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Who are you going to call? (Choosing the Right Investigator)

 by *Judith A. Rosenberg*

It's Friday afternoon and you are getting ready to turn off your computer and head home for the weekend. The phone rings and it's an agitated client telling you the Human Resources department has just reported they received a formal complaint of harassment and discrimination from an employee. Your client wants you to be on-site Monday morning to "take care of things." After you calm her down and ask her to send you the information she received, you tell her you will be in touch over the weekend with a plan.

What will you do over the weekend to start the process for your client?

As an attorney practicing in California, you know that Cal. Gov. Code Section 12940(j)(1) requires an employer to show that it took "immediate and appropriate corrective action." California's law mirrors the federal law applicable in most other states. This means that your client must take prompt steps to start an investigation and to determine (with your assistance) what steps she should take in response to the complaint.

Your first step is to find an investigator who is available to start work on Monday morning. You want to make sure you choose an investigator who has experience and training necessary to conduct a neutral and thorough investigation.

Availability

The investigator's availability is a critical consideration when starting an investigation. California's statute requires "immediate" action. Sometimes an investigator will not be able to rearrange a schedule to provide the timely assistance you need. In those cases, as much as you might otherwise want to have that person conduct the investigation, it is prudent to find someone who can assist you immediately.

The author was recently involved in a case where it was extremely important to start the investigation as quickly as possible. Employees at a large national company called the Human Resources department on Friday afternoon and alleged that one of the upper management employees had been harassing almost a dozen women, both verbally and physically. The allegations included explicit sexual acts which occurred in the office. The company's outside counsel advised the employer to put the individual on leave as soon as they learned of the complaint. They contacted the author over the weekend and asked if she could be on-site to start interviews on Monday morning. Like the attorneys, I changed my plans so I could be there.

The employees were apprehensive about what would happen when they returned to work after they made the complaint. Starting interviews as soon as their work day began on Monday helped reduce their anxiety, as they saw that the employer intended to take prompt and appropriate action. A delay of a day or two would have affected the employees' perception of how seriously the employer took the complaint and would have also resulted in the opportunity for further discussion about the issues among the employees, which could adversely affect the investigation.

Type of Investigator

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The client has asked for help - right now! Before you jump in, you should consider what happens if you or someone in your firm undertakes an investigation for your client.

First, it means that it is likely you and your firm will not be able to represent the client if there is litigation. Second, even if you continue to represent the client, it is problematic to put one of your partners or associates on the witness stand to assert they conducted an unbiased investigation. A plaintiff's attorney could spend substantial and interesting time asking about the firm's relationship with the client, other work performed, total billing to the client over the years and even your relationship with the partner or associate who conducted the investigation. It may be difficult to separate the conclusions of the investigation from the advice you provided to the client, raising possible issues of attorney-client privilege.

In-House Investigator

The decision to use an in-house human resources or attorney is sometimes penny wise and pound foolish. If your client decides to use an in-house investigator, you should ensure the investigator has been trained to conduct investigations and has no relationship with anyone involved in the investigation. Neither the complainant nor the subject of the investigation should have the ability to affect the investigator's employment situation. If the complaint involves high level executives or especially sensitive matters, the investigator must be someone who has the credibility and status within the organization to evaluate the issues without fear of reprisal.

Experience shows that what starts out as an apparently simple complaint may become more complex and sensitive as the allegations or facts are brought to light. An inexperienced investigator may not recognize the potential problems and could quickly become out of her depth.

The author has been retained as an expert to evaluate the work done by a very junior in-house attorney who had no training or experience in investigations and had been assigned to investigate complaints in what was a potentially high profile case for a large corporation. The case involved allegations of sexual harassment and assault with a baseball bat on the complaining employee's husband by a high level executive. Not your typical harassment and discrimination complaint and one with the potential for substantial liability for the company and its executive.

The attorney assigned to the work did not meet any of the criteria outlined above. She was untrained and inexperienced. Her neutrality and even ability to come to the conclusion that the executive had engaged in misconduct was suspect because of her position in the company and the status of the accused executive.

During her deposition, the attorney admitted she had not developed a plan for the investigation, had not gathered critical documents (such as the police report, tapes of the 911 calls after the altercation, or emergency room records to determine what injuries the employee's husband sustained), had not interviewed the executive in person "because he was too busy," and had lost some of her notes and was unable to read some of the others because they were illegible. Overall, one could politely say that this was a disaster for the defense. In a complicated case like this, if the client chooses to use an in-house investigator, you should help them ensure that the person has the necessary training, experience and credibility within the organization to explore all of the issues and reach a conclusion about what occurred and make certain they understand the problems that might arise if they use an internal investigator.

Independent Investigator

Perhaps the most reliable way in most cases to ensure an investigation is neutral, prompt and thorough is to use an experienced outside investigator. When choosing that person you should consider what special skills might be needed to address the complaint.

Are there allegations of workplace violence or threats?

Are there technical issues that should be addressed, such as tracking emails, text messages or telephone records?

What cultural issues might affect the ability of witnesses or parties to talk with the investigator?

- Relationship with attorney or client

It is important to consider whether the investigator has a personal or professional relationship with your client, your law firm or even with you. How much work has he done for you or the client in the past? How often has he determined that complaints were unfounded in his work with you or your client? Does this make him appear less neutral?

Simply because an investigator has worked with you or this client in the past does not mean that he will not be neutral. However, an investigator who has repeatedly determined that the complaints are unfounded may find his conclusions more easily subject to attack. It is important to choose someone with a reputation for well-reasoned balanced conclusions.

In a large firm, attorneys often have a list of investigators they recommend. The investigator's neutrality is less subject to attack if he works for a variety of attorneys or attorneys in offices in one firm or for different offices of the same firm than if he works repeatedly for an individual attorney. While most investigators have not done work directly for a plaintiff's attorney, some have been agreed upon by both attorneys as a neutral and others have credibility as being neutral because they have provided expert witness opinions for plaintiffs and defendants. Similarly, an investigator who has practiced law and represented both plaintiffs and employers or served as a neutral in employment situations may be more credible than the investigator who has never worked on a plaintiff's case.

- Credentials

California Business and Professions Code Sections 7522 and 7523 regulate who may conduct investigations. For employers with operations in California, consider before you retain an investigator whether the person you choose is qualified under the statute. Under the California Business and Professions Code, investigations may be conducted by:

- Internal employees (Bus. and Prof. Code Section 7522 (a) - A person employed exclusively and regularly by any employer who does not provide contract security services for other entities or persons, in connection with the affairs of such employer only and where there exists an employer-employee relationship.);
- Attorneys (Cal. Bus. & Prof. Code Section 7522 (e) - An attorney at law in performing his or her duties as an attorney at law);
- Private Investigators (Cal. Bus. and Prof. Code Section 7523 (a) - Unless specifically exempted by Section 7522, no person shall engage in the business of private investigator, as defined in Section 7521, unless that person has applied for and received a license to engage in that business pursuant to this chapter.).

It is important to review the investigator's credentials, training and experience both to ensure a thorough neutral investigation and ensure that a plaintiff's attorney or jury will find the investigator credible. An investigator who can demonstrate a neutral approach as a result of representing plaintiffs and employers or management and who has experience as a neutral expert witness or mediator may be as good a choice as an investigator with years of experience who does not have a reputation for even handed conclusions.

If you do not know the investigator, you will want to obtain basic information such as the number of investigations she has done, whether she has investigated these types of complaints before or investigated complaints in similar organizations, and what training she received about conducting investigations. Most of this information should be available on her resume or website. You could also ask for references from other attorneys or employers for whom she has conducted investigations.

Engagement Letter

After you identify an investigator, you should clarify who will retain the investigator- the law firm or your client. If the investigator is retained by the client, you may wish to participate in discussions with the client and the investigator as the interviews progress so the conversations might be covered by the attorney client privilege. The retainer agreement should clarify who is responsible for paying the investigator's bills - the law firm or the client.

If your client retains the investigator, you should ensure they do not send a letter directing the investigator's work or telling her how to conduct the investigation. The client should provide names and contact information for employees who may have information about the circumstances leading to the complaint and should provide documents, emails and any other relevant information (after you review it for privilege or other issues).

You may also want to discuss whether the investigator carries Errors and Omissions insurance for their work as an investigator and determine what their policy limits are. Public entities will rarely indemnify the investigator and generally have minimum policy limit requirements for outside investigators.

Practical Details

You or your client should designate a contact person who can schedule interviews, provide documents for review and arrange a location for the interviews. In most cases, the contact person will be someone in Human Resources who will also have information about the complaint.

The client will ordinarily provide copies of the documents for you to review before they are given to the investigator. You should make sure the client gathers all relevant documentation at the beginning of the investigation and follows through with requests for additional documents. Your client should provide all relevant documents in their possession, as failure to do so may suggest they are not cooperative or not seriously interested in a thorough investigation.

The contact person will generally be responsible for finding a location for the interviews. It is important to consider whether the interviews should be held away from the workplace. The author has conducted interviews in hotel conference rooms or offices of attorneys in the building where the employer is located. The author has also interviewed witnesses at local restaurants where there was a private space to talk. While conducting interviews at the work location may be most convenient for the client, parties and witnesses are often more comfortable away from the workplace so others are not aware of the interviews. It also makes maintaining confidentiality easier if the witnesses are not crossing paths as they come in and out of a conference room.

Updates and Reports

You and your client should decide whether you would like updates about the information the investigator obtains during the interviews. Having current information allows you and your client to determine whether it is necessary to take immediate action in response to the information received, such as placing an individual on paid or unpaid leave, reassigning work locations or terminating an employee. It is important that there is no attempt to or appearance of trying to influence or guide the investigation if you talk with the investigator during the course of the interviews.

In most cases, the investigator prepares a written report or summary, summarizing the interviews and information from the documents and providing a conclusion about the complaint. The report may also include an assessment of the credibility of the parties or witnesses as part of the basis for the conclusion. In some instances, particularly with public entities, the attorneys and employer may meet with the investigator before the report is completed. This allows them to ask questions about the interviews and conclusions and ensure that the investigator has addressed all of their concerns. Both you and the investigator must make certain that there is no suggestion that you or your client attempted to influence the investigator's conclusion or that the report or conclusions were in any way affected by the discussion. If the investigator has a draft

report prepared before the meeting it is easier to document that the conclusions were not affected by any discussion of the facts or issues.

It is unusual for an attorney or employer to request that the investigator not prepare a written report. The investigator's recall of statements and conclusions may be called into question if there is no final written report summarizing all of the information reviewed, summarizing the interviews and documenting conclusions. Absence of a report may call into question the process for and thoroughness of the investigation. It may also be difficult to be certain that you and your client have understood all the information and conclusions based only on a conversation with the investigator. It is better practice to have the investigator prepare a report, even an executive summary, than to end the investigation without one.

Conclusion

The choice of an investigator plays a critical role in your ability to understand, analyze and resolve a workplace complaint. You should ensure that the investigation will be prompt, thorough and neutral; that you have all of the necessary information to analyze the facts and perform a proper risk assessment for your client; and that the investigation will withstand the scrutiny of a plaintiff's lawyer or jury. Taking time to consider the investigator's availability (to ensure that the investigation will be prompt), the investigator's credentials and experience (to ensure the investigation is thorough) and the investigator's relationship with the client or with you (to ensure the investigation will be neutral) should allow you to find the best resource to help your client resolve her problem quickly and efficiently.

About the Author

Judith Rosenberg's experience as a plaintiff's lawyer, management consultant and Federal Court appointed neutral monitor for a class action sexual harassment and retaliation case provides her instant credibility with employers, employees and plaintiff and defense attorneys. As a result of her experience working on "both sides of the table," she has a deep understanding of employment issues, practices and solutions which is demonstrated in all of her work as an investigator, expert and educator.

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