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POINTING FINGERS

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Viewpoint: Neutral investigators help eliminate the perception of bias on the part of employers, who may be accused of favoring one side in sexual-harassment claims.

I. Introduction

Employers often engage independent fact-finders to investigate claims of workplace misconduct, particularly sexual harassment. This typically occurs when the accused is a high-ranking executive or the allegations involve the human resources or legal departments themselves.

Some attorneys automatically reject an investigator's request to interview the client because the investigator is paid by the employer. This approach may cause counsel to miss valuable opportunities for resolution.

Neutral investigators seek to gather, examine and critically reason through information provided by all parties without a preconceived outcome in mind. Unlike a deposition, an interview with a neutral investigator probably is the only meaningful opportunity many clients will ever have to explain their position, other than to their own counsel.

Neutral investigators, who are compensated for their services, are free from the concerns of job security, career advancement and employer liability that can influence an employer representative's fact-finding. Neutral investigators are separate from the employer decision-maker, which further enhances independence.

Perhaps the most valuable aspect of participating in an investigation is the opportunity to learn and respond to information, which leads to a better understanding of both sides of the case. This interactive process is satisfying and results in a complete and evenhanded evaluation of the evidence, unlike the way in which jurors sometimes view the findings of an employer representative.

Most independent investigations, particularly those involving allegations of sexual or other types of harassment, are conducted soon after the filing of the internal complaint and before commencement litigation. It usually is the employer's responsibility to conduct and pay for investigations, and employers often have little obligation or incentive to share information their neutral investigators have gathered.

II. Determining Independence

Good investigators are aware of the potential for litigation. Employers expect, and pay for, the unvarnished truth and an investigator who can support the factual position asserted. No single resource exists to locate independent investigators, so they are usually found through reputation, word of mouth or referral.

Parties can obtain the investigator's curriculum vitae and references from other counsel. Counsel should request that the investigator provide written clarification of neutrality.

Plaintiff- or defense-side experience does not necessarily determine neutrality. Counsel should consider interviewing the investigator, and, if not satisfied as to neutrality or qualifications, suggest alternatives.

III. Negotiating the Process

To reduce the perception of bias and persuade an employee to participate more openly and fully in an investigation, some employers present the employee's counsel with a list of possible investigators, similar to mediator selection, which also can increase the investigator's credibility with the employee and counsel.

Employers should evaluate at the outset whether the investigation will be conducted under an attorney-client privilege, which would limit the employer's ability to share information. An employer may agree to share all or part of the investigative information with counsel for the employee, perhaps in exchange for the employee making certain concessions, such as agreement to mediate.

Sharing information can be accomplished in a variety of ways, subject to negotiation. An investigator sometimes prepares a written report; sometimes only an oral report is requested. Sometimes the parties agree that the employer will provide a draft of the report to all parties for their review and comment before it is finalized. Reports may be less vulnerable to future attack in litigation if all parties have input into the final document.

If litigation ensues and the employer relies on the investigation, the entirety of the investigative file will be subject to discovery. If only oral findings are to be made, counsel must determine how information can be shared.

Sometimes written documentation created or gathered during the investigative process can be shared, such as transcriptions of witness interviews, actual witness statements or relevant documentation. Whatever the decision about memorializing the findings of an independent investigation, that determination rarely is made at the outset of an investigation.

Another subject to be negotiated is who will be present during investigative interviews. Counsel may refuse to allow a client's interview unless counsel can be present, but, in doing so, counsel risks becoming a witness in the action if the interview's statements to the investigator later are disputed.

An alternative is to have someone from counsel's office, a paralegal or contract attorney, sit with the client during the interview. Another alternative is to allow a witness, usually the accuser or the accused, to tape record the interview. Most employers provide parties with copies of their own interview transcripts, if requested.

Attendance at an interview by anyone other than the witness's counsel should be discouraged. The presence of human resources personnel, or inside or outside counsel, inhibits witnesses' willingness to speak candidly. Such a presence also can increase the risk of a retaliation claim from interviewees who offer information adverse to the employers.

Withholding otherwise discoverable, corroborating information for use in litigation is counterproductive. What serves clients well is providing the independent investigator with a full and complete explanation of the employee's position, positioning the case for settlement.

IV. Reaching Settlement

Investigations consume energy, time, and money, so counsel should consider using the completed investigation as a tool for resolution. One way is for the parties to agree at the outset to mediate at the conclusion of the investigation.

If mediation does result, counsel should consider having the investigator present findings at the joint sessions or be available to talk with the mediator and parties. On occasion, it is possible for the investigator to transition to serving as a mediator, because both roles require impartiality. This can be effective because the fact-finder-turned-mediator is familiar with the facts. In that situation, the fact-finder may complete the investigation but delay making specific factual findings, unless the mediation is unsuccessful.