# The Ins-And-Outs of Corporate Investigations[1]

## Techniques for Preparing Your Client for a Corporate Investigation In Discrimination, Harassment or Retaliation Matters

Nancy Bornn
A Law Corporation
8117 W. Manchester Avenue, Suite 540
Playa del Rey, CA 90293
Tel/Fax: (310) 821-8534
Email: nbornn@dslextreme.com

## I. Introduction

This paper will discuss the applicable law and practical tips for advising your client in connection with an internal workplace investigation of a discrimination claim. The issues addressed will apply to your client as the complainant, the accused, or a third party witness. The word "discrimination" in this paper will include statutory claims arising out of the anti-discrimination laws, including anti-discrimination, harassment, and retaliation. This paper will focus on non-union employees in the private sector. It will not address public employees[2], safety officers[3], and union employees,[4] each of whom are covered by federal and state laws concerning workplace investigations.

---

[1] This paper was presented at the NELA – 2012 Twenty Third Annual Convention, San Diego, California June 20—23, 2012.

[2]See, Federal Labor Management Relations Act, 5 U.S.C. § 7101, et. seq., the Federal Civil Service Reform Act, 5 U.S.C. § 1101, et. seq. and the First and Fourteenth Amendments to the U.S. Constitution. For example, a public employer may terminate a public employee who refuses to answer questions directly, specifically, and narrowly related to the performance of the employee's duties. Gardner v. Broderick, 392 U.S. 273, 278 (1968).

[3]Most states have enacted an officer procedural bill of rights that cover internal investigations. For example, the California Public Safety Officers Procedural Bill of Rights Act, California Government Code Section 3303, et seq., http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=03001-04000&file=3300-3313 gives peace officers, among other things, the right to be advised of the nature of the investigation prior to the investigation, the right of a representative who can speak, object, etc. during the interview, the right to record the interview, the right to a copy of the notes or record of the interview, and the right to keep their statements out in a subsequent civil proceeding. Two excellent articles delineating the rights of officers and firefighters in California written by attorneys Sue Ann Van Dermyden and Debra L. Reilly are included in the material on this topic, with their gracious permission to republish.

[4]Union employees enjoy rights provided by the National Labor Relations Act, 29 U.S.C. §§ 151-169, https://www.nlrb.gov/national-labor-relations-act and their union contract. For example, union employees have the right to have a union representative present during any interview where the employee reasonably believes that disciplinary action may result from what he or she says. It is the employee's responsibility to know of that right and request it, not the company's duty to inform his/her of that right. NLRB v. J. Weingarten, Inc. 410 U.S. 251 (1975).

II. How to deal with the obligation of witnesses to cooperate in an investigation.

A. Be Mindful of the Law.

In order to prevent discrimination, an employer has a legal obligation to promptly, fairly and thoroughly investigate all such claims.[5] An employer also has a legal obligation to protect the complainant and witnesses from retaliation for protesting discrimination and/or participating in an investigation.[6] An uncooperative witness will not be favored by the courts in light of this strong public policy.[7]

B. Be Mindful of the Company's policies and practices.

1. The obligation of an employee to cooperate with an investigation is a standard employer policy and/or practice.
2. Some employers have a stated policy that an employee's failure to cooperate in an investigation may be considered insubordination and could subject the employee to discipline up to and including termination. (Note, however, an employer who takes adverse action against a complainant who does not want to be interviewed exposes itself to potential liability for retaliation.)
3. Some employers will have a stated policy or actual practice that allows them to terminate an employee who is found to have lied during the investigation, whether or not the underlying charge is substantiated.
4. A prohibition against retaliation and a qualified promise of confidentiality are standard policies as well.

C. What should you do as the lawyer to prepare your client for the interview?

1. General guidelines for representing the claimant, accused and/or third party witness:

---

[5] Equal Employment Opportunity Commission's ("EEOC") Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (Mar. 19, 1999) *available at* http://www.eeco.gov/policy/docs/currentissues.html; Watson v. Blue Circle, Inc., 324 F.3d 1252 (11th Cir. 2003) ; Hatley v. Hilton Hotels Corp., 308 F.3d 473 (5th Cir. 2002) ; Bator v. Hawaii, 39 F.3d 1021 (9th Cir. 1994) ; Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) , *cert. denied*, 513 U.S. 1082 (1995) . *See also* Malik v. Carrier Corp., 202 F.3d 97 (2d Cir. 2000) (employer's investigation of sexual harassment complaint is not a gratuitous or optional undertaking, but required by law); Sarro v. City of Sacramento, 78 F. Supp. 2d 1057 (E.D. Cal. 1999) . *Accord*, Nichols v. Azteca Rest., 256 F.3d 864 (9th Cir. 2001) ; Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995)

[6] 42 U.S.C. §2000e-3(a); Robinson v. Shell Oil Co., 519 U.S. 337, 117 S. Ct. 843 (1997); Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000)

[7] See, for example, Hollis v. Fleetguard (M.D. Tenn. 1987) 668 F.Supp. 631, 637: Once a member of management attempted to explore the plaintiff's claim and was asked not to by the plaintiff, she will not be heard to say that her employer was thereafter responsible for the hostility of her work environment.

a. Review the Employee Handbook and applicable policies. Advise your client regarding any and all rights and obligations s/he has with respect to investigations pursuant to the handbook and policies.
b. Review any writings the client may have relevant to the claims, such as emails, texts, notes, calendars, diaries, and the like. The client's report to the investigator should be consistent with these writings, including dates of events.
c. Prepare your client to give the investigator a list of witnesses and any documents that s/he believes will be supportive of his/her report.
d. Counsel and advise your client regarding how to respond to any questions that unduly invade his/her privacy and/or would disclose an attorney-client or other privileged or private communication, such as a spousal conversation or medical records.
e. Advise your client to be wary of signing any document that states his/her responses during this interview are the complete and final statement of their claims, responses and/or observations.
f. If your client is fearful of retaliation or believes the investigator is biased, advise your client to send a written note to the employer to let them know the concerns and the basis therefor. Ask for an objective investigation, for assurances of confidentiality, and that the employer monitor the workplace to ensure there is no retaliation. Also advise your client to maintain a copy of the note and the response, if any.
g. If you are concerned about your client's ability to do well in the interview, ask the employer if you can attend. (See Section III below, "Right to Counsel.")

2. In addition to the above general guidelines, if you are representing the claimant, the following steps should help your client be better prepared and feel more at ease during the interview:
   a. Encourage your client to cooperate fully with the investigation. If your client does not cooperate, the employer is legally bound to proceed with the investigation and make a determination without the benefit of your client's input.[8]
   b. Meet with the claimant before the interview to go over all possible aspects of his/her claims. Be mindful that any omitted claims later recalled will be given less credence (rightly or wrongly) after this first interview.
   c. Consider helping your client prepare a "cheat sheet" so all facts are more easily recalled under the pressure of having to disclose possibly

[8] Hollis v. Fleetguard (M.D. Tenn. 1987) 668 F.Supp. 631, 637.

embarrassing or distressing incidents. Be sure to note on the sheet that it is not intended to be a complete or final list.

d. If supportive documents, or other tangible evidence (such as the soiled dress, photos of the offensive graffiti, or love texts from a claimant) are in your client's possession, advise your client to present them at the first interview. Again, subsequently produced evidence that was in your client's possession at the outset, while not disregarded, will be looked at with less trustworthiness.

e. Prepare your client for these questions by the interviewer, in particular:
   1) Who, what, when, where, and how: Who committed the alleged discrimination? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
   2) How did you react? What response did you make when the incident(s) occurred or afterwards?
   3) How did the discrimination affect you? Has your job been affected in any way?
   4) Are there any persons who have relevant information? Was anyone present when the alleged discrimination occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged discrimination?
   5) Did the person who discriminated against you discriminate against anyone else? Do you know whether anyone complained about discrimination by that person?
   6) Are there any notes, physical evidence, or other documentation regarding the incident(s)?
   7) How would you like to see the situation resolved?
   8) Do you know of any other relevant information?[9]

f. If even after all of this, your client is still resistant to meeting with an investigator to discuss his or her claims, send them to a psychologist or doctor to assess whether they should be on a medical leave due to stress from the discrimination, and whether they should be subject to an interview at this time. Make sure your client complies with all medical leave requirements of the employer.

g. Be aware that it will be up to the employer whether to conclude the investigation without the benefit of input from your client, so long as the employer acts reasonably.

[9] See "Questions to Ask the Complainant," EEOC Enforcement Guidance, Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 1999, modified March 29, 2010), at p. 15. http://www.eeoc.gov/policy/docs/harassment.pdf

h. You can also ask the employer to put your client out on paid "administrative leave" pending the investigation. When the claim involves two employees who work together, a request for paid leave pending the investigation is commonly granted. In such event, the client will be expected to fully cooperate with the investigation.[10]

3. If you are representing the accused, in addition to the general guidelines provided above, the following tips should help:
   a. Advise your client to fully cooperate with the investigation. Failure to cooperate will likely subject your client to discipline, up to and including termination.
   b. Advise your client to send an email to the investigator and/or HR to ask for notice of the specific charges made against him/her so that they can be best prepared to respond to them during the interview. Don't be shocked when you get something vague in response. Unless set forth in their policies, it is not uncommon for the employer to avoid disclosing the details of the charges before the interview. However, standard HR practices regarding adequate investigations require the investigator give the accused a full and fair opportunity to respond to the specific charges before concluding the investigation.
   c. Encourage your client to be truthful and forthright. Some employers have company policies or practices that use a failure to be truthful or forthright as a reason to discharge the accused even if the underlying claims are not substantiated.
   d. Prepare your client to answer the following questions:
      1) What is your response to the allegations?
      2) If the accused claims that the allegations are false, ask why the complainant might lie.
      3) Are there any persons who have relevant information?
      4) Are there any notes, physical evidence, or other documentation regarding the incident(s)?
      5) Do you know of any other relevant information?[11]

---

[10]"It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation" EEOC Enforcement Guidance, supra at FN 8 above.

[11]See "Questions to Ask the Alleged Harasser," EEOC Enforcement Guidance, Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 1999 modified March 29, 2010), pp. 15-16. http://www.eeoc.gov/policy/docs/harassment.pdf

4. If you are representing a third party witness, in addition to the general guidelines provided above, the major concern is usually fear of retaliation. See Section II.C.1.g. above for applicable tips regarding retaliation fears.
   A. Prepare your client to answer the following questions:
      1. What did you see or hear? When did this occur? Describe the alleged wrongdoer's behavior toward the complainant and toward others in the workplace.
      2. What did the complainant tell you? When did s/he tell you this?
      3. Do you know of any other relevant information?
      4. Are there other persons who have relevant information?[12]

III. The Right to Counsel.

A. Your client, whether the claimant, accused and/or third party witness, can request the presence of his/her attorney at the interview. As a practical matter, consistent with federal labor laws, at least in the case of the claimant and/or the accused, more and more employers are allowing attorneys to be present so long as they agree not to interfere with the interview process. [13]

B. If you are representing the claimant or the accused, and an attorney is the investigator, the request for your presence may be made based on the prohibition against ex parte contacts with a person known to be represented by counsel.[14]

C. Peace officers and firefighters have the right to counsel, among other rights, where the interview could lead to disciplinary action based on various states' procedural bill of rights acts that protect safety officers.[15]

---

[12] See, "Questions to Ask Third Parties," EEOC Enforcement Guidance, supra at p. 16.

[13]For example, see NLRB v. J. Weingarten, Inc., 420 U.S. 251, 259 (1975): The union representative is only present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that it is only interested, at that time, in hearing the employee's own account of the matter under investigation. Private employers are following this practice where they allow counsel present.

[14]Rule 4.2 of the ABA Model Rules of Professional Conduct (2010) provides: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html Virtually all 50 states and the District of Columbia have adopted an ethical rule identical or similar to ABA Model Rule 4.2 or its predecessor. See, for example, California Rules of Professional Conduct, Rule 2-100(A): AZ Ethical Rules, Rule 4.2: same; Colorado RPC, Rule 4.2: same.

[15] For example, California has the Public Safety Officers Bill of Rights Act (POBR), Govt. Code § 3303 provides a panoply of rights to the an officer or firefighter who is subject to an interrogation that could lead to disciplinary action. Read the applicable statute in your state to familiarize yourself with the rights of your client.

D. Union employees have the right to request union representation during an investigatory interview where the employee reasonably believes the interrogation could lead to disciplinary action.[16]

E. Non-union employers may or may not allow counsel to be present.[17]

F. In all events, if counsel is present, this is not a deposition or trial where counsel has the right to object. However, certain privacy and privileged matters should always be protected, or may be considered waived if disclosed, especially if done so in the presence of counsel.

IV. Conflicts of interest and joint representations in investigations.

A. ABA Model Rules of Professional Conduct.[18]

Rule 1.7. Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;

[16] This is commonly referred to as "Weingarten rights," arising out the of the Supreme Court case of NLRB v. J. Weingarten, Inc., 410 U.S. 251 (1975).
[17] See, IBM Corp., 341 NLRB 1288 (2004): non-union employees do not have a right to have a *coworker* be present during an investigatory interview. Compare, TRW, Inc. v. Superior Court, 25 Cal.App.4th 1834 (1994): no right to attorney under the Fifth Amendment right to counsel in private sector workplace investigation, with Gelini v. Tishgart, 77 Cal.App.4th 219, 224: an employee who was fired for retaining an attorney to write a letter regarding her pregnancy discrimination charge properly stated a cause of action for wrongful discharge under California Labor Code Section 923 giving employees the right of representation in negotiating terms and conditions of employment.
[18] Your state may have enacted its own rules of professional responsibility that take precedence over the ABA rules, but are usually similar. For example, California has enacted the California Rules of Professional Conduct. CRPC Rule 3-310 provides, inter alia, (C) A member shall not, without the informed written consent of each client: (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

B. Practical Tips: Unless there is some compelling reason, and you obtain both clients' consent in writing, don't represent the claimant and a witness, or the accused and a witness. Joint representation may cause multiple problems regarding the attorney-client privilege and conflicting interests among the clients. In addition, representing a witness and a party may cause the investigator to discount (wrongly or rightly) the accounts of both parties.

V. Tape recording.

A. What to do if the investigator wants to tape record the interview.[19]

1. Legality?
    a. The Omnibus Crime Control and Safe Streets Act of 1968, amended by the Electronic Communications Privacy Act of 1986,[20] make it unlawful intentionally to intercept wire, oral or electronic communication. Often referred to as the Federal Wiretapping Act, the law allows an exception when one party to the conversation has consented to interception.
    b. Many states also have developed wiretapping laws. Among those that call for prior consent for lawful interception, about half (Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Illinois, Iowa, Louisiana and Ohio) mirror federal law in requiring only one party's consent, according to the Bureau of National Affairs *HR Library*. Some states (California, Connecticut, Florida, Georgia, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington) require the consent of all parties to the communication to lawfully intercept communication.

2. Prepare your client for the possibility that the investigator may want to record the interview. Although it is not a recommended HR practice by this writer due to the potential chilling effect, some investigators prefer this method. In

[19] Note, again, public, union and/or safety officers have special rights regarding tape recordings of interviews. Check applicable law.
[20] 18 U.S.C.S. §§ 2511(a), 2520.

most states, knowledge and consent of the employee is required before the interview can be recorded.

3. If your client would find the tape recording of the interview to be an intimidating factor or hindrance in any way, let the employer know this in writing before the interview. If there was no notice of the intent to tape record, advise your client that s/he has the right to decline permission to record (at least in those states requiring consent of both parties.)

4. If the investigator insists it is the only way for him/her to accurately and completely make notes of the interview, suggest that they reschedule and bring someone else to take notes.

5. If an investigator wants to record, and your client does not object, you should prepare your client to bring his/her own tape recorder, plenty of batteries, and plenty of tape. Taping your client's own interview will avoid any potential mishaps with the investigator's tape recording. In all events, the witness should request a copy of the investigator's tape.

## VI. Key Ethical Issues.

### A. Trolling the Social Networks of Employees

Investigators now have an additional resource at hand – the social networks which tend to contain TMI about employees' private lives. The question is whether or not it is ethical for investigators to be trolling through employees' Facebook, LinkedIn, or other social network accounts under false pretenses. Is there a reasonable expectation of privacy in such postings?[21]

1. The Laws Regarding Invasion of Privacy Issues.[22]

   a. U.S. Constitution's protections of privacy, contained in the First Amendment (freedom of expression and association) and Fourth Amendment(freedom from unreasonable searches and seizures) are

[21] The Privacy Clearinghouse www.privacyrights.org and the Electronic Frontier Foundation www.eff.org are excellent resources for the latest news on privacy rights in electronic communication.

[22] "*Legal Protections for Employees' Workplace Privacy Rights Arise from Many Sources*" published by SHRM May 25, 210, and written by Joanne Deschenaux, J.D. SHRM Senior Legal Editor.

applicable only to "state action" or government conduct, and not the actions of private parties, including employers.

b. Ten state constitutions also protect the privacy of public employees. They are: Alaska, California, Florida, Hawaii, Illinois, Louisiana, Montana, New York, South Carolina and Washington. California is the only state to grant privacy rights to private sector workers (California Constitution, Art. I, Section 1). The California Constitution also protects data privacy (Art. I, Section 13).
c. Some state courts, including New Jersey and Alaska, have found the state constitution's privacy protection enough to support a private employee's public policy claim of privacy infringement.
d. Under federal law, the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2511, et seq.) prohibits the interception of wire, oral or electronic communication without consent, but does not generally apply to an employer's monitoring of its own e-mail or phone systems.
e. The Stored Communication Act (SCA), which is part of the ECPA, prohibits an entity "providing an electronic communication service to the public" from knowingly divulging the contents of an electronic communication. It applies only to communications in which the employee had a reasonable expectation of privacy. Where an employer makes it clear that certain communications are not protected, the SCA will likely not apply.
f. The Computer Fraud and Abuse Act, which has been used by employers to pursue departing employees who leave with computer data, does not protect employees using company systems.
g. The Fair Credit Reporting Act, which puts certain restrictions on employers that use a consumer reporting agency to conduct background checks on job applicants.
h. State laws provide more privacy protections than federal law. A number of states recognize private employees' rights to some degree of privacy in the workplace. They include: Alabama, Alaska, Arkansas, California, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Vermont and Wisconsin.
i. In California, Connecticut, Delaware, Michigan and Rhode Island, employers' electronic monitoring of employees at work is subject to regulation, and prohibited in some locations within the workplace associated with a higher expectation of privacy, such as bathrooms. In Connecticut, for example, employers must give prior notice to employees

of electronic monitoring in the workplace, absent reasonable grounds to suspect illegal conduct, a hostile work environment or other misconduct.

j. Every state recognizes tort-based, privacy-related causes of action that do not arise from statutes. These are common law protections, and generally fall into two categories. (a) "Intrusion into seclusion" claims have been brought in the employment context to challenge workplace monitoring. The employee must establish that the monitoring would be highly objectionable to a reasonable person. This standard is very hard to meet for routine work-related monitoring and few claims have been successful due to the difficulty of proving a reasonable expectation of privacy–as long as an appropriate policy is in place, communicated to employees and consistently enforced. (b) "Public disclosure of private facts" claims are based on employer disclosure of private facts, and have also been generally unsuccessful.

k. In addition, collective bargaining agreements may affect an employer's right to conduct surveillance.

2. Practical Tips.

Most employers have policies that state that the employer has the right and will monitor the use of employer-owned electronic devices. If you're representing an employee who is either the complainant or the accused, you should advise them to assume that everything they post on a social media page will find its ways into the hands of the investigator, one way or another. Accordingly, it may be best to advise your client to stay off the social networks for a while. However, it is not a good idea to advise your client to delete any existing posts or photos. See paragraph B below on "Spoliation of Evidence."

B. Spoliation of Evidence.

1. Federal Law.

Federal Rules of Evidence, Rule 401, Federal Rules of Civil Procedure 37, and the ABA Model Rules[23], and the cases interpreting them, prohibit the

[23] ABA Model Rules of Professional Responsibility, "Rule 3.4 Fairness To Opposing Party And Counsel .

destruction of evidence in a matter in litigation or under investigation. Advise your client to save all electronic data, written, and tangible items that have relevance to the subject of the investigation. If your client does not have a regular practice of deleting emails, photos, texts, iChat or other electronic communications, doing so after notice of an investigation will be presumed by the investigator as a culpable act. In litigation, it will be grounds for sanctions in subsequent litigation. FRCP, Rule 37(f).[24]

2. State Laws.

A Sixth Circuit case addressed the issue as to whether state or federal spoliation law applies in federal cases. In *Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009) the en banc court held "as does every other federal court of appeals to have addressed the question — that a federal court's inherent powers include broad discretion to craft proper sanctions for spoliated evidence." Id. at 651.

While state laws may differ in the nuances of when sanctions are appropriate, the majority if not all have rules against the willful and knowing destruction of relevant evidence.

A New Jersey court addressed the deletion of a Facebook profile photo and a website in the trademark infringement case of *Katiroll Co., Inc. v. Kati Roll and Platters, Inc.*, 2011 WL 3583408 (D.N.J.). The plaintiff argued that the defendant's deletion of these allegedly infringing items were deliberate acts of spoliation of evidence. As to the Facebook profile photo, the court recognized that it is a common occurrence for people to change their profile pictures on Facebook, and found that it would not have been immediately clear to the defendant that changing his profile picture would undermine discoverable evidence. As such, the Court determined that this spoliation was unintentional. However, since it was "somewhat prejudicial" to the plaintiff, it ordered the defendant to repost the profile picture so the plaintiff could download and

---

A lawyer shall not: (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." . http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html As the Second Circuit once noted, the spoliation of evidence relevant "to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).

[24] Federal Rules of Civil Procedure, Rule 37(f) safe harbor provision. This rule provides that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

print it for evidence. It further ordered that immediately thereafter, the defendant should again delete the "infringing photo." As to the website deletion, the court ordered the defendant to produce pictures of the deleted website, and if it could not do so, the court would grant a spoliation instruction (that the jury could presume the evidence would have been damaging to it).

Another unpublished case addressed the deletion of photos from the plaintiff's Facebook page in a case of personal injury and wrongful death of the plaintiff's wife. In *Lester v. Allied Concrete Co*, CL08-150, CL09-223, (9/1/2011), the Circuit Court of the City of Charlottesville, Virginia cut a $10.6 million verdict in half, and imposed sanctions of $542,000 against the attorney who advised the plaintiff to "clean up" his Facebook and MySpace accounts. It also imposed $180,000 in sanctions against the plaintiff. Since the ruling, the plaintiff's attorney has been referred to the Virginia State Bar for misconduct and the plaintiff has been turned over to the state prosecutor for perjury. One deleted photo depicted the allegedly distraught widower, holding a beer and wearing a t-shirt emblazoned with "I [heart] hot moms. Both sides have appealed. For the court rulings, see http://www.x1discovery.com/download/Lester_v_Allied_Contrete_Order.pdf And http://hytechlawyer.com/wp-content/uploads/2012/01/Lester_v_Allied_Concrete_Final_Order.pdf

3. Practical Tips.
   a. Be mindful of all applicable federal and state laws.
   b. Review the company's policies and practices regarding the use of company-owned equipment, and the company's right to monitor all uses. Has the policy or practice been clearly communicated to the employee, and/or has the employee signed a receipt or otherwise acknowledged agreement of such terms. Some company policies state that by using the company-owned equipment, the employee consents to the employer's right to monitor the use. In this day and age, it is a rare employer who does not have a policy regarding its right to monitor an employee's email, text messages, Internet and any other use of company-owned equipment. Your client should be prepared to return to the employer all company-owned electronic equipment if it is relevant to the investigation. Most employers also have policies that prohibit the deletion of information on their equipment upon the commencement of an investigation. Advise your client against making any attempts to delete information from their

company-owned equipment. Covering up information is sometimes worse than the underlying claim, and may result in disciplinary action, including termination.

c. Some companies have started a "bring your own device" policy, commonly known as the "BYOD" policy. This has encouraged employees to use their own personal devices for work. This has raised several issues about the employer's right to monitor the activities of employee-owned devices. Again, familiarize yourself with the company's policies regarding the use of employee-owned devices, and be prepared to assert applicable privacy rights.

VII. Investigator bias and how to force a fair investigation.

A. Standard HR procedure requires that a fair investigation be one that is conducted by an investigator who has no real or perceived bias, with no stake in the outcome. The investigator who conducts the investigation must be impartial, with no preconceived notions as to who was at fault, and must treat all parties involved—the complainant, alleged wrongdoer and all witnesses—fairly and with respect.[25]

B. Be mindful of who is controlling or influencing the investigation. If your client believes that someone with a grudge against them is influencing the investigation, bring his/her concerns to the attention of the employer, in writing.[26]

C. If there is any bias, real or perceived, make a record of it. Make sure that your client gives notice to the employer in writing the reasons the client believes the investigator is biased and/or unduly influenced by an impartial party, and insist on an independent, neutral investigator. Making a paper trail of the bias of an investigation will force the employer to be mindful of its obligation to conduct a fair and impartial investigation.

---

[25] "Proper Workplace Investigations," by David I. Weissman, Esq., Ford & Harrison, LLP, SHRM HR Magazine, Vol. 56 , No. 5, May 1, 2011; Nazir v. United Airlines, Inc., 178 Cal. App. 4th 243, 277 (Cal. App. 1st Dist. 2009): Summary judgment reversed where investigation was not impartial; See also, EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, '615 Harassment, June 18, 1999, as modified March 29, 2010. See http://www.eeoc.gov/policy/docs/harassment.pdf

[26] See, for example, Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. Wis. 1990), and it's progeny of cases relating to the "cat's paw" theory. In Shager, summary judgment for the defendant was reversed in an age discrimination case where plaintiff was terminated by a personnel review committee based on the recommendations of his supervisor where there was evidence of the supervisor's bias against older workers. See, also, Nazir v. United Airlines, Inc., supra at fn 23.

VIII. How to disqualify an investigator or counsel.

A. Make your record! See above. Cite to the employer the various laws and regulations that require the investigation be conducted by a neutral, fair, objective investigator. (See FN 24.)

B. If the discrimination investigation is being conducted before litigation or an administrative action is filed, as a practical matter, there is not much you can do for your client to force the change of an investigator or counsel. The best use of your time is in making a record of the request for the investigator or counsel to recuse themselves, and the reasons therefor. If any adverse or remedial action is later taken or not taken based on the investigation, and legal or administrative action ensues, you will have an excellent record upon which to discredit the findings and handling of the claim.

IX. Who should pay for fees and costs of a harassment, discrimination or retaliation investigation?

A. There is no question that an employer pays the investigator's fees. The obligation to investigate possible harassment, discrimination or retaliation is a legal one imposed on the employer by law.[27]

B. Arguably, an employer should also pay for legal fees for the claimant in a harassment, discrimination or retaliation claim, where the claim is substantiated, under Title VII, the ADEA, ADA, and other discrimination laws which provide attorneys' fees as a remedy for a violation.[28]

C. And, arguably, an employer should pay for the legal fees of someone who is required to participate in an investigation, is compelled to defend him or herself, and is vindicated by the investigation. Check for various state and federal indemnification laws.[29]

---

[27] See FN 1.

[28] Title VII of Civil Rights Act, 42 U.S.C.S. § 2000e et seq.; ADEA, 29 U.S.C.S. §626(b); ADA, 42 U.S.C.S. §12205

[29] For example, California Labor Code § 2802 states that an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. Cal. Lab. Code § 2802(a). Section 2802(c) defines "necessary expenditures" to include attorney's fees incurred by the employee enforcing the rights granted by § 2802. Compare, Jacobus v. Krambo Corp., 78 Cal. App. 4th 1096 (2000): employer should have paid for accused's costs of defense, and must now indemnify, where employee was vindicated in a sexual harassment suit by another company employee, with Farmers Ins. Group v.

D. As a practical matter, you can always ask for payment or reimbursement of your fees. However, you should prepare your client for the employer's counter request for a release of all claims arising out of the investigation, up to and including the remedial action taken

X. Advising your client about how to proceed in the aftermath of an investigation.

A. If your client is the complainant or accused, s/he is entitled to know the results of the investigation.[30] Ask for a copy of the written report. Standard HR procedure is NOT to share the written report with the employees, but rather to simply advise them of the result. Unless you are a public employee, safety officer or union employee, you don't have a legal right to the report of an investigation into a discrimination charge pre-litigation. But, it doesn't hurt to ask.

B. If you represent either party, and s/he is dissatisfied with the results of the investigation, you can ask for a meeting with HR to fully discuss the matter to try to find a mutually acceptable resolution in lieu of litigation. Some possible resolutions could be another investigation by a mutually agreeable investigator, your client's transfer to another location, or a mutually agreeable severance. I strongly urge you to encourage the employer to let you make an *informed* decision whether or not to sue. This is done by the employer sharing with you in a mediation/confidential context the investigation results leading to its conclusion. The alternative is to learn all the reasons at a MSJ.

C. If you represent any of the parties or witnesses in the investigation, advise the client to immediately inform HR of any retaliation. Although all companies have anti-retaliation policies, most do not properly monitor the workplace after an investigation to prevent discrimination or retaliation from occurring. It will usually fall upon your client to be the person to let HR know of any continuing wrongful conduct or retaliation.

---

County of Santa Clara, 11 Cal. 4th 992 (1995): employer not required to defend or indemnify employee found to have engaged in the alleged acts of sexual harassment. Such acts do not arise out of the course and scope of the accused's employment.

[30] Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination. EEOC Enforcement Guidance (June 1999, as modified March 29, 2010). See http://www.eeoc.gov/policy/docs/harassment.pdf

D. If returning to the workplace after the investigation is awkward or would pose potential retaliation claims, you may want to ask for a transfer.

E. If you represent the accused, ascertain whether there has been anything placed in his/her personnel file, or any other file, concerning the results of the investigation. Be aware that a past record in a personnel or other file will be evidence against your client in a future claim of the same or similar nature. For example, an employee's past record is one of the factors an investigator should consider in making credibility assessments.[31]

THE END

[31] EEOC Enforcement Guidance, supra.