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Workplace Harassment Investigations Worldwide

A Comparison of the United States, Canada, Australia, Ireland, and New Zealand

By Amy Oppenheimer

Laws prohibiting workplace harassment cannot accomplish much without adequate enforcement—and the capacity for enforcement agencies to monitor work environments and take action to prevent and respond to harassment and discrimination is limited. This means it is largely up to employers to enforce the law by preventing and responding to harassment occurring in their midst.

To enforce rules against harassment, an employer must first determine what happened—after all, much of harassment happens behind closed doors. Therefore, when allegations arise, employers are tasked with having procedures in place to swiftly and fairly make factual findings as to what occurred.

In the United States, this has resulted in a plethora of workplace investigations, mostly conducted by internal human resource professionals, but also by external professionals, most of whom are lawyers.

Since 1998, when the U.S. Supreme Court made it clear that appropriate employer practices could prevent an employer from being liable for harassment,[1] best practices have developed for how to conduct internal investigations. These practices are set forth in legal opinions;[2] in guidance from regulatory agencies—in the U.S., from the national agency, the Equal Employment Opportunity Commission (EEOC),[3] in California, the Department of Fair Employment and Housing (DFEH),[4] and fair employment practices agencies in other states; professional organizations such as the Association of Workplace Investigators (AWI)[5] and the Society for Human Resource Management (SHRM),[6] as well as various other publications.

This article compares workplace investigations in the United States with four other countries: Canada, Australia, Ireland, and New Zealand.

Methodology

A questionnaire was sent to professionals who conduct workplace investigations in Canada, Australia, Ireland, and New Zealand asking the following questions about the practices in their jurisdictions:

- When an employee brings a complaint of discrimination to his/her employer, is it usually investigated?
- Who has primary responsibility for doing the investigation?
- How long does a typical investigation last?
- What standard of proof is used?
- Is it the same standard of proof as that used in civil court cases and/or labor court cases?
- Is there a specific case, policy, guidance, statute, or other law that sets out the burden of proof? If so, what is the case, policy, guidance, or statute?
- What due process/procedural fairness rights does the respondent have during the investigation prior to the interview?
- What due process/procedural fairness rights does the respondent have after the investigation?
- What rights does the respondent have during the investigation?
- Are parties given the investigative report? Does that include witness statements? Are they given the documentation gathered during the process?
- Does either party have appeal rights? If so, does this depend on the seriousness of the charges or the seriousness of the disciplinary action?
- Are there standards for investigations? If so, who promulgated them and where are they found?
- What primary authority is there regarding workplace investigations?

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If you are interested in writing for the *AWI Journal*, please send an abstract describing the topic you will be covering to awijournal@awi.org. Our articles focus on the many different aspects of workplace investigations, including how the law applies to the work of investigators, practical matters, similarities and differences between workplace investigations and other fields of endeavor, developments and trends in the law and profession, and book reviews. **Article deadline: October 21 for Issue 4.**

Letters to the editor are welcome; email awijournal@awi.org. Nothing contained in this publication constitutes legal advice.

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President's Message

Happy 10th Birthday, AWI!

By now, the party is behind us and we are basking in the glow of this year's Annual Conference. Congratulations to co-chairs Elizabeth Gramigna and Cara Panebianco, and to the Annual Conference Committee, for such an amazing 2½ days.

While I am humbled by the opportunity to serve as AWI's president, I would be remiss in not acknowledging my predecessors, who nurtured it into becoming the successful organization it is today.

Amy Oppenheimer founded the California Association of Workplace Investigators (CAOWI) when our membership consisted primarily of California attorneys. We all owe Amy a debt of gratitude for recognizing the void that most of us did not know existed and for recruiting our former executive director, Steve Angelides, to form an organization dedicated to "promoting and enhancing the quality of impartial workplace investigations."

Michael Robbins succeeded Amy as president of CAOWI, and under his leadership, what was once an organization comprised primarily of members based in California became the international organization we now know as the Association of Workplace Investigators (AWI). Michael also led the group's board of directors to create AWI's mission statement, noted above.

Sue Ann Van Dermyden was AWI's third president. Under her watch, we teamed up with Ewald Consulting, our beloved association management company. We are lucky to have Laurie Krueger as our executive director and Julia Renner as program manager. In addition, the AWI-CH designation was created during Sue Ann's tenure, after the AWI Training Institute was accredited by the American National Standards Institute (ANSI).

Keith Rohman, our immediate past president, gets the credit for bringing AWI's membership to number into the 1000s. Keith took over as president within weeks of when the #MeToo movement took hold. We all knew it was a good time to be workplace investigators and that our profession was going to grow, but I don't think any of us anticipated just how busy we would become.

The year 2020 will be an exciting one. We will continue to focus on executing the goals under AWI's strategic plan. We have the most diverse board of directors since AWI was formed in 2009. We will hold five Training Institutes throughout the U.S. and Canada, with an updated curriculum that incorporates adult learning principles. And in furtherance of AWI's strategic plan, we have retained a public relations consultant to raise our public profile so that the organization is consulted first on emerging issues regarding workplace investigations.

I am honored and excited to be president of this amazing organization—one I have watched grow up since its infancy—and am thrilled to be serving in this capacity with a wonderful group of colleagues on the board of directors who spend countless hours working to grow and improve it.

AWI relies on our member volunteers to further its mission. I urge you to get involved by becoming a member if you're not already, joining a committee, attending local circle gatherings, writing an article for the *AWI Journal*, or attending the amazing array of educational programs AWI offers, including the AWI Training Institute, Annual Conference, and frequent seminars and webinars.

Please contact me if you have any questions or feedback about AWI or want to get involved.

President of the Board of Directors
Karen Kramer
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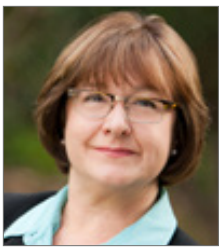

Letter From the Editor

Dear AWI Members and Friends,

Doctor Who (the eleventh incarnation) said: *Everything's got to end sometime. Otherwise nothing would ever get started.*

It is a time of endings and—happily—beginnings here at AWI.

A very happy beginning indeed is welcoming Karen Kramer as our fifth president. Karen's gracious acknowledgment of past AWI presidents in her *Journal* letter is in keeping with her unselfish approach to leadership. Karen has been a critical part of AWI's success from the beginning—instrumental in annual conferences, institutes, and leadership development—whether or not the spotlight was on. AWI will thrive under her leadership.

Another beginning for which I am personally grateful is that Barbara Kate Repa has assumed the role of managing editor of the *Journal*. Barbara Kate brings a wealth of knowledge of editing, publishing, and the law, having worked at *California Lawyer* magazine and at Nolo Press. As important, she's one of the funniest people I have met in a long time, and those of you who know me know that is saying something!

Something that has not ended is the intelligence and creativity of our *Journal* authors. This issue starts off with Amy Oppenheimer's article, "Workplace Harassment Investigations Worldwide." Amy has surveyed investigators in Canada, Australia, Ireland, and New Zealand and compared investigation practices in those countries with practices in the U.S. The result is an intriguing look at global similarities and differences—one that invites questions about where U.S. practice may be headed. Considerations of procedural fairness in investigations have been in the news in the U.S. lately; this article presents various approaches to consider.

Staci Dresher and Morgan Taylor of the Mintz Group provide insights into what could be called preventative investigations in their article, "Sleuthing Out Potential Harassers Before They're Hired." Recognizing the potential risk of hiring an executive with a history of misconduct, employers engage investigators to ferret out information that might not be easily accessible. Staci and Morgan discuss practical approaches to information that can (and cannot) be found and some of the legal obligations of investigators working in this field.

We continue with part two of Nancy Bornn's article on strategies for dealing with witnesses represented by counsel, "Breaking Through: How Investigators Balance the Competing Priorities of Claimant and Employer Counsel." This installment addresses what the investigator can do to facilitate working with counsel who represent complainants. I wish I had read this article years ago and am so glad to have it as a resource now.

Can we get too much advice about writing well? No! All investigators, at every stage of their careers, can benefit from tips on improving their written work. Editor and writer Kelly Cozy has stepped up and offers her take: "Writing Investigation Reports: Clarity Is Crucial." Unlike your (at least my) sixth grade English teacher, Kelly provides straightforward and practical guidance on this important topic.

I think the Doctor would agree with me that we are off to a smashing start to a new era of AWI.

Susan Woolley
Editor, *AWI Journal*
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Number of responses received:

- Canada—11
- Australia—8
- New Zealand—3
- Ireland—2

Based on the responses and additional research, this article summarizes practices related to workplace investigations for the United States and each of the other countries in the following areas:

1. The extent to which employers are performing investigations, who performs them, and how long they typically last.
2. The standard of proof used.
3. Due process and procedural fairness considerations.

Who performs investigations and how long do they last?

United States

In the United States, all but very small employers have a human resource (HR) function that, among other things, investigates complaints. Since under United States law there should be a fair and thorough investigation of complaints of harassment based on membership in a protected category, those types of complaints are usually investigated by either an in-house HR employee, an in-house attorney, or an outside investigator who is usually an attorney. Many employers will also investigate complaints of harassment even if the harassment is not based on the employee's membership in a protected category—often called "bullying" in the United States.

Employees can also bring a complaint to an enforcement agency, but employers have a duty to conduct a prompt, fair, and thorough investigation. The enforcement agencies investigate some percentage of the complaints they receive, but these investigations can take a considerable amount of time and are not a substitute for the employer's response.

Typically, investigations done internally by an employer take two weeks to two months to complete and those done externally take one to three months, depending on the allegations and the availability of the parties and witnesses.

Canada

Survey respondents from Canada report that workplace investigations are conducted by either the employer or an external investigator. If there was a complaint to the Ministry of Labour, the Ministry might require an investigator to conduct the investigation—sometimes, at a cost to the employer.

Respondents reported that most investigations took approximately six to twelve weeks, noting there were often outliers, where investigations had been completed in as few as two weeks, or as long as three years.

Australia

Australian respondents report that investigations are also generally conducted by the employer, either by in-house HR professionals or an external investigator, although certain government investigations may be handled by the relevant enforcement agency if criminal or corrupt behavior such as fraud is thought to have occurred. Respondents reported that most investigations took approximately six to twelve weeks, but simple investigations with limited witnesses and scope took as little as two weeks.

New Zealand

Survey respondents from New Zealand report that investigations are also generally conducted by the employer, with both external and internal investigations being common. They confirmed that investigations generally take one to three months, depending on circumstances, complexity, and number of witnesses.

Ireland

Ireland's respondents report that employers are obligated to conduct investigations into complaints of discrimination, and such investigations often last several months.

What standard of proof is used?

United States

In the United States, the preponderance of the evidence standard is used, which is the same standard used in civil court. This is also known as "more likely than not"—or "50 percent plus a feather."

Guidance from California's enforcement agency (DFEH) and the Association of Workplace Investigations (AWI) underscore that the preponderance of the evidence standard is the proper evidentiary standard in workplace investigations.

Canada

In Canada, the standard used is the "balance of probabilities" standard, which is the same as the preponderance of the evidence standard and "more likely than not." This is the same standard of proof used in civil court. Case law provides the standard used.

Australia

Similar to Canada, survey respondents reported that the standard applied is the balance of probabilities standard, essentially the same as the preponderance of the evidence standard. Australian investigators referred to the Briginshaw test,[7] which requires that the more serious the allegation and gravity of a substantiated

finding, the more comfortably satisfied the investigator must be before making any substantiated finding.

New Zealand

The balance of probabilities standard is used, which is the same standard of proof used in civil court. The burden of proof is set out in the Employment Relations Act of 2000.

Ireland

The Employment Equality Acts also delineate the balance of probabilities, or "50 percent plus one," as the standard of proof—the same standard as used in civil cases.

Any due process and procedural fairness considerations?

United States

In the United States, due process rights depend on the type of proceeding. Investigations by private employers are not generally associated with any specific due process rights, though best practices connected with investigations indicate that the parties (the complainant and respondent) should have the opportunity to be heard and to present relevant information. This is often articulated as a "fair, thorough, and timely" investigation. This language appears in some court cases and in some administrative agency guidelines.

Public employees have a property interest in their jobs and with that comes enhanced rights. Generally, they cannot be discharged without good cause. Thus, the degree of proof needed may be enhanced. Further, public employees often have fair hearing rights associated with disciplinary action that would apply. Unionized employees often also have enhanced rights.

Some of the due process rights that might be extended in an investigation include the rights to:

- Notice of the substance of the charges;
- Know who complained;
- Review written documentation before being interviewed;
- Review the information provided and gathered during the investigation (witness statements, documents, the report);
- Cross-examine the opposing party or witnesses;
- Representation;
- A formal hearing; and
- Appeal.

Most experts agree that non-unionized employees of private employers have a right to know there is a complaint against them; to know, by the end of the interview, what the allegations are; and to have a full and meaningful opportunity to respond. Likewise, most agree that the other rights listed above are not typically provided or necessary. However, some experts feel there is a right to know who complained and some types of employees may have a right to review written documentation, including a written complaint. Unionized employees have a right to a representative if there is a likelihood of disciplinary action.

Some of the other rights listed, such as a right to cross-examine and a right to review the information and statements gathered during the investigation, are not generally included in an employment context. However, they are sometimes included in sexual assault or harassment cases that arise in educational institutions under Title IX, and that is currently an area in flux.

There is generally no right to be given the final report, although parties are usually told the outcome and sometimes given a summary of the findings. If public employees are going to be disciplined, they have a right to see the portion of the report relied on for the discipline.

Canada

In Canada, respondents have a right to notice of the substance of the charges against them and to know who made the complaint. Survey respondents replied that employees were entitled to details of the allegations made against them, and some practitioners reported providing a written summary of allegations as a best practice. Respondents to complaints are not entitled to information obtained during the course of the investigation itself and are not entitled to a copy of the investigative report. They are, however, entitled to see the findings. As in the United States, unionized workers typically enjoy more rights than non-union employees, and those protections vary among bargaining units.

Those responding to the survey noted that timeliness and impartiality are also key elements impacting the fairness of any investigation, both to complainants and respondents.

Australia

Survey respondents reported that practices were different in different jurisdictions, but that respondents have the right to know the specifics of the charges against them, and in some cases are entitled to have the specifics of the complaint provided to them in writing prior to responding to the complaint or allegation. Respondents are also entitled to a fair and reasonable opportunity to defend themselves by responding to the allegations, and are entitled to have support, likely a union representative or attorney, present during meetings with an investigator.

Similar to other countries, absent company policy stating otherwise, respondents are not entitled to a copy of the report, but as a matter of practice, are advised of the findings of the investigation.

New Zealand

Respondents said that employees are entitled to a prompt, thorough, and impartial investigation if the employer decides the allegations warrant an investigation.

Employers are required to undertake a fair process before taking any adverse action against an employee, including dismissal. They must also have substantively justified grounds for taking the action.

The Employment Relations Act of 2000 sets out the test the Employment Relations Authority will apply when considering whether an employer's decision is justifiable.[8] The test is whether the employer's actions were what a fair and reasonable employer would have done, given all the circumstances at the time the dismissal or action occurred.

It is relevant whether the employer sufficiently investigated the allegations against an employee before dismissing them. This includes assessing whether:

- The employer fairly raised the allegations with the respondent employee by disclosing all relevant information regarding the allegation;
- The employee had a reasonable opportunity to respond to the allegations; and
- The employer genuinely considered the employee's response to the allegations before the action is taken or a disciplinary decision is made.

Notably, both complainants and respondents are generally entitled to view a draft copy of the investigation report, and they can then comment on it before it is given to the decision makers. Respondents also can raise a "personal grievance" against the employer if they consider the investigative process to have been unfair, regardless of the severity of the allegations.

Ireland

Respondents to complaints in Ireland are entitled to know the allegations and who made the complaint, are entitled to all the written documentation containing the allegations, and have the right to 24 hours' prior notice that they will be interviewed in connection with the complaint.

Additionally, respondents have the right to have someone with them during interviews, and also have the ability to cross-examine witnesses if the matter moves to a subsequent disciplinary stage, a right recently expanded by the High Court.[9]

Global Similarities and Differences

In all of the countries surveyed, employers are tasked with conducting investigations of workplace complaints of harassment and thus law and practice have developed relating to these investigations. The length of time investigations typically take and the standard of proof used is uniform throughout the five countries.

There is variation in what is considered a fair process that offers due process and procedural fairness. The United States provides the most flexibility, especially in the private arena. Canada and Australia are quite similar to each other, providing that there is a right to know what the complaint consists of, who made it and, at times, a copy of the complaint, but not a copy of the evidence collected or the report. New Zealand goes a step further and includes the rights provided in Canada and Australia, as well as a right to view a draft copy of the report, which the parties can comment on and appeal (called raising a "personal grievance") if they consider the process unfair. Ireland goes the furthest in providing the above and the right to cross-examine witnesses if the matter involves disciplinary action.

Additional International Resources

Canada

Legislation

- Sexual Violence and Harassment Action Plan Act, Bill 132 (2016).
- Legislation for federal employers for Workplace Harassment and Violence Investigations, Bill C-65 (2018).

Publications

- Kelly J. Harbridge, Workplace Investigations: *A Management Perspective*, Canadian Bar Association (November 2000).
- Hena Singh, *A Practical Guide to Conducting Workplace Investigations* (LexisNexis Canada)(2019).

Australia

Legislation

- *Fair Work Act 2009* No. 28 (Austl.)

Publications

- Fair Work Commission, *Industrial Action Benchbook* (July 31, 2017).

New Zealand

Legislation

- Case law from the Employment Court covers some issues, and the Employment Relations Authority hears personal grievance claims, including challenges that an investigation was unfair.
- Employment Relations Act 2000, No. 24 (NZ).

Publications

- Robin Arthur, *Effective Advocacy in the Employment Relations Authority—A Member's View*, New Zealand Law Society (October 24, 2014).
- James Crichton, *Practice Note 1: Steps to Be Taken in Proceedings*, Employment Relations Authority (March 31, 2016).
- Rosemary Monaghan, *Running a Case in the Employment Relations Authority*, Employment Relations Authority (September 2014).

Ireland

Legislation

- The Workplace Relations Commission has jurisdiction over discrimination claims under the Employment Equality Acts,

and it has propagated its own regulations and published case law: Workplace Rel. Comm'n, www.workplacerelations.ie/en.
- Standards for investigators: S.I. No. 146/2000, Indus. Rel. Act (1990), Order 2000.

Case Law
- Procedural standards for investigations:
- *Lyons v. Longford Westmeath Educ. and Training Bd.* [2017] IEHC 272.
- *Georgopoulos v. Beaumont Hosp. Bd.* [1998] 3 I.R. 132.

Publications
- *Procedures in the Investigation and Adjudication of Employment and Equality Complaints*, Workplace Relations Commission (October 2015).

Amy Oppenheimer has more than 35 years of experience in employment law, as an attorney, workplace investigator, expert witness, arbitrator, mediator, trainer, and administrative law judge. She is the founder and past president of the board of the Association of Workplace Investigators, Inc. (AWI), is on the Department of Fair Employment and Housing Task Force on Sexual Harassment, and is past chair of the Executive Committee of the Labor and Employment Section of the State Bar of California. Amy is co-author of Investigating Workplace Harassment, How to be Fair, Thorough and Legal*, (Society of Human Resource Management, 2003). She can be reached at: amy@amyopp.com.*

[1] *Faragher v. City of Boca Raton*, 524 U.S. 742 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).
[2] *Cotran v. Rollins Hudig Hall Int'l, Inc. 17 Cal. 4th 93 (1998) and Silva v. Lucky Stores, Inc*. 65 Cal. App. 4th 256 (1998).
[3] *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 1999 WL 33305874 (June 18, 1999).
[4] "Workplace Harassment Prevention Guide for California Employers," California Department of Fair Employment and Housing (DFEH) and the California Task Force on the Prevention of Sexual Harassment in the Workplace (May 2, 2017).
[5] "Guiding Principles for Conducting Workplace Investigations," Association of Workplace Investigators (Rev. July 29, 2013).
[6] Amy Oppenheimer & Craig Pratt, *Investigating Workplace Harassment: How to Be Fair, Thorough, and Legal* (Society for Human Resource Management) (2003).
[7] *Briginshaw v. Briginshaw* (1938) 60 CLR 336.
[8] Employment Relations Act, §103A (2000, No. 24).
[9] *Lyons v. Longford Westmeath Educ. and Training Bd.* [2017] IEHC 272.

Sleuthing Out Potential Harassers Before They're Hired

By Staci Dresher and Morgan Taylor

Since the #MeToo movement began in 2017, many people have come forward with allegations of sexual misconduct or abuse of power in their workplaces. Many of them described decades of unreported problems and corporate cultures that permitted the misconduct to continue. Investigators have long been called on to gather facts about allegations of misconduct at work. Now there is mounting concern over the risk of hiring someone who has a history of improper conduct, both in and outside the workplace.

Not only is looking into past behavior important in the context of a new hire, it is also crucial when elevating an individual to a position of power or prominence, such as a promotion to a C-level position or one that has significant public-facing duties. The #MeToo movement has demonstrated that sexual harassment and other abusive conduct have often been overlooked across many industries—including entertainment, tech, higher education, and politics. This is particularly true when it is committed by individuals who have been in positions of power for many years or who are considered to be high performers or otherwise untouchable figures.

With the currently changing landscape, former colleagues, subordinates, and classmates who may have felt silenced for years, or even decades, are now coming forward with complaints of past misconduct. Allegations against Harvey Weinstein and

Larry Nassar, for example, highlighted years of abuse that had gone unreported or unacknowledged.[1]

The spread of social media and wide coverage of #MeToo allegations by mainstream media have not only encouraged those who have been mistreated to speak out about it, but also have the potential to tarnish the reputations of alleged aggressors. Further, public disclosure of an executive's past inappropriate behavior that should have been discovered through previous due diligence can lead to a public relations nightmare for an employer.[2]

One insight gained from years of investigating workplace misconduct and conducting background checks on executive candidates is that the most important step in preventing misconduct is to identify potentially problematic employees with reputational concerns from the get-go, during the pre-hire vetting process. This requires going deeper than an inexpensive, cursory check-the-box background check, and is essential when hiring managers and executives who will set the stage for a company's or a department's culture.

The most important step is to identify potentially problematic employees with reputational concerns from the get-go, during the pre-hire vetting process.

Checking the Public Record

It can be difficult to identify past issues of workplace misconduct and harassment in the public record, given that:

- There is historical trepidation about filing formal complaints;
- Many complaints do not identify the accused by name; and
- The accused and their companies may make efforts to keep allegations confidential.

Most veteran executives who have harassed or abused their colleagues in a prior job have a history of that behavior, and they often have tried to scrub any evidence of their actions.[3] Rooting out that reality takes careful research across dozens of sources, sometimes in multiple countries and languages, given the increasingly global talent pool.

A professional background checking firm still has many resources and strategies that can uncover past misbehavior. When employers hire someone in a position of power, the safest and most comprehensive background checks include:

- Verification of employment, education, and professional licenses, including searches for undisclosed affiliations;
- Research into relevant legal and regulatory actions that involve the executive and prior employers, even if the actions do not name the executive personally;
- Deep press and social media research on the person and his or her prior companies; and
- Reputational interviews with former colleagues not included in the list of references provided by the executive, if appropriate.

What to Look for When Checking

When investigation firms are looking for discrepancies, past bad acts, or controversies, a thorough background check should take notice of a number of facts and behaviors.

Patterns of jumping from job to job, or an abrupt or suspicious departure from a job. Such behavior may require a closer look for evidence that improper conduct was an issue.[4]

Undisclosed positions. Sometimes individuals will leave problematic past jobs off their résumés. If any undisclosed affiliations are identified, a background checking firm may look closer into the culture at the company, or any coverage of general problems with its leadership.

History of personal disputes or litigation in the professional context. A lawsuit might include allegations that highlight a candidate's problem behaviors, such as a tendency to bully colleagues, a prior affair with a subordinate, or inappropriate conduct at social company events. Sometimes, the press coverage of the lawsuit or controversy might highlight the candidate's behavior more clearly than court filings.

Claims in the workplace that do not name the accused individuals. Search for actions taken against the candidate's prior employers, such as employment lawsuits, SEC investigations, and EEOC or state agency complaints, because problems that occur in the workplace often do not name the individuals accused of the wrongdoing, even though their fingerprints are all over them.

In addition, a comprehensive search of social media is also needed to see what candidates have posted over the years, as well as what has been posted about them.

- Have they "liked" an offensive tweet or scandalous photo?
- Do they support or "like" posts from known bad actors or people who post racist or misogynist content?
- Have they referred to the opposite sex or protected class in a dismissive or derogatory way?
- Beyond their own posts, there's a world of blogs, industry forums, anonymous job review forums, grassroots watchdogs, and crowd-sourced social media profiles that may reveal a candidate's questionable or inappropriate behavior.

Posts on these websites could make clear allegations that an individual created a "frat-house" or aggressive atmosphere at the office, or treated certain employees differently or unfavorably. Remember that anonymous posts require additional verification.

- Scrutinize those same sources for general reviews of past employers where the candidate held leadership positions, searching for insights about the culture or general comments about the leadership. For example, there have been telltale posts calling a company's leadership team sexist or an exclusive "boys' club," while never naming any specific executives.

Interviews: Powerful Tools to Fill in the Gaps

Sometimes past misconduct is not mentioned anywhere in the public record. If nobody posted about it online, mentioned it in a lawsuit or a news article, or filed an external formal complaint naming the individual, there could be no public record of the wrongdoing or subsequent internal HR investigation. This is troubling, as sometimes a high-level executive has a reputation for being abusive or inappropriate, even though it has never been explicitly stated in public records. Absent interviews with former colleagues, it may not be possible to uncover his or her true reputation and background.

Often there may be clues to dig deeper, and in those cases, it is a good idea to conduct interviews of the candidate's past colleagues, subordinates, or others who were present to get a more complete picture. These should be people who were not identified by the candidate as professional references.

Ex-colleagues have shared surprising and disturbing details about a candidate's inappropriate conduct with subordinates, sexual affairs with colleagues, or HR investigations of misconduct and reputations for bullying, to name a few. Background-checking firms do their best to substantiate an allegation through additional interviews, and to discredit unsupportable or false claims.

> Search claims against past employers, because workplace problems often do not name the individuals accused, even though their fingerprints are all over them.

Legal Limits on Background Checks

In addition to practical limits on what a pre-employment background check may uncover in the public record, some laws strictly limit what employers, private investigators, and background checking firms can disclose to their clients.

Background checking firms and private investigation companies—which are deemed "consumer-reporting agencies" by the Fair Credit Reporting Act (FCRA)[5] and similar state laws—are restricted by myriad federal, state, and local laws from reporting certain kinds of past bad acts to prospective employers. For example, the FCRA prohibits CRAs from reporting civil suits, judgments, and arrest records that are more than 7 years old or when the governing statute of limitations has expired, whichever is longer. It similarly restricts reporting paid tax liens, collections, or "any other adverse item of information, other than records of convictions of crimes which antedates the report by more than 7 years."[6]

These FCRA reporting restrictions do not apply if the job being offered has an annual salary of more than $75,000,[7] and executive background checking firms routinely vet candidates for high-paying positions well above this floor. Also note that an employer may always conduct in-house research on a candidate to determine fitness for a position, which could include uncovering details on the candidate that a CRA would not be allowed to report.[8]

California, which has one of the most restrictive state laws,[9] prevents CRAs (called Investigative Consumer Reporting Agencies or ICRAs under California law[10]) from reporting most adverse findings that are more than 7 years old, no matter if the candidate would earn $75,000 or $5 million a year.[11] This means that if you're vetting a candidate for a position located in California—even if the candidate currently resides in another state—and you uncover evidence of sexual harassment or workplace misconduct that's 8 or 9 years old, you could not legally report it to the prospective employer.

Further, many states and municipalities—including San Francisco, New York City, and Philadelphia—have passed ban-the-box statutes, which prohibit employers and CRAs alike from asking candidates about their criminal backgrounds or searching for their past criminal records, until a job offer has been made.[12] And often it's criminal records that disclose evidence of violent behavior, such as disorderly conduct, assault, or domestic abuse. Note that the FCRA and relevant state laws require employers and CRAs to have candidates sign a consent form that clearly details their rights under these laws.[13]

Should adverse findings be uncovered and ultimately used to deny an employment application, the FCRA requires that the candidate must be alerted and have an opportunity to dispute incomplete or inaccurate information.[14]

This article has only scratched the surface with the relevant legal limitations on reporting past misconduct, harassment, or other adverse issues when conducting pre-hire background checks. It's a minefield that requires vigilant attention and research. Many employers and background screening firms have been sued and required to pay millions of dollars for violations of the FCRA and relevant state laws.[15]

Pre-Hire Restrictions Lifted for Internal Investigations

If an individual is hired and subsequently accused of misconduct—whether by a current work colleague or person from the past—the legal restrictions that regulate pre-employment vetting of candidates are no longer in force. A company's internal or external counsel could authorize an investigation into the alleged aggressor's background that searches more than 7 years back, including a deeper dive into their social media activity, litigation history, and interviews with former colleagues.

Pre-hire background checks are minefields that require vigilant attention and research.

When making decisions about who authorizes and conducts an investigation, employers should work with counsel who are familiar with the local jurisdiction's rules on how best to protect the attorney-client and work-product privileges, if these are a concern. These issues are too complex to dig into here; employers would be wise to consult professionals who stay on top of the constantly changing laws.

The risk to employers in hiring known bad actors has never been higher and no industry has been spared from the public embarrassment and criticism of a bad hire. Companies should be prepared for possible pushback from shareholders and employees to enforce the changing expectations of what is acceptable behavior in the workplace.

With wall-to-wall social media coverage and unfettered access for everyone to share and post about their experiences and knowledge of misconduct, close scrutiny and comprehensive background checks are absolutely critical for companies to maintain cultures of inclusivity, trust, and safety—and to avoid public relations catastrophes.

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[1] *See* Audrey Carlson, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, "#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women," *The New York Times* (online, October 29, 2018) https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html?mtrref=www.google.com&assetType=REGIWALL.

[2] *See* Conor Friedersdorf, "How to Identify Serial Harassers in the Workplace," *The Atlantic* (online, November 28, 2017) https://www.theatlantic.com/politics/archive/2017/11/whisper-networks-20/546311/; Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 Minn. L. Rev. 229 (2018).

[3] *See* Minda Zetlin, "54 Percent of Women Report Workplace Harassment. How Is Your Company Responding?" *Inc.* (March/April 2018). *See also* Ryan Mac, Davey Alba, "These Tech Execs Faced #MeToo Allegations. They All Have New Jobs," *BuzzFeed News* (online, April 16, 2019) https://www.buzzfeednews.com/article/ryanmac/tech-men-accused-sexual-misconduct-new-jobs-metoo.

[4] *See BuzzFeed News* article, *supra*,"These Tech Execs Faced #MeToo Allegations. They All Have New Jobs."

[5] The Fair Credit Reporting Act, 15 U.S.C. §1681; federal government legislation enacted to promote the accuracy, fairness, and privacy of consumer information contained in the files of consumer reporting agencies.

[6] 15 U.S.C. §1681c(a), which outlines the information that must be excluded from consumer reports.

[7] 15 U.S.C. §1681c(b).

[8] *See* Equal Employment Opportunity Commission (EEOC) and Federal Trade Commission (FTC) joint publication, "Background Checks: What Employers Need to Know" (https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm).

[9] *See* Privacy Rights Clearinghouse, "Employment Background Checks in California: A Focus on Accuracy," (online August 21, 2018), https://www.privacyrights.org/consumer-guides/employment-background-checks-california-focus-accuracy.

[10] Cal. Civ. Code § 1786.

[11] Cal. Civ. Code § 1785.13.

[12] San Francisco Fair Chance Ordinance, San Francisco Police Code Art. 49; New York City Fair Chance Act, Rules of the City of New York, title 47, §2-04; Philadelphia Fair Chance Hiring Law, Philadelphia Code ch. 9-3500.

[13] 15 U.S.C. §§ 1681d, 1681g.

[14] 15 U.S.C. § 1681m.

[15] *See* Megan Cerullo, "What Everyone Should Know About Employer Background Checks," *CBS News* (online, June 28, 2019) https://www.cbsnews.com/news/what-job-candidates-should-know-about-employer-background-checks.

Breaking Through: How Investigators Balance the Competing Priorities of Claimant and Employer Counsel, Part 2

By Nancy Bornn

When it comes to convincing claimant counsel to cooperate in a workplace investigation, there are some things that investigators can do on their own, and others that will need employer approval. This installment is the second in a series from a larger article about balancing competing priorities. It focuses on the options offered within our discretion as investigators by presenting summaries of views from three stakeholder groups surveyed: investigators, claimant counsel, and employer counsel.

Smaller Markets May Pose Smaller Problems

A general observation from an AWI member who works in a smaller market is that it usually is not a problem to set up interviews with claimants represented by counsel, as the stakeholders typically know each other. If the claimant is represented by one of the experienced claimant counsel in the area, that counsel will agree to the interview so long as he or she knows the investigator is reputable and will agree to the usual terms. Those terms include conducting the interview in the claimant counsel's office, in counsel's presence. As one top claimant counsel in the smaller market shared, she is often learning as much in the interview as the investigator is. Participating in this way helps her know the strengths and weaknesses of her case early on.

This AWI member also noted that when claimant counsel is inexperienced, or not an employment lawyer, difficulties can arise. Trying to persuade inexperienced counsel that employer investigations are *de rigueur* in these situations is challenging. This problem arises in any size market. As discussed below, this may be a situation where getting employer counsel involved in providing a quick tutorial on the applicable law to such counsel may be helpful.

Get to Counsel Early

It was recommended by an AWI member responding to the survey that as soon as you are retained as the investigator, you should make an introductory call or send an email to claimant counsel. This can be used as an opportunity to demonstrate that you are a trained professional investigator who is committed to conducting an impartial, prompt, and thorough investigation. As one AWI member pointed out, once counsel has already said "no," it is hard to change his or her mind. So, try to get to counsel early in the process.

Along these lines, you also may want to check with the employer to make sure it has not already embarked on an investigation, or said something that might have damaged the relationship with claimant counsel from the start. For example, one California Employment Lawyers Association (CELA) member described a situation in which the employer immediately responded to his demand letter by saying something to the effect that the claims were frivolous and malicious. Trying to get him to cooperate with the employer's investigation after that statement was out of the question.

Another AWI member suggested that you approach the claimant counsel with an open mind and no agenda. Your goal should be to develop a rapport with counsel, just as you would with a reluctant witness. You might start by trying to engage them in a conversation about whether they will let the claimant participate, and if not, probe to find out why not. They may identify many of the concerns addressed in this article, for which I have provided some options to help assuage those concerns.

Trying to persuade inexperienced counsel that employer investigations are *de rigueur* is challenging.

Describe Your Qualifications, Background, and Training

A good approach, where applicable, is to inform claimant counsel that you are an AWI Certificate Holder (AWI-CH). Explain that it means you have been trained and tested by AWI in the standard practices and procedures for conducting impartial workplace investigations. If you are not an AWI-CH, describe the training you have received in the field of investigations. Where applicable, mention any training, teaching, or writing you have done on how to conduct workplace investigations. If you have testified as an expert witness on workplace investigations, consider providing references who can confirm that your expert witness opinions have conformed to workplace investigation standard practices.

Emphasize Your Impartiality

A few of the AWI members who responded to the survey suggested that you share your "stats," or ratio of times you have found for the claimant compared to the times you have found for the respondent, with claimant counsel. However, one AWI member who responded would not recommend this as a good policy to

follow. For one thing, it is hard to measure the results when, for example, there are multiple claims. Another objection was that some people may fabricate these numbers and it's hard to prove their validity.

Another AWI member pointed out that we can all agree that a reputable investigator is not looking to attain a certain percentage of substantiated versus not substantiated findings. The point to be made to claimant counsel is that you have substantiated claims, or that in any event, you are not afraid to make findings that may displease the employer.

Speaking as an impartial investigator, some of the points you may wish to make are that:

- You follow the facts where they lead you.
- Sometimes employers do "shoot the messenger," but that is a price you are willing to pay to protect your integrity and reputation.
- The only allegiance you owe to the employer is to be as impartial and honest as possible.
- It does not behoove you to "rubber stamp" anything, as it will undermine your credibility at a later time.
- You are not doing the employer any favors by whitewashing the investigation.
- Your role is to get to the facts so that the employer can take the appropriate remedial action—whether that turns out to be as minimal as retraining and monitoring the workforce or as severe as firing the wrongdoer.

It is extremely difficult to establish rapport over the telephone, especially with claimant counsel monitoring the situation.

The CELA members who responded to the survey said the reputation of the investigator is a crucial part of their decision making. They check around with other members on the CELA list and at various CELA events to find out the investigator's history of bias, relationship with the employer, methodology, and style. For example, they stay away from investigators who are known to favor management, who take the definition of "thorough" and stretch it beyond recognition, or who are rude and abrasive during interviews.

Address the "hired gun" argument

One responding AWI member addressed claimant counsel's concern that investigators working for or hired by employers cannot be impartial because the employer is paying them. She explains to claimant counsel that the employer is paying her to fulfill its duty to conduct an impartial investigation, not for a specific result; it is in everyone's interests to know if there is a problem in the workplace.

She also tells the claimant counsel they are welcome to pitch in 50 percent of her fee if that will increase their trust in the process. Should they accept this invitation, it would no doubt come with a hefty price tag: that you share the results and interview notes with them, which condition the employer is likely to deny.

Address the "repeat client" argument

If an investigator has been hired by the same employer on multiple occasions, the thinking is that the investigator must be pleasing the employer by consistently upholding the employer's position. One AWI member told me she addresses this "repeat client" concern by explaining that her role is like that of a judge who has the same DA appear before him or her every day—the judge simply follows the facts. Another member suggested that you point out to claimant counsel that the fact you have investigated for the client before is a good thing, not a bad thing. It means the employer believes you will conduct a thorough and objective investigation, which can be easily upheld as adequate at trial. You may also want to point out that the employer has its own separate legal counsel to advocate on its behalf.

Refer to Your Retainer Agreement

Another AWI member made, in my opinion, an excellent suggestion. You should inform claimant counsel that there is language in your retainer agreement with the employer that assures impartiality and independence, such as:

- The employer has agreed in writing that it will not interfere with your process.
- The employer will let you speak with any employees and review any documents you wish, subject to privacy and confidentiality laws.
- The employer agrees it will pay you no matter what the findings of the investigation are or what the investigation otherwise reveals.

If you have an attorney-client relationship with the employer/client or a confidentiality restriction on your investigation, you will need the employer's approval before sharing this information.

Explain Your Role and Your Process

The more claimant counsel know about your process, the less likely they will fear they are about to expose their client to a waterboarding interrogation. Knowledge is power.

As you would do when you first meet with a claimant, respondent, or witness, explain that your role is to be an impartial factfinder. Inform them to whom you will be reporting your findings. If applicable, inform them it will be up to the powers that be at the employer to decide the appropriate remedial action to take based on your findings. As applicable, explain that you have not represented the employer, or any of its employees, as an advocate in any legal proceeding, and that you don't know any of the participants

involved in the claim. Advise them that you have no stake in the outcome and no biases favoring one side or the other.

Explain the differences between your interview and a deposition. This is the "user friendly" version. There will be no court reporter. Although you expect the truth, there is no oath given. If counsel wishes, you will read your notes back to the claimant. That will give claimant an opportunity to make any changes he or she wishes. Explain that you will be giving the claimant an opportunity to rebut relevant contradictory evidence you later obtain.

Assure claimant counsel that we do our best work when we have the details, including the who, what, when, why, where, and how. Oftentimes this information is not in the statement, charge, or complaint. If applicable, explain that you have received training on trauma-informed interviewing; that you understand victims may have delays in retrieving memories of traumatic events; and that you will not weigh a delayed response against a claimant in making a credibility assessment. Explain how you believe that gathering information isn't often a linear process that is complete in one meeting. Explain that pending the conclusion of the investigation, you remain open and encourage the claimant to share any newly recalled or discovered information, witnesses, or documents.

In my practice, if needed as an incentive, before the interview, I provide claimant counsel with a copy of my "Information Letter," which describes this investigative process in writing. I have found that the more information a claimant and his or her counsel have about my role, my process, and my goals, the more inclined they will be to cooperate with the investigation.

Describe the Benefits to the Claimant

One CELA member pointed out that sometimes participating in an investigation may actually help the claimant. He believes that if the claims are substantiated, which is more likely to happen with his client's participation, it may push the employer to an earlier settlement. Conversely, he thinks that if the claims are not substantiated, and the employer relies on the investigation in litigation thereby waiving the attorney-client privilege, claimant counsel may obtain the report and witness statements and thus receive significant and substantial free discovery. And, as mentioned by the claimant counsel in the smaller market, it is possible to learn as much in the interview as the investigator learns, which helps claimant counsel know the strengths and weaknesses of his or her case early on.

Provide a Comfortable Interview Environment

Significant research reveals that when interviewing a "victim," you should make the environment as unimposing and comfortable as possible.[1] Ask what accommodations the claimant might like, or offer some. For example, consider agreeing to a request that you limit the interview to a certain topic or to a certain time period. Consider offering to do the interview where claimant will be most comfortable, such as his or her home or claimant counsel's office. Consider a request to record or not to record the interview. Offer to allow claimant to bring any support person (not a witness) he or she would like to be present during the interview.

If claimant counsel continues to refuse an in-person interview, then you may consider offering to conduct the interview using one of the various video-conference solutions such as GoToMeeting, or video-calling applications such as Skype, FaceTime, or Zoom.

As a last resort, offer to conduct the interview over the phone, with no video. Although I do conduct interviews of witnesses over the phone when necessary, I am not a fan of this approach when it comes to the claimant. It is extremely difficult to establish rapport over the telephone, especially with claimant counsel monitoring the situation.

Invite Claimant Counsel to the Interview

For attorney/investigators, claimant counsel has the legal right to attend the interview and the invitation is pro forma. Furthermore, as discussed above, private investigators and some in-house investigators also respect this directive and do not turn down requests to have counsel present.

Be aware that allowing claimant counsel to be present commonly causes delays in scheduling the claimant's interview in order to accommodate counsel's calendar. You may remind counsel of your obligation to conduct a prompt investigation, but be prepared to start your investigation with interviews of other known witnesses if claimant counsel refuses to make the claimant's interview a priority on his or her calendar.

Be sure to set some ground rules. Claimant counsel may attend, but only if he or she agrees not to interfere or participate in your investigation, except for clarification purposes if needed.

One CELA member advised that if he allowed the interview, he would have to attend *and* the employer would have to waive the right to call him as a witness at trial. So long as the waiver is reciprocal (i.e., claimant counsel cannot testify for the claimant either), employer counsel may agree to this waiver. On the other hand, one employer counsel reported that if claimant counsel participated in the interview, he would not waive the right to call counsel as a witness.

Permit Claimant Counsel to Ask Questions

In situations where you are still getting resistance from claimant counsel, consider offering to allow claimant counsel to ask questions of the claimant at the interview. Again, certain ground rules would have to be preset, such as requiring that claimant counsel not ask leading questions. You do not want one-word (yes or no) answers by the claimant to long-winded, scripted explanations by counsel. That does not help you judge the claimant's credibility, such as the claimant's recall, consistency, or plausibility. Most

employers with whom I spoke would allow claimant counsel to ask a few questions, so long as they do not actively participate, and only as needed for clarification purposes. Employers and investigators want to get as much information as possible.

One employer counsel advised that under the right circumstances, she would agree to allow claimant counsel to participate. She prefers to have the information from the claimant, even if it is filtered or the counsel advises the claimant not to respond. Some information is better than none. On the other hand, if early interactions with claimant counsel reflect that he or she is not being sincere about participating or is trying to make things difficult, these are indications it would not be productive to have the interview. Under most circumstances, she would leave this decision to the discretion of the investigator.

As mentioned above, one employer counsel said he would agree to allow claimant counsel to ask questions if needed, but only at the end of the investigator's interview and only if the employer retains the right to call claimant counsel as a witness a trial.

Allow Claimant to Answer Written Questions (or Not)

One investigator suggested that investigators send claimant counsel a list of questions for the client to answer, or ask for the claimant's account in writing if they do not already have a detailed account of the claim. Claimant counsel might be more willing to participate using this method as it provides an opportunity to review the responses before they are submitted.

Use this as a last resort only. Answers reviewed or prepared by claimant counsel should not be considered "hard evidence."

Some of the employer counsel who responded to the survey did not think that submitting written questions was a good investigative process. They felt that the investigator would miss too much; that there is no opportunity for clarification, and it would require too much follow-up to get clarifications; that there is no way to judge credibility. Also, they do not want to give a claimant so much time to think about an answer. Another employer counsel, who sometimes conducts investigations himself, said he needs to make credibility assessments and this process does not give him the opportunity to do so—plus, he does not know who actually wrote the answers: the claimant or counsel. Other employer counsel said written answers are better than getting nothing, assuming the employer has received nothing from the claimant, but at least one added that she would not consider it as having any evidentiary weight.

The bottom line is that written answers provided by or through claimant counsel to an investigator's written questions are not reliable. They are not like written interrogatories that are required to be verified under oath by the claimant and can be relied on as evidence at trial. At most, use those answers for purposes of defining the scope of the investigation and as a basis for asking questions.

Be Flexible

One CELA member pointed out that the reasonableness of the investigator in working out mutually agreeable terms under which an interview would be permitted is critical. If this CELA member makes what he believes to be some reasonable requests, and the employer or investigator meets them, or presents valid, logical reasons why they can't, he's more inclined to participate. On the other hand, if the investigator or employer, for example, refuses reasonable requests for time limits, refuses to discuss scope, or insists on meeting in the employer counsel's office, he will say no. He requires that the investigator be flexible on specific requests such as location, subject matter, or time limitations, and some reciprocity of information exchange.

Appeal to Civic Duty or Desire for Justice

Recommendations were made by AWI members that the investigator emphasize the improvements to the work environment and culture that the claimant may help create, or talk about the possibility of others still on the job who may be experiencing the same conduct. If that doesn't work, appeal to the claimant's desire to bring the respondent to justice. Explain that these changes to the workplace are more likely to happen if the employer has the benefit of a complete understanding of what happened.

Another CELA member, who typically declines participation, said she has agreed to let her client be interviewed when three elements are present: there appears to be very strong liability, the client would like to settle fast, *and* the employer has made serious statements about wanting to do the right thing.

Give Notice You Will Proceed Without Claimant's Cooperation

When all else fails, you will want to explain to claimant counsel that you will be moving forward with the investigation whether the claimant participates or not, and that, usually, not having the benefit of the claimant's account makes it difficult for the claimant's concerns to be heard by the employer. If claimant counsel hasn't been emphatic about his or her refusal, it may be a good idea to keep the door open for the claimant to participate at a later time during your investigation.

This language was suggested by an AWI member:

"Your client's perspective and information is important to my process. I understand, however, he/she is declining to be interviewed as part of the investigative process. Please be advised that we will nonetheless proceed with the investigation without the benefit of your client's participation. [In the event of disputed facts, I will necessarily have to weigh them against the nonparticipating party.] Please advise if I misunderstood or if your client changes his/her mind."

Or, as another AWI member suggested, put it on the employer:

"[Employer] has asked me to continue with the investigation even though your client has chosen not to participate, so if he/she changes his/her mind in the next ___ days/weeks/months, please let me know."

One in-house employer counsel said she would get involved at that point as well. She would say something like the following, directed to the claimant:

"I wish and hope you will participate so we can make sure we can come to the best determination possible. We want to know your perspective and what information you have so we can make this right. You came forward, so please do the right thing for yourself and others. If for any reason you cannot do that, we are going to move ahead without your input and make our decisions based on the information we have."

Part 3 of this article, focusing on the employer's role in persuading claimant counsel to cooperate in investigations, will appear in the next issue.

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[1] At the AWI Conference in 2016, Brenda Ingram, PhD, Director of the University of Southern California's Relationship and Sexual Violence Prevention and Services, gave a presentation on trauma-informed interviews. She advised that environmental barriers are a factor to consider. The environment should be structured to help the interviewee feel comfortable. Glass enclosures for an interview room are not recommended. Start every interview with an offer of water; it is a sign of nurturing. Make sure the temperature is comfortable. Face the person. Consider what to wear that will help the person feel comfortable. Pastels, such as blues and pale greens, are calming colors.

Writing Investigation Reports: Clarity Is Crucial

By Kelly Cozy

As an editor who's worked on dozens of investigation reports, I'm sometimes asked what the most important element is when writing them. My answer: clarity.

When it comes to presenting witness statements and giving a clear timeline of what happened and when, clarity is key. And in the interest of clarity, things that might be revised or deleted from a business report or essay, such as repetition or lengthy sentences, are fine—even preferable—in workplace investigation reports, as long as they make things clear to the reader.

One reason reports are not always as clear as they should be has to do with their very nature. Often, investigators aren't recounting past events; rather, they're recounting a witness's account of those past events—and this occasionally leads to some ambiguity in the timeline.

Example: During the argument between Hauser and O'Brien, Lee said he was over by the photocopier.

This could be misconstrued that Lee told Hauser and O'Brien during their argument that he was over by the photocopier. To clarify matters and make the timeline clear, consider some rephrasing.

Revision: Lee told investigators that during the argument between Hauser and O'Brien, he was over by the photocopier.

Revision: When the argument between Hauser and O'Brien took place, Lee said, he was over by the photocopier.

Revision: According to Lee, during the argument between Hauser and O'Brien, he was over by the photocopier.

Even though some of these revised examples are slightly wordier than the original sentence, they provide greater clarity and avoid confusion about the timeline.

Sometimes ambiguity is caused by dangling participial phrases. A participle is a verb that's usually formed with *–ing* or *–ed*. A

participial phrase, which contains a participle and appears at the beginning of a sentence, modifies a subject; that is, it tells you more about that subject, acting as an adjective. For example, in the sentence "After resigning, Johnson walked out of the manager's office," the participle is "resigning," and the participial phrase "after resigning" modifies the subject "Johnson." The participial phrase describes Johnson's actions.

A dangling participle occurs when the participial phrase doesn't have a relationship with the nearest subject.

Example: Being the subject of several harassment complaints, HR had no choice but to put Newman on paid suspension.

Here, the participial phrase "Being the subject of several harassment complaints" is intended to refer to "Newman," but the nearest subject is "HR." As written, the sentence makes it sound as if HR has been the subject of several harassment complaints. The reader will be pretty sure that is not the case, but to avoid ambiguity, the sentence should be revised so the relationship is clear.

Revision: Given that Newman was the subject of several harassment complaints, HR had no choice but to put him on paid suspension.

Revision: After receiving several harassment complaints about Newman, HR had no choice but to put him on paid suspension.

Establishing the proper relationship between a participial phrase and the intended subject makes the sentence easier to read—and makes its meaning clearer for the reader.

After spending countless hours interviewing, researching, and writing, investigators can find it difficult to be certain their work is as clear as it should be. Having someone else—preferably someone who has not worked on the case and knows little about it—review the report will often help in catching ambiguities or unclear wording.

Kelly Cozy is an editor and proofreader with more than two decades of experience. Her clients have included workplace investigative firms and attorneys; health care providers and medical information services; and independent authors of fiction and nonfiction. Kelly is a member of the Editorial Freelancers Association (EFA) and American Copy Editors Society (ACES). She welcomes any questions about editing and writing and can be contacted at booksidemanner@gmail.com.