



# The Art of Disciplining, Separating, and Laying Off Employees:

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Diego  
La-Law-Palooza***

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# Today's Agenda

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01 Setting the Stage: Overview of Practical and Ethical Considerations In-House Counsel Face When Involved in Personnel Issues

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02 In-House Counsel's Role in Internal HR Investigations and Related Ethical Considerations

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03 Effective Strategies When Disciplining Employees and Maintaining the ACP

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04 Navigating Terminations and Layoffs: Practical Advice and Ethical Concerns

# Obligatory Attorney Admonition

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# Introduction

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- ***Decisions relating to investigating employee complaints and disciplining and separating employees can create considerable risks for employers, particularly in California.***
- ***Every decision an employer makes relating to these issues may be the basis for a costly and time-consuming lawsuit.***
- ***The business often expects in-house counsel to play a significant role in these critical personnel decisions, however the extent of in-house counsel's involvement can create its own unique risks and ethical challenges.***



# Setting the Stage: Overview of Practical and Ethical Considerations In-House Counsel Face When Involved in Personnel Issues

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# ***Setting the Stage: Overview of Practical and Ethical Considerations In-House Counsel Face When Involved in Personnel Issues***

<b>Practical Questions</b>	<b>Further Considerations</b>
<b>Should in-house counsel be involved in pre-litigation personnel decisions?</b>	<ul style="list-style-type: none"><li>• Is it part of counsel's job duties?</li><li>• Is in-house counsel sufficiently qualified to provide legal counsel on employment law issues?</li><li>• Concerns about counsel becoming a witness in a future lawsuit?</li></ul>
<b>If in-house counsel is involved in a personnel issue, what should the nature of their involvement be?</b>	<ul style="list-style-type: none"><li>• Lead the investigation?</li><li>• Direct or guide HR during the process?</li><li>• Communicate directly with the employee?</li><li>• Make or authorize the decision?</li></ul>
<b>How should in-house counsel document their involvement in personnel decisions?</b>	<ul style="list-style-type: none"><li>• Considerations regarding the attorney-client privilege?</li><li>• Where and how to draw the line between privileged "legal advice" and general non-privileged business advice?</li></ul>
<b>Should in-house counsel be the ultimate decision maker when it comes to personnel issues?</b>	<ul style="list-style-type: none"><li>• Is it appropriate for in-house counsel to make personnel decisions impacting employees in other parts of the business?</li><li>• Potential personal liability?</li><li>• Impact on litigation and ACP?</li></ul>

# ***Setting the Stage: Overview of Practical and Ethical Considerations In-House Counsel Face When Involved in Personnel Issues***

Ethical Questions	Considerations
Who is the client?	<ul style="list-style-type: none"><li>• “Firm” or “law firm” means a law partnership ... or lawyers employed in a legal services organization <b>or in the legal department, division or office of a corporation</b> .... [Cal. Rules of Professional Conduct, Rule 1.0.1(c)]</li></ul>
Can (should) in-house counsel provide legal advice on personnel decisions?	<p><b>Rule 1.1 Competence</b></p> <p>(b) For purposes of this rule, “competence” in any legal service shall mean to apply the <b>(i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.</b></p> <p>(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by <b>(i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent,</b> (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.</p>



# Setting the Stage: Overview of Practical and Ethical Considerations In-House Counsel Face When Involved in Personnel Issues

Ethical Questions	Considerations
Are in-house counsel's communications privileged?	<ul style="list-style-type: none"><li>• Attorney-client privilege protects confidential communications between attorneys and clients made for the <b><u>purpose of giving legal advice</u></b>. See <i>United States v. Richey</i>, 632 F.3d 559, 566 (9th Cir. 2011).</li><li>• Privilege protects communications with outside as well as in-house counsel. See <i>United States v. Rowe</i>, 96 F.3d 1294, 1296 (9th Cir. 1996).</li><li>• Privilege can also apply to communications between members of in-house counsel. See <i>United States v. ChevronTexaco Corp.</i>, 241 F. Supp. 2d 1065, 1077 (N.D. Cal. 2002).</li></ul>
How does in-house counsel draw the line between general business advice and legal advice?	<p>“In-house counsel may act as integral players in a company’s business decisions or activities, as well as its legal matters. When attempting to demonstrate that an internal communication involving in-house counsel deserves privileged status, <b>a party therefore must make a clear showing that the speaker made the communication for the purpose of obtaining or providing <u>legal advice</u>.</b>” See <i>Oracle America, Inc. v. Google, Inc.</i>, 2011 WL 3794892, at *4 (N.D. Cal. 2011) (emphasis added).</p>



# Setting the Stage: Overview of Practical and Ethical Considerations In-House Counsel Face When Involved in Personnel Issues

Ethical Questions	Considerations
How have California courts analyzed the “predominant purpose” test?	“In determining whether a communication is privileged, the Court looks to the <b>dominant purpose</b> of the attorney’s work.” The privilege does not apply where an attorney merely gives business advice. The <b>predominant purpose test</b> is not applied on a document-by-document basis. “[I]t is not the dominant purpose of a particular communication that dictates whether the attorney-client privilege is applicable; <b>rather the issue is what was the dominant purpose of the relationship.</b> ” <i>Rotz v. Symetra Fin. Corp</i> (S.D. Cal. 2016) (emphasis added).
How can an in-house counsel avoid improper <i>ex-parte</i> communications with represented parties?	<b>Rule 4.2(a) Communication with a Represented Person</b> In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer <b>knows to be represented</b> by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.  -Pre-litigation -Single plaintiff -Member of a certified class action



# In-House Counsel's Role in Internal HR Investigations and Related Ethical Considerations

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# Know When to Investigate and What to Investigate

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## *What to do when HR approaches in-house counsel seeking advice on whether the following complaint triggers a “formal” investigation:*

- § “My supervisor is not fair.”
  - § “Mary Sue, who sits next to me, talks dirty to her boyfriend on the phone.”
  - § “I did not get a raise because of my gender.”
  - § “I was given a warning for coming in late, but it was because I have medical problem.”
  - § “This company sucks. Asian employees are marginalized.”
  - § “I think one of my direct reports is secretly photographing his co-workers and may be posting them on the Internet.”
  - § “My co-worker is looking at pornography on his computer.”
  - § “My manager is violating company policy.”
  - § “I am never allowed to take my meal periods.”
- ***Allegations of unfair treatment on the basis of protected characteristics: Sex/Gender, Sexual Orientation, National Origin, Disability, Veteran Status, Age, Race, etc.***
  - ***Unethical behavior***
  - ***Mistreatment in the workplace - e.g. - “unfair,” “bullying,” “microaggression,” “bias,” “exclusion,” “demeaning”***
  - ***Violence of any kind***
  - ***Health and safety issues***
  - ***Regulatory concerns***
  - ***Listen to key words: “harassment” “discrimination” “racism” “ageism” “sexism” “homophobia” “retaliation”***

# Laws That Trigger an Investigation

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State and federal antidiscrimination laws.

Federal securities laws /  
Sarbanes-Oxley.

State and federal whistleblower  
protection laws.

State and federal wage and hour  
protections.

Health and safety laws.



Federal Contractor provisions.

Department of Labor

Environmental protection laws.

State common law (wrongful  
termination against public policy).

# Consider a Formal Escalation Process

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1. Assess whether to conduct a full-on investigation or is it an employee relations/HR concern;
2. Have the issue addressed by the appropriate individual; and
3. Follow an investigation process that aligns with the organization's policies and standards and promotes cultural goals and expectations—e.g., a culture of “speaking up and transparency.”

# Know What Is Being Investigated

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§ Not all complaints are equally serious.

§ How do you tell the difference?

- Ask yourself, what is really going on?
- Is there a simple solution that will satisfy everyone?
- Is there a practical issue that needs to be addressed?
- Listen for key buzzwords: “retaliation,” “harassment,” “discrimination.”
- Listen for the unspoken issues, concerns.
- Look for patterns within a department or unit.

§ If you are not sure that it is serious and requires escalation, talk it over with HR or an employment attorney.

# Threshold Considerations

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01

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**Do you want the investigation to be covered by the attorney-client privilege?**

02

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**Who will be conducting the investigation?**

- HR/ER Business Partner
- In-house counsel
- Compliance officer
- Outside counsel
- Third-party investigator
- *Key consideration: Whoever investigates must be willing to serve as a witness and come across as a fair, impartial, and knowledgeable investigator*

03

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**If not serving as the lead investigator, what role does in-house have in the investigation?**

- Provide legal advice and counsel
- Review/edit/revise the report
- Liaison with outside counsel and/or the outside investigator



# Warn Against Errant Communications

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Any communication about the investigation that is not with, or at the direction of counsel, is discoverable.

- “This employee is a kook. Can you believe she is insisting on getting a stool for her foot? Doesn’t she know we have better things to do?”
- “I know we can’t do anything about this employee because he made a complaint, but he is irritating everyone he works with and creating chaos.”
- “This is sexual harassment. We have no option but to fire the supervisor. I don’t know why I even have to talk to him.”
- “Not another complaint from Elaine. Can’t she just get a life and find someone else to bother?”
- “Let’s do this by the book, since we know we are likely to fire [the complainant] when this is over.”
- **REMEMBER:** IF IN-HOUSE COUNSEL IS DIRECTING THE INVESTIGATION, EVERYTHING SHOULD BE LABELED ACP UNTIL THE FINAL PRODUCT.

# When the Investigator Is an Attorney

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- ***Upjohn v. U.S., 449 U.S. 383 (1981) and its progeny. Provide written (or oral) warnings to all employees before conducting interviews.***
- ***In order to fall under the ACP the communication with in-house counsel must be:***
  - ***Made by “corporate employees” (or former employees)***
  - ***Made to counsel for the Company “acting as such” (i.e., in a legal capacity)***
  - ***For the purpose of obtaining legal advice***
  - ***At the direction of corporate superiors***
  - ***Intended to be and were kept confidential***

# When the Investigator Is an Attorney

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## Contents of an Upjohn Warning

- *I am in-house counsel.*
- *I am conducting this interview to gather facts in order to provide legal advice to the Company. I represent the company and not you personally.*
- *Your communications are protected by the attorney-client privilege. Generally, no one can force you or me to disclose in court what we tell each other today. But the attorney-client privilege belongs solely to the Company, not to you personally. The Company alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.*
- *For this discussion to be subject to the privilege, it must be kept in confidence. Except for your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside the company. You may discuss the facts of what happened, but you may not discuss this discussion.*
- *I have provided this notice to every employee I am interviewing as part of my investigation.*
- *Any questions?*
- *Confirming you are willing to proceed?*

# Best Practices to Maintain the Privilege

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- ***The investigator is an attorney.***
- ***The investigator provides Upjohn Warnings before interviewing witnesses, and employees sign the Warning.***
- ***Written communications***
  - ***Label communications ACP.***
  - ***Clearly identify the legal purpose of the communication at the outset***
    - ***“In my capacity as in-house counsel, I am reaching out to you to discuss ....”***
    - ***“As part of my privileged investigation into XYZ, I would like to arrange a meeting to discuss ...”***
  - ***If you are concerned about the communication being discoverable, be careful not to mix “business” advice and “legal advice.”***
  - ***Remind leaders on how to ask for legal services versus general business advice.***

# Hypothetical: The Vegas Conference

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## Fact Pattern

- Leaders attend the annual sales conference in Las Vegas.
- While at the conference, the Scranton Regional Manager Michael, gets blitzed and *allegedly* sexually propositions two of his colleagues, Jan and Holly.
- As Senior Corporate Counsel, you were at the meeting, but did not witness Michael's *allegedly* outlandish behavior.
- Two months after the conference, Jan (who you consider to be a work friend), tells you in strict confidence, that Michael sexually harassed her and Holly in Vegas, but she does not want to “make a big deal about it” because he was “just being stupid and had too much to drink.”



# Hypothetical: The Vegas Conference

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What is your obligation as an employee?  
Manager? As in-house counsel?

- Considerations:

- Does Jan's complaint trigger an investigation?
- Can/should you personally investigate the complaint?  
If not, who should do the investigation?
- To what extent should you heed Jan's request that the matter be kept confidential?
- If you are going to investigate the complaint, do you need to give Jan and Holly an *Upjohn* Warning?
- Can you "on the down low" tell Jan, your friend, the status of the investigation?



# Effective Strategies When Disciplining Employees and Maintaining the ACP

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# ***Why Are Managers Afraid of Disciplining Disgruntled Employees and What In-House Counsel Can Do About It?***

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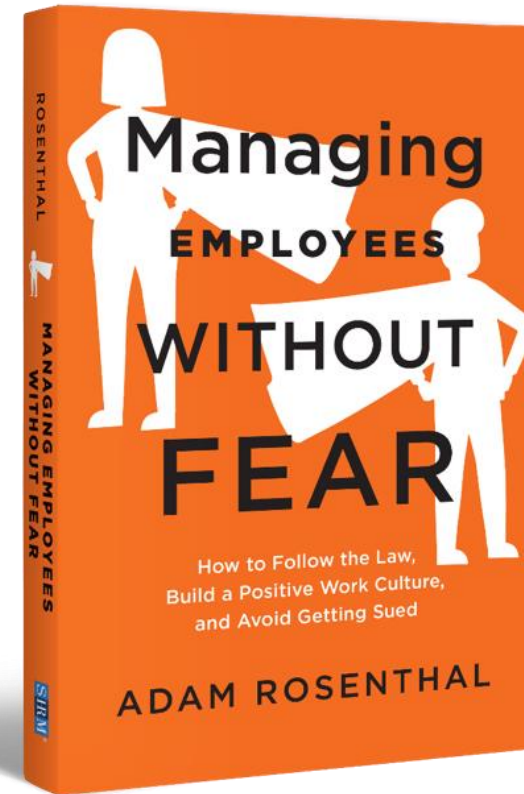
## ***Managers Receive Mixed Messages***



# ***Why Are Managers Afraid of Disciplining Disgruntled Employees and What In-House Can Do About It?***

## ***Too Many Managers Manage With Fear***

- ***Fear of how to discipline employees***
- ***Fear of not having sufficient documentation/examples to support the discipline***
- ***Fear of their employees***
- ***Fear of being blamed for their employee's performance issue***
- ***Fear of being accused of discrimination or retaliation***
- ***Fear of how to "performance out" an underperforming employee***



# Five Things Every Disciplinary Documentation Should Include

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01

**Evidence** that prior to the write-up the employee knew the employer's expectations.

02

**Evidence** that the employer's expectations were appropriate, lawful, and consistent with the job duties/responsibilities and business needs.

03

**Evidence** that the employee did not meet the employer's expectations.

04

A clear statement of the employer's expectations going forward.

05

A clear statement regarding the consequences of failing to meet the employer's expectations.

# Best Practices for In-House Counsel Around Disciplining Employees

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- ***Message to leaders: Discipline decisions come from manager/HR not from the Legal Department.***
- ***Legal does not have to review every write-up (although HR generally should).***
- ***In-House Review of Disciplinary Write-ups:***
  1. ***Perform a “legal audit” (e.g., confirm that the discipline is non-discriminatory and non-retaliatory).***
  2. ***Confirm that the write-up is grounded in solid evidence.***
  3. ***Review and revise for “legal clarity” and ensure that all communications with HR/Managers in the drafting and preparation is covered by the ACP.***
  4. ***Make sure it is well written (poorly drafted write-ups often lead to scary jury verdicts).***
- ***Caution about directly interacting with the employee or getting too much in the weeds on the write-up.***

**Important:** The final version of the document should not have in-house counsel’s fingerprints on it.



# Navigating Terminations and Layoffs: Practical Advice and Ethical Concerns

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# Termination 101

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***As a general precaution, even an “at-will” state like CA, the decision to terminate should always be:***

- ***Based on legitimate business reasons***
- ***Supported by ample documentation***
- ***Consistent with the employer’s policies***
- ***Conducted in good faith***
- ***Made “for good cause” (not “for cause”) which means for a fair and honest reason, regulated by good faith, that is not trivial, arbitrary, or capricious, or unrelated to the business needs or goals, or pretextual.***



# Termination 102

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- It is always better to separate an employee based upon a specific event or events rather than based upon a cumulative effect.
- Always provide the true reasons why the employee is being separated.
- Never fake a layoff that is really a separation for cause; it creates more problems than it solves.



# Termination 102

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## *Should you use a termination letter?*

- *Do not use a form for termination.*
- *Forms may not properly cover the real reasons for the termination.*
- *No one likes to be terminated by a form.*
- *A jury may punish an employer for being so impersonal with an employee.*
- *Carefully state all reasons for termination. However, do not limit your ability to add more information later.*
- *Avoid legal conclusions.*
- *Do not use loaded terms such as “sexual harassment” or “disability.” Rather, use “violation of employer policy,” “inappropriate behavior” or “inadequate performance.”*

# Termination 102

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- *Be evidence-based in the termination letter.*
- *The employer will be stuck with the contents of the letters for years to come.*
- *Be sure you can support the reasons for the termination set forth in the letter.*
- *If the arbitrator or jury thinks the manager lied or did not consider the full context, they may assume illegal conduct on the part of the employer.*
- *Remember who your audience is for the termination letter.*

# In-House Counsel's Role in Termination Decisions

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- Trust and verify.
- Formal review under the umbrella of the ACP.
  - Legal Audit
  - Review/revise termination letter
- Recommend having a privileged “termination review” meeting to address any legal / policy concerns with the termination decision.
- Remind HR of obligations re final pay, COBRA, etc.

**Legal should *never* make a termination decision (unless it is for a direct report).**

# To Severance or Not to Severance

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- Does your organization have a consistent policy around offering severance agreements to certain employees (terminations vs. layoffs)?
- Is there a particular reason to offer a severance agreement to *this* employee who is being involuntarily separated?

Obviously, you need a strong and legally compliant severance agreement (e.g., OWBA, special rules for an employee who claimed harassment, wage and hour, etc.).

# The Termination Meeting

## ***Termination meeting:***

- ***Have a witness present at the termination meeting (Legal should avoid attending or risk being a witness).***
- ***Require that HR is present at the meeting.***
- ***Document the termination carefully.***
- ***Ask the employee to sign the termination notice.***
- ***State specific obligations are satisfied (e.g., final pay, incentive comp/stock options, etc.).***
- ***Conduct exit interviews whenever possible.***
- ***Review post-employment obligations around confidential information and trade secrets (and potentially restrictive covenants outside of CA)!***

# ***In-House Counsel's Involvement in Exit Interviews for Layoffs/Resignations***

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- ***Tread carefully.***
- ***If in-house counsel conducts the exit interview, it may prompt an investigation (and Upjohn Warning).***
- ***Can learn important information about work conditions and supervisory issues***
- ***Can lock employee into a story that may prevent employee from bringing a contrary claim after termination***

The background of the slide is a blue-tinted photograph of a modern office interior. In the foreground, the silhouettes of a man and a woman are seen from behind as they walk away from the camera. The man is carrying a briefcase. They are walking on a polished floor that reflects the light. In the background, other people are visible, also in silhouette, walking in the same direction. The office has large windows on the right side, and the overall atmosphere is professional and corporate.

# Got Questions?

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**SheppardMullin**



# Thank you for attending!

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