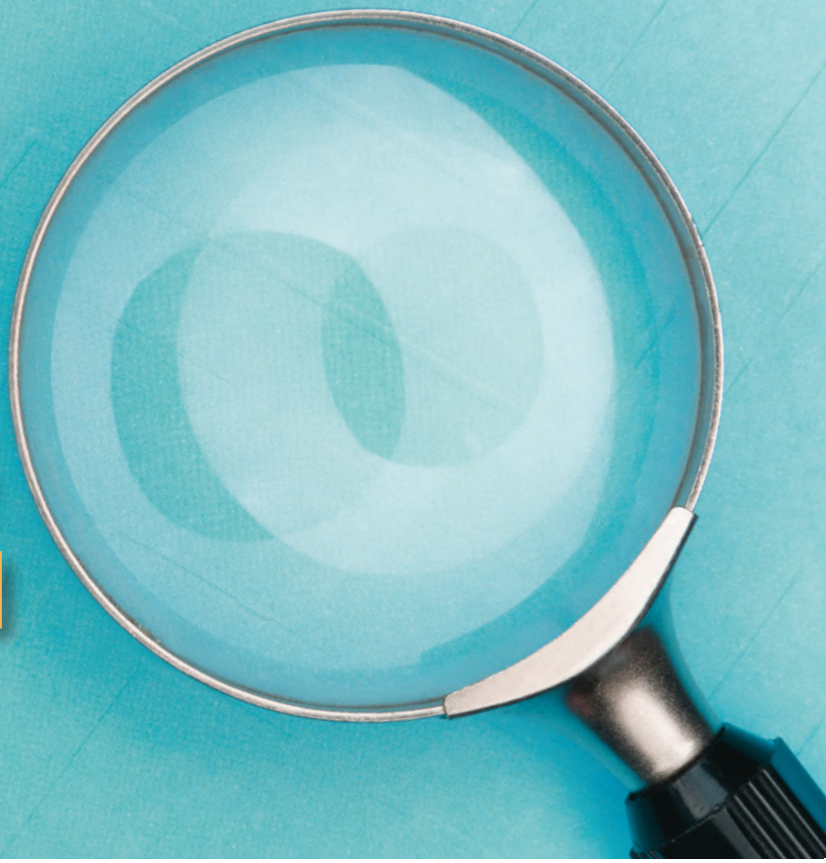
Considerations for the growing role of the attorney-investigator in the post #MeToo world



By Fran Haas and Mary Funk

The role of the investigator has taken on a higher profile in recent years due in large part to the #MeToo movement that hit the cultural mainstream, leading to a cascade of high-profile allegations of sexual harassment and abuse in nearly all industries. The #MeToo movement cast a spotlight on how employers respond to reports of sexual harassment and abuse, as well as other misconduct in the workplace.

As a result of this and other factors, many organizations are taking a more engaged approach in managing internal complaints or concerns about employee misconduct. These efforts include enhanced training, more reporting options for concerned employees and being proactive about addressing workplace issues before they evolve into a more complex or potentially intractable set of problems.

A natural by-product of a heightened interest in managing employee issues or misconduct is an increase in attorney-led workplace investigations. An attorney-led investigation was at issue in *Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235 (Iowa 2018). In that case, the Iowa Supreme Court discussed the intersection of an attorney-led workplace investigation and the *Faragher-Ellerth*[1] affirmative defense, which can apply to claims of harassment perpetrated by supervisors. 908 N.W.2d 235 (Iowa 2018). Among other observations, the Iowa Supreme Court wrote that employers frequently rely on an internal investigation to discharge their "duty to take reasonable measures to investigate and eliminate workplace discrimination." *Id.* 908 N.W.2d at 241.

Whether conducted by an attorney or not, a prompt, thorough and effective workplace investigation is a critical tool in responding to complaints or potential concerns with workplace misconduct, including harassment. Although employers understand their legal and practical obligations to respond to internal complaints of misconduct, they may not be well-equipped to render findings on the more serious internal complaints or concerns, which is when it might make sense to engage an attorney investigator.

For example, if witnesses provide competing reports about what happened, an employer must generally make a credibility finding to determine whether corrective action is required. This can be difficult to do when a party holds a management role, or is a peer to someone who may be handling the investigation. It may also be complicated by a party's inability to devote internal resources to what are often time-consuming, lengthy investigations. Another challenge with internal investigations arises when an entity must make, carefully assess and synthesize evidence or legal issues – such as whether fraud has been committed – that may be beyond the skill level of an organization's human resources team. And, as a practical matter, workplace investigations are also effective in identifying latent issues, such as unrelated acts of misconduct or harassment. Many employees are more likely to share concerns with a neutral third-party investigator than a co-worker. Learning about these issues can also serve as a way to understand and manage personality conflicts and improve employee morale.

Many of us have dealt with workplace investigations in our practice. Perhaps we have been asked to conduct the workplace investigation as counsel for an organization,

or advise clients on when, who and how to conduct an investigation, or recommend what to do with the results of the investigation. Many of us also litigate issues that arise from workplace investigations. No matter your level of involvement with workplace investigations, here are a few considerations to bear in mind when you encounter the need for a workplace investigation:

1. How do I know when my client needs an external attorney-investigator?

There is no hard and fast rule that governs when it's appropriate to retain an attorney-investigator. One key factor that tends to justify the retention of an attorney-investigator is the seriousness of the allegations and who is implicated. Are you concerned a crime has been committed? Is there a potential violation of the organization's anti-discrimination or anti-harassment policy that could lead to litigation? Are managers or supervisors potentially culpable of misconduct? Is an officer-level employee involved? Has human resources, who may otherwise conduct the investigation, been implicated? Is the allegation of misconduct mission-critical? Are you short on internal resources to devote to a prompt, thorough investigation? If so, retaining an attorney who is well-versed in employment law and has experience conducting difficult or sensitive witness interviews makes sense.

Another factor is whether the organization has an interest in maintaining the findings of the investigation confidential pursuant to the attorney-client privilege. Assuming the attorney-investigator provides the findings of a privileged investigation to a client in a confidential manner, the investigator's findings and report are protected by the attorney-client privilege. *Fenceroy*, 908 N.W.2d at 242-43. However, as discussed below, the organization may later need or want to waive privilege to defend itself in administrative proceedings or litigation.

A third factor is the message that an organization sends to its employees about how seriously it's taking the allegations. Retaining an external attorney-investigator demonstrates that an organization is committed to finding out what happened, and wants a neutral fact-finder to make that determination.

Because the decision about whether to treat the investigation and its results as privileged often cannot be made until a later date, it is advisable to take steps from the outset to protect the investigation. The privilege can be waived at a later time if it is determined necessary to defend the client's actions in litigation. But the privilege cannot be retroactively applied if the results are not what the client assumed would be the outcome.

2. Are there any drawbacks to conducting the investigation for my own client?

Yes. As the Iowa Supreme Court observed in *Fenceroy*, if litigation ensues, and your client relied on the outcome of a privileged investigation when responding to an issue subject to litigation, a waiver of privilege may be necessary. 908 N.W.2d at 242-43. Even if your client is resistant to the idea, waiver may occur if the client intends to rely on the investigation and the investigation is relevant to an issue in the case. *Id.* at 246.

If there is a possibility that privilege could be waived, that means the outcome and findings may be revealed in discovery. It also means that the attorney who conducts the investigation may become a witness in any related litigation. *See id.* at 908 N.W.2d at 242. If your client wishes to have its regular attorney defend any ensuing litigation, or provide advice about what to do with the results of an investigation, it makes sense to retain an external attorney-investigator to conduct the investigation and permit an entity's regular counsel to provide advice about what to do with the results of an investigation.

3. Is there a benefit to retaining an attorney to conduct a workplace investigation rather than a non-attorney?

Usually, yes. While many non-attorney investigators, such as prior law enforcement investigators or human resources professionals, provide competent services, attorneys are uniquely positioned to provide services that are subject to additional safeguards due to ethical obligations required by the Rules of Professional Conduct. For example, it's critical to retain an investigator who will be free from improper bias when reaching a decision. Unlike many other professions, Iowa attorneys are ethically obligated to refrain from engaging in "misconduct," including "conduct that is prejudicial to the administration of justice." Iowa R. Prof'l Conduct 32:8.4(d). The comment to Rule 32:8.4(d) explains that "misconduct" includes "[a] lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or economic status[.]" In other words, Iowa attorneys are ethically compelled to deliver legal services, such as an internal investigation, without improper bias.

Another unique procedural safeguard for an attorney investigator is the requirement that attorneys "be truthful with dealing with others on a client's behalf." Iowa Rule Prof'l Conduct 32:4.1. Attorneys are prohibited from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation," which includes making false statements or incorrect statements "in reckless disregard for whether the statement was true or not." *Iowa Supreme Court Disciplinary Bd. v. Barnhill*, 847 N.W.2d 466, 474 (Iowa 2014) (citation and internal quotation marks omitted). When interviewing witnesses or providing findings to a client, it's critical that any investigator's work rise above challenges to honesty and truthfulness. An attorney's ethical obligation to be truthful and careful in dealing with others in an investigation furthers that important goal.

Separately, attorneys are trained to use their judgment, analyze difficult and complex issues, identify potential new issues for consideration and assess witness credibility. These tools are essential in every investigation. Attorneys use these skills regularly and are comfortable drawing judgments and assessing the evidence. Additionally, judges and juries may assign more credibility to an attorney-conducted investigation, than one led by an internal human resources professional who may be presumed to have an internal company-leaning bias.

4. Should I be concerned about an external attorney-investigator poaching my client?

A high-quality investigator should know better than to try and use an investigation as an opportunity to "steal" a client. That type of conduct will destroy the integrity of the investigation, and gives the impression that the attorney-investigator may have reached a conclusion favorable to a company in an effort to develop more work or an enhanced role with a particular organization. External attorney-investigators may be required to be deposed or testify at trial if the company elects to waive privilege. *See Fenceroy*, 908 N.W. 2d at 242. If that occurs, all the communications, including an attorney-investigator's effort to develop more work or market additional legal services, will be exposed and cheapen the quality of the investigation and the perception of integrity.

Whether hiring an external attorney-investigator or using in house counsel, the careful planning and conducting of a thorough and timely investigation on the front end, can ease clients' burdens on the back end, in terms of expense, time and liability.

[1] The *Faragher-Ellerth* defense requires employers to show: (1) reasonable care was exercised to prevent and promptly correct any harassing behavior; and (2) a claimant employee unreasonable failed to take advantage of any preventive or corrective opportunities by the employer. *Fenceroy*, 908 N.W.2d 235, 241-242 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (internal quotation marks omitted).

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