

## **NO SURPRISES: MAKING 3<sup>RD</sup> PARTY INVESTIGATIONS PAY OFF FOR YOU**

A client calls you with a problem. They've received a letter from a law firm retained by a former employee accusing them of a racially hostile environment. You notify the law firm to deal with you. You start interviews, move into depositions and proceed.

Could you have done anything better?

One of your clients faces a union organizing attempt. You meet with the company's executive team and give them wise counsel. You provide all managers and supervisors a training session on NLRB regulations. Could you have done anything else to help your client?

A client lets you know a newly hired employee cornered a senior manager in the hallway and alleged a coworker sexually harassed her when they traveled together on a company project. Do you counsel the client to have his human resources officer handle the interviews internally?

In recent years, attorneys handling these and similar situations elected to engage neutral third-party investigators. What led them to make this decision? And how did they avoid any unpleasant surprises?

### ***Investigate right away***

According to attorney Tom Van Flein, "Investigating serious allegations is good business and good legal protection." Without the investigation, you don't know where you stand or what you're up against. By promptly investigating issues, management shows both good faith and adherence to anti-discrimination and fair treatment policies."

### ***Use a neutral third party***

Although you could investigate the situation yourself, "You've got to use an independent investigator," says attorney Nelson Page. "If you don't, every conclusion drawn from the

investigation is subject to question by those involved and by enforcement agencies. In any except the most simple or basic situations you need to find someone who is both independent and perceived as independent.”

***Could the client’s HR officer investigate – or someone from your law firm?***

“Although the HR department can sometimes investigate in less complex matters,” says attorney Lee Holen, “the attorney needs to consider how close the investigator is to the individuals to be investigated and the incident. If there is any doubt that the interviews and investigation appear completely impartial, it is better to use an independent third party investigator.”

Attorney Van Flein adds that neutral third party investigators can be direct and honest without worrying about offending management.

Further, says attorney Kim Colbo, “Unless the employer has a large HR department, it may not have anyone experienced enough to conduct a quality investigation. Employers who use their own staff to handle complaints internally may face additionally allegations their investigation was neither neutral nor fair. If the complaint ends up in litigation and an independent investigator conducted the investigation a jury may view an independent investigator’s testimony as more credible. Also, if we as attorneys conduct the investigation, we risk becoming a necessary witness and disqualified from representing our client in litigation.”

“An outside investigator is valuable is,” notes Attorney Bob Stewart, “when you want to raise a Farragher/ Ellerth defense with a claimant who is still employed by arguing that you took reasonable remedial actions based upon a good faith investigation.” Further, says attorney turned HR consultant Andy Brown, interviewees interviewed by a non-attorney often relax and offer more information to someone not presented as an attorney.

***Avoiding surprises***

Like an FAA air traffic controller, as the attorney you retain responsibility for the investigation “flight” without personally handling the controls. What helps you avoid unpleasant surprises?

### ***Assignment clarity***

“By definition,” says Attorney Page, “an independent investigator comes to independent conclusions. Attorneys who want to reduce unpleasant surprises makes sure their assignments are clear and that all necessary information has been clearly and accurately transmitted to the investigator.”

The attorney needs to make sure, adds attorney Colbo, “the investigator understands to whom to report and whether to make an oral or a written report. Not every investigation warrants a written report. While written reports can be very powerful tools, a sloppily prepared report can prove to be an employer’s worst nightmare.”

According to attorney Holen, “if you want the investigator to only conduct interviews, state so clearly. If the investigator believes he or she was hired to make a determination of some sort, you can be surprised by written conclusions on issues you did not anticipate or intended to determine for yourself.”

### ***Experience***

“Pick someone experienced,” as attorney turned HR consultant Andy Brown. “You can’t afford the learning mistakes a green investigator makes.”

Experienced investigators know how to get sufficient rapport to get most interviewees talking, how to probe harder when necessary, how to ask questions without putting ideas into an interviewee’s head and how to recognize when a manipulative interviewee plays a game, and how to make the dozens of judgment calls necessary to do a thorough, unbiased investigation.

Experienced investigators know how to let those requesting confidentiality know they can’t promise it without scaring interviewees into silence.

### ***State the obvious***

Never take your investigator's process for granted. Let your investigator know to write "attorney work product" at the top of each investigative interview – or risk your investigator being forced to turn documents over to your opposing attorney.

Let your investigator know if you want any interviews taped. Make sure your investigator checks with you before widening the investigation or cutting it short, given the risks involved in both courses.

***Getting the information fast and accurately***

Finally, "in terms of unpleasant surprises learning what actually happened in the client's company is crucial. The sooner management knows what happened, the more effectively the attorney and management can assess the problem and resolve it before litigation results. If litigation occurs despite management's best efforts, the neutral third party's detailed, factual report and findings may vindicate the company."

***Any written report may ultimately become fair game***

Finally, adds attorney Holen, do not expect your attorney client or work product privilege to ultimately shield the investigator's interviews or other products. If litigation ensues, the employer may have a battle on its hands and be forced to turn over the report an interviews, particularly if the attorney and client use the investigation to show good faith. If your client opens the door concerning the report, the jury may read every word in the investigator's report."

Does one of your clients face an allegation or a union organizing attempt? Consider retaining a neutral independent investigator – and avoid surprises by taking reasonable precautions.

*Author Dr. Lynne Curry, SPHR, regularly conducts third party investigations for Alaskan attorneys and also serves as an expert witness on workplace issues. Although not an attorney, Curry is a member of the Alaska Bar Association's employment law section and author of [Managing Equally and Legally](#), McFarland and Company, 1990 and can be reached at [www.thegrowthcompany.com](http://www.thegrowthcompany.com) and 907-276-4769.*