleged perpetrator, witnesses (employees and non-employees)
- ✓ Determine order of interviews and communication plan
- ✓ Inform those within the organization who have a need-to-know of the complaint and investigation
- ✓ Outline questions in advance
- ✓ Consider how you will document the interview (notes, recording)

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Assess Issues of  
Attorney-Client  
Privilege



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Attorney Client Privilege in  
Internal Investigations

The entire area of internal audits [and investigations] continue to be a troubling one for corporations, since the findings of such an audit . . . are not necessarily privileged. Companies conducting such audits [and investigations] would be well advised to attempt to structure the audit [and investigation] as a fact gathering with the purpose of giving legal advice. It is not certain that such structuring will be sufficient to erect a wall of privilege. Yet without it, it is fairly certain that the privilege will not apply

*The Attorney-Client Privilege and the Work-Product Doctrine, 53 (Edna Selan Epstein, ed., ABA 4th ed. Supp. 2004)*



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**Establishing the Attorney-Client Privilege**

Each of these elements must be satisfied:

- ✓ Person/entity asserting the privilege is a "client"
- ✓ Communication was to or from a lawyer acting as a lawyer
- ✓ Communication made in confidence
- ✓ Communication is made for the purpose of securing legal advice
- ✓ Privilege has not been waived



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**Application of the Attorney Client Privilege to Workplace Investigations/Audits**

- Proceed with investigation as if it is and always will be privileged and confidential
- Keep information restricted to those with "need to know"
- May decide to use investigation as an affirmative defense and waive the privilege



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**Waiver of Privilege**

- Express or Intentional
- Implied
  - Such as when proffer good faith defense or prompt remedial action affirmative defense
  - Asserting an internal investigation as a defense to a matter implicitly waives the privilege for the entire investigation
  - Cannot affirmatively point to company's "good faith" by conducting an investigation but then attempt to shield parts of the investigation with attorney-client privilege
- Accidental
  - Balancing test will indicate no waiver as long as the company shows that it took reasonable precautions to prevent inadvertent disclosures and acted promptly to cure any inadvertent dissemination





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**Faragher-Ellerth:  
Best Practices**

- Ensure reporting policy has multiple avenues for employees to complain, including anonymously
- Ensure investigators are trained and following best practices on conducting investigations
- Ensure remedial action actually is designed to stop the offensive conduct and remediate work environment

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**Investigations as an Affirmative  
Defense**

- ❖ Under *Faragher-Ellerth*, a prompt and thorough investigation may provide an affirmative defense.
- ❖ Invoking the affirmative defense waives the attorney-client privilege — even when the investigation is conducted by an attorney.

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**Inadvertent Waiver of Privilege**

- *Rheeder v. City of Marion* (Iowa Ct. App. 2021) (does implied waiver render entire report discoverable?)
- *Culp v. Remington of Montrose, LLC* (D. Colo. May 11, 2020) (privilege waived re: in-house counsel's advice to general manager regarding his investigation)
- *Koss v. Palmer Water Dept.*, 977 F.Supp.2d 28, 29 (D. Ma. 2013) (defendant waived privilege for not only the report but for all documents, witness interviews, notes, and memoranda created as part of and in furtherance of the investigation)

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### Copying Counsel

- ❖ Simply copying counsel will not shield communications that would otherwise be unprivileged
- ❖ Essential that counsel is consulted before employees undertake any action that could have legal consequences



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### Identifying the Client

Model Rule 1.13(f)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.





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### What is an *Upjohn* Warning?

- *Upjohn* warnings, i.e. "Corporate Miranda" warnings, inform employees that the attorney represents the company, not the employee
- Informs the corporate employee that the company controls the attorney-client privilege and the confidentiality of the communication
- Informs the employee that no attorney-client relationship exists between the employee and attorney
- Explains the information provided may be disclosed at the company's discretion



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Triggering the  
Work Product  
Doctrine



- Must be created in “anticipation of litigation”
- Generally, documents created in the normal course of business or pursuant to company policy, are not protected
- Need to be able to point to a definite shift from the normal course of business to preparation for litigation

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Considerations in Evaluating the Need  
for Confidentiality

- ✓ Is there the potential for cover-up, collusion, or fabrication of information?
- ✓ Is there a potential for theft or misappropriation of trade secrets, confidential data, insider trading or other sensitive data?
- ✓ Is there the potential for copycat testimony or evidence?
- ✓ Is there a concern for retaliation against the accused, the accuser or the witnesses?

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Confidentiality  
Considerations



- Could there be damage to the reputation of the witnesses, the accused or the accuser?
- Could evidence be destroyed or manipulated?
- Is there the potential for future criminal charges arising out of the investigation?
- Could persons reach out to others who have not yet been interviewed to persuade or change perspectives provided in future interviews?

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# Interviewing Witnesses



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## General Guidelines – Witness Interviews

- Explain the purpose of the interview
- Describe the investigator's role and make any introductions, if necessary
- Communicate the Company's policy on retaliation regarding no reprisals for complaints or participation
- Assure that no conclusions have been made
- Inform the employee that you will be taking notes of the interview
- Ask if there are questions before you begin
- Note: What to do if you suspect employee is recording conversations?

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## Interviewing Fact Witnesses

- ☐ Inform the witness that the Company is conducting a workplace investigation
- ☐ Explain purpose of the investigation is to gather relevant information
- ☐ State that no conclusions have been reached
- ☐ Review policies potentially implicated by the complaint
- ☐ Broadly ask whether the witness is aware of any conduct that may implicate these policies



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Gather the Facts

- **WHO** engaged in the conduct or witnessed conduct?
- **WHAT** occurred?
  - Physical evidence?
  - Documentary evidence (paper & electronic)
  - Audio recordings?
  - Video recordings?
- **WHEN** did it happen?
- **WHERE** did it happen?
- **WHY** did the conduct happen (motive?)



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Interviewing the Complainant

- Begin with the Complainant to determine scope of facts to investigate
- Thank the Complainant for availing him/herself of the Company's reporting mechanisms
- Explain the prohibitions against retaliation and provide contact information should Complainant experience any conduct that the Complainant believes is in retaliation for the Complainant's participation in this investigation
- Review policies potentially implicated by the complaint
- Broadly ask whether the Complainant whether s/he is aware of any conduct that may implicate these policies



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Interviewing the Accused

- Inform the Accused that the Company is conducting a workplace investigation
- State that no conclusions have been reached and the purpose of the investigation is to gather relevant information
- Review policies potentially implicated by the complaint
- Broadly ask whether the Accused is aware of any conduct that may implicate these policies



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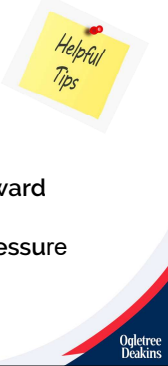
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Interview Tips

- Avoid “police-tone” warning/tactics
- Adopt an objective mindset and avoid applying a preconceived result
- Prepare for tough and incredibly awkward discussion
- Prepare how to respond to internal pressure



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Make a  
Determination



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Assess Facts and Ensure Proper  
Documentation Exists

- Determine whether any follow-up is needed
- Prepare draft of Investigative Summary based upon investigation
- Summary should include:
  - The context of the investigation, including an overview of relevant facts, allegations, and individuals involved
  - A description of the scope of the investigation listing the complainant, accused, and all witnesses
  - A summary of each allegation and a description of what could be verified by records, data, and corroborating statements
- Findings should correlate to specific company policies

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No Policy Violation

- If Company determines that no violation of company policy occurred:
- > Notify the Complainant and Accused of determination
  - > Thank the Complainant for giving the Company opportunity to resolve problem
  - > Invite the Complainant to report any additional witnesses or facts relevant to current complaint and to report any future policy violations
  - > Thank Complainant, Accused and Witnesses as appropriate for their cooperation in investigation
  - > Reiterate relevant company policies (including prohibition against retaliation)

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Inconclusive Findings

- If the investigation is inconclusive, (i.e., “he said/she said”) follow steps outlined previously, and:
  - Issue a formal warning to the Accused reiterating the relevant company policy, and that any further complaints may result in disciplinary action



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Discipline Considerations

- Factors to consider in determining appropriate discipline:
- How severe was conduct?
  - How many incidents were there?
  - Has the employee been previously warned?
  - Was expectation clearly communicated?
  - What does the policy say?
  - How has the company disciplined similar inappropriate conduct in the past?
  - Employee’s overall work record

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Document Corrective Action

Once the company decides on the appropriate corrective action, write a summary (either as an addendum to Investigation Summary or as a separate document) detailing:

- (1) who was involved in the decision;
- (2) what information was relied upon;
- (3) the factors relied upon; and
- (4) how and when the corrective action was carried out

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Follow Up



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Following Up

- The company should follow up with the complainant periodically for several months after the investigation to ensure that there has been no further misconduct or retaliation
  - *Follow the Rule of Ones: follow up after one week, one month and one year and document such communications*
- The company should also consider issuing a written or verbal reminder to employees reiterating the importance of complying with the relevant policies
- Depending on the outcome of the investigation, additional training or education might be warranted and, if so, refresher training should be provided in a timely manner and should be documented

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