

# **Four (Foot)Steps to Investigative Fortune: Lessons Learned From an Investigator and a Litigator**

*presented by*

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October 20, 2017, Session Two  
Advanced Master Class on Effective Investigations  
2:00 p.m. – 3:15 p.m.

*for*



American Employment Law Council  
2017 Conference

October 18-21, 2017  
Monarch Beach Resort  
Dana Point, California

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## Preface – A Message From The Authors

**W**orkplace investigations are increasingly in the spotlight. Think “deflategate,” where football hero Tom Brady was suspended based upon an investigative finding that the team deliberately under-inflated footballs. Or think Fox News, where Bill O’Reilly was dropped from the lineup following an investigation into sexual harassment allegations. Or Uber, which fired 20 employees after an investigator interviewed 200 people about workplace culture.

Outside the spotlight, though, the number of workplace investigations is exploding. Consider the creation and expansion of the Association of Workplace Investigators. AWI, formed in late 2009 for the purpose of “promoting and enhancing the quality of workplace investigations,” has grown to over 850 members from across the globe in less than eight years. Anecdotally, we know from AWI members that they are conducting more investigations than ever before. Relatedly, workplace investigators and experts in the workplace investigative field are making regular appearances in litigation and trials, and not just in employment cases.

*Along with an increase in the number of workplace investigations comes an expanding body of law, and emerging methods that are now considered “standard practices.”*

Along with this increase comes an expanding body of law, and emerging methods that are now considered “standard practices.” The result is a dizzying array of developments that workplace investigators must track and apply. Many workplace investigations carry the potential of becoming the centerpiece of a legal battle or, perhaps, a drama played out in the court of public opinion. Consequently, conducting a prompt, thorough and impartial investigation requires investigators to understand how their work may be used – and challenged – by litigators and others.

In this context, there are an increasing number of knotty issues that arise. In this paper, we address four of those issues:

- How can a workplace investigator maintain impartiality, while being strategic with the employer and its counsel?
- How does a workplace investigator conduct witness interviews in light of trauma-informed science?
- What exactly is a “credibility analysis” in the context of a workplace investigation?
- What considerations should govern the investigative report?

We do so from the perspectives of an attorney-investigator, Sue Ann Van Dermeyden, Esq., and a trial attorney, Fred Plevin, Esq. We have, through our respective practices, spent years working through the myriad and complex issues associated with workplace investigations. Our opinions are informed by the framework of a burgeoning area of law and practices now considered to be standard. We present our opinions in the context of our personal experiences, and through anecdotal evidence we have gathered. We intend this to be high-level guidance for handling tricky issues that arise in the course of conducting an investigation, and that surface when challenged or defended in court.

**Investigator's Note:** As a 23-year attorney with 11 years dedicated to being an attorney-investigator, I have personally conducted over 750 workplace investigations, reviewed another several hundred investigative reports, been scrutinized in deposition as a fact witness, and acted as an expert witness on investigative standards. From this, I have a few bruises, and a few triumphs, to talk about. Fortunately for me, I have also rubbed elbows with what I consider to be investigative geniuses. As a founding member, seven-year Board member and current President of the AWI, I have lived and seen firsthand some of the stickier issues that arise for those of us who do this work on a daily basis. I hope this perspective adds value for the reader. *Sue Ann Van Dermynen*

**Trial Attorney's Note:** My perspective on investigations is that of an employment litigator, trial attorney, and advisor to employers over a 31-year career focused on representing employers. I have conducted dozens of investigations of all types, hired and coordinated with outside investigators, guided and coached internal investigators, and strategized with management and investigators on all aspects of investigations. And, I've had the privilege of trying cases in which an investigation was at issue, which is the best way to learn what works, what doesn't, and what's important in an investigation. *Fred Plevin*

## I. Impartiality vs. Advocacy

Investigators have an interest in maintaining impartiality so their investigative findings withstand scrutiny when challenged. Employers, and by extension their advocacy counsel, have an interest in minimizing liability for the organization. Can these two interests be married? We believe the answer is "Yes," because both the investigator and the employer share a common interest – keeping the workplace free from harassment, discrimination, retaliation and other kinds of wrongdoing. With that in mind, we explore how an external investigator can maintain impartiality, while still walking the fine line of being strategic with outside counsel.<sup>1</sup>

We know from a myriad of sources that workplace investigators must be impartial and every other similar descriptor – independent, neutral, unbiased, objective, autonomous, disinterested, fair and balanced.<sup>2</sup> Clearly, then, this means the workplace investigator cannot also be advocacy counsel.<sup>3</sup> As succinctly stated in June 2016 by the Equal Employment Opportunity's Select Task Force on the Study of Harassment, "The system must ensure that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees."<sup>4</sup>

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<sup>1</sup> While many of the same principles apply in other contexts (such as the employer's decision-maker and internal counsel), we focus this article on the relationship between the external investigator and outside counsel.

<sup>2</sup> See, e.g., *Nazir v. United Airlines*, 178 Cal. App. 4th 243 (2009); AWI GUIDING PRINCIPLES, available at [http://www.awi.org/page/Guiding\\_Principles](http://www.awi.org/page/Guiding_Principles); Amy Oppenheimer, *Investigating Workplace Harassment and Discrimination*, 29 EMP. REL. L.J. 56 (2004); *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html>.

<sup>3</sup> This is further emphasized by the California Rules of Professional Conduct ("CRPC"), which prohibit an attorney from acting as an advocate at a trial in which the attorney will be called as a witness, without the client's informed, written consent. Cal. Rules Prof. Conduct 5-210. The ABA Model Rule (Rule 3.7) is even more restrictive. See MODEL RULES OF PROF'L CONDUCT R. 3.7.

<sup>4</sup> *Select Task Force on the Study of Harassment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (June 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf).

What does “impartiality mean,” exactly? In this context, it simply means the ability to separate one’s self from, and not have any personal or professional interest in, the outcome of the investigation. Whether it is determined by a preponderance of the evidence the conduct occurred – or did not occur – matters not at all to the investigator. The investigator’s future is not at stake – the internal investigator still has a job, and the external investigator gets paid – whether the allegations were substantiated or not. An “impartial” investigator is one who has the skill and experience to objectively gather and analyze all of the evidence and come to a well-reasoned conclusion – regardless of outside influences.

Maintaining impartiality requires a series of things. For purposes of this article, we focus on the need for the investigator to maintain freedom from the influence of the employer’s decision-makers and attorney advocates. The AWI Guiding Principles punctuate this:

An outside attorney investigator conducting an impartial investigation should appreciate the distinction between the role of impartial investigator and that of advocate. [...] Employers should guard against exerting undue influence on investigations. This does not preclude them, for example, without limitation, from preserving evidence, providing necessary notifications to employees, and providing input to investigators concerning the investigations’ scope.

Unlike the impartial investigator, the role of defense counsel is that of an advocate.<sup>5</sup> As set forth in most states and by the Model Rules of Professional Conduct, a lawyer acts as an advocate by zealously asserting the client's position under the rules of the adversary system.<sup>6</sup> The advocate operates under the well-established rules of attorney-client and work-product privileges, with little thought to the concept that the privilege will one day be waived.<sup>7</sup> By contrast, both the investigator and employer enter into the investigative process understanding that one day, the employer may have an interest in waiving the attorney-client privilege surrounding a workplace investigation.<sup>8</sup>

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<sup>5</sup> The Model Rules of Professional Conduct also recognize the lawyer in the role of negotiator and examiner. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. MODEL RULES OF PROF’L CONDUCT pmbl. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. *Id.*

<sup>6</sup> See *id.*

<sup>7</sup> This is not meant to simplify the complex rules of attorney-client and work-product privileges, and when the privileges may exist or be waived. One example of the complexity of these rules is *Kaiser Foundation Hospitals v. Superior Court*, 66 Cal. App. 4th 1217 (1998) [If investigator carefully segregates fact finding from legal advice, no waiver of the attorney-client privilege occurs even if the report and advice of counsel defense is used].

<sup>8</sup> An employer must produce the investigation in order to rely on it as a defense in litigation. *Wellpoint Health Networks, Inc. v. Superior Court (McCombs)*, 59 Cal. App. 4th 110, 130 (1997). While this paper does not explore the complexities and nuances surrounding the attorney-client privileged nature of an investigation, we know that recent cases have upheld the privilege in the workplace investigation context. As recently as June 2016, the California First District Court of Appeal in *City of Petaluma vs. Superior Court* held that an investigative report of allegations in an EEOC charge of a former employee was protected by the attorney-client privilege and work-product doctrine because the external attorney-investigator was providing a “legal service” by conducting a factual investigation. *City of Petaluma v. Superior Court*, 248 Cal. App. 4th 1023 (2016). The investigation is typically performed under a limited scope engagement of reaching factual findings and policy determinations. These findings then facilitate the rendering of legal advice to the company by the company’s advocacy counsel. See, e.g., Lindsay E. Harris and Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, 5 CAL. LAB. & EMP. L. REV. 4 (July 2011).

In the context of investigations, then, counsel for the company and the investigator have distinct roles.<sup>9</sup>

The advocate attorney is focusing on a myriad of issues, such as: determining whether interim action is advisable; identifying the scope of the investigation; assessing the appropriateness of confidentiality admonitions; determining any legal requirements governing the investigation, analyzing reporting requirements and notice obligations; outlining the requirements for retaining or waiving the attorney-client privilege in the investigation; managing the preservation of evidence; granting the investigator necessary authority and access to data and witnesses; assisting with public relations strategy; overseeing the delivery of closing documentation to the complainant and respondent; and, if necessary, dealing with attorneys engaged by the complainant and/or respondent. He or she is doing all of this while protecting the best interests of the company for future decisions, and in the event of litigation or regulatory investigations.

*There is one uncompromising feature of a good faith investigation – the investigator must have complete independence to evaluate the evidence and reach findings by the proverbial weight of a feather without influence by the employer or its counsel.*

The investigator, on the other hand, is responsible for the decision-making related to the methodology of the investigation – who, when and how to interview, what documents to access, what technology to go after, how to analyze evidence, and ultimately reaching the findings. As part of this methodology, the investigator must, among other things, understand applicable policies and laws; properly plan the investigation; understand the scope of the investigation; identify potential sources of information; prepare for witness interviews (logistics and questioning); establish a schedule; identify special issues; secure and maintain files; understand privacy issues; notify the respondent of the allegations against him/her; provide the respondent an opportunity to adequately admit, deny or provide explanations as to each allegation; prepare and maintain an adequate record; take detailed, accurate notes of witness interviews, or have sufficient recall of what was learned; document findings; notify parties of findings; analyze the facts based upon a preponderance of the evidence standard; make credibility determinations supported by the record; adequately document analysis and findings; and, reach a reasoned conclusion supported by the evidence.

So with these distinct roles, how can a workplace investigator maintain impartiality, while being strategic with the employer and its counsel?

As a starting point, it is critical to understand there is one area in which the investigator and employer *cannot* be strategic. There is one uncompromising feature of a good faith investigation – the investigator must have complete independence to evaluate the evidence and reach findings by the proverbial weight of a feather. The employer and its defense counsel must not and cannot influence that sacred ground. This is critically important when one considers the standard of evidence. As reiterated by AWI's Guiding Principles:

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<sup>9</sup> In the engagement letter, it is critical to define the role of the attorney-investigator. This is particularly true in states where individuals may not conduct investigations unless they are a licensed private investigator or meet certain exemptions – such as an attorney performing his or her duties as an attorney at law. *See, e.g.,* California's Private Investigator Act, Cal. Bus. & Prof. Code §§ 7512–7573. The engagement must be unambiguous as to the character of the services being provided, or the services may not qualify for the exemption.



The investigator should clearly understand the applicable standard to be used in evaluating the evidence and should weigh the evidence in accordance with the applicable standard. In many workplace investigations, the appropriate standard of evidence will be “the preponderance of the evidence” standard; namely, whether after weighing all the evidence, it is more likely than not that the alleged incident occurred.

We know from several sources, including the California Supreme Court,<sup>10</sup> that investigators can get the ultimate finding wrong, yet still be found to have conducted a good faith investigation. The reality is that if 10 investigators conducted the same investigation, five of them may find the conduct occurred, while five may not. While this may keep an investigator awake at night, we find solace in the Court’s finding in *Cotran v. Rollins Hudig Hall International, Inc.* There, the California Supreme Court held that an employer’s conclusions must be reasonable, meaning based on “substantial evidence gathered through an adequate investigation.”<sup>11</sup>

If an employer is required to have in hand a signed confession or an eyewitness account of the alleged misconduct before it can act, the workplace will be transformed into an adjudicatory arena and effective decisionmaking will be thwarted. The proper inquiry for the jury, in other words, is not, “Did the employee in fact commit the act leading to dismissal?” It is, “Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?”

The jury conducts a factual inquiry in both cases, but the questions are not the same. In the first, the jury decides the ultimate truth of the employee’s alleged misconduct. In the second, it focuses on the employer’s response to allegations of misconduct. [...]

The ultimate determination is whether a reasonable employer could have found that an employee committed the charged misconduct based on all the evidence before it.<sup>12</sup>

So setting aside the findings as an option, in what areas *can* the investigator and employer be strategic during the pendency of the investigation? The AWI Guiding Principles seem to recognize that there is a certain strategic element to the relationship between investigator and counsel:

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<sup>10</sup> *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998).

<sup>11</sup> In that case, the Court held that employers are not liable for wrongful termination when the jury determines that the employer based its decision on objectively “fair and honest reasons regulated by good faith,” versus reasons that are “trivial, arbitrary, capricious, unrelated to business goals, or pretextual.” *Id.*

<sup>12</sup> *Id.* at 106. This concept applies as well to discrimination cases: It is the employer’s honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts, that is at issue in a discrimination case. Good examples of this are *Wills v. Superior Court*, 195 Cal. App. 4th 143, 170 (2011) and *King v. United Parcel Service, Inc.*, 152 Cal. App. 4th 426, 436 (2007).

A determination should be made with whom the investigator will be communicating about what matters, taking into consideration issues of privilege.

Key factors to consider:

- a. In addition to witnesses, communications with the employer (or on behalf of the employer) generally fall into three main categories: (1) communications concerning the scope of the investigation, the advisements to be given, and the type of report to be produced; (2) communications concerning the process for obtaining evidence, scheduling, and logistics; and, (3) background information.
- b. If feasible, investigators should avoid communicating outside the interview process with anyone who is or may be directly involved in the matters being investigated, or with anyone who is or may be interviewed on substantive matters.
- c. If feasible, an employer representative should not be a witness or participant in the matter being investigated.
- d. An employer representative generally is the most appropriate person to handle logistics and scheduling and to determine the content of initial advisements to be given to current employees. These include, for example, the need to cooperate in the investigation, to maintain appropriate confidentiality, and to tell the truth during the interview.
- e. An employer representative generally will decide whether third parties may be present during interviews if requested by a witness. This includes representatives if an employee is covered by a collective bargaining agreement. However, an investigator who is an attorney must be cognizant of rules of professional responsibility, including rules concerning contact with a represented party.
- f. An investigator should avoid communicating conclusions before the investigation is complete.

Keeping this in mind, let's explore some areas for strategic communications during the pendency of the investigation.

**Scope.** AWI's Guiding Principles echo the generally accepted tenet that it is within the employer's province to define the scope:

The employer and the investigator should develop a mutual understanding concerning the scope of the investigation. In this context, the "scope" of the investigation refers to the issues to be investigated. Determining the scope of the investigation differs from determining the process to be followed in conducting the investigation.

But “scope” is a funny thing. It can change during the course of an investigation, in what is in investigator parlance lovingly referred to as “scope creep.” As investigators gather evidence and learn more information, it is not uncommon for scope creep to occur.

This can occur in a couple ways. One, the complainant, respondent or witnesses may raise additional allegations during the investigation that are outside the original scope; or two, in the absence of additional allegations, the investigator may identify facts to support other claims during the course of the investigation, either through interviews, documents or otherwise. Sometimes the “creep” is related to the current investigation, sometimes it is unrelated. For example, a witness may claim that not only did she witness sexual touching of the complainant, but the witness also experienced other unwelcome sexual advances by the same respondent. In this case, the investigator has more facts to support harassment against the same respondent, but the employer also has to decide whether the additional allegations require a separate but concurrent investigation, treating one who was formerly a “witness” as a new “complainant.”

Sometimes the “creep” is allegations unrelated to the underlying claim against the same respondent. For example, the underlying claim relates to misuse of funds, but the new claim relates to age harassment, both against the same respondent. Yet other times the scope creep involves unrelated allegations against a new respondent. When an investigator becomes aware of additional claims, he or she must inform the employer, and allow the employer to decide how to handle it. The employer has options: expand the investigator’s scope; assign to a second investigator; or, handle it in some non-investigative way. Once it is on notice of possible EEO issues or other misconduct, the employer has an interest in responding in a manner that fixes the problem.

Consider the impact of expanding scope. One, it can dramatically increase the budget. Not all employers have the resources to retain an outside investigator into every allegation that arises. Employers have to make informed business decisions in light of financial implications. Two, scope creep can disrupt the organization in that it typically means yet more witness interviews. That affects morale and productivity – individuals cannot perform the regular functions of their jobs while they are being interviewed, or worrying about being interviewed, or talking to their colleagues about being interviewed. Three, scope creep can affect the timing of the investigation. An employee advocate will (and should) challenge whether an investigation was conducted in a “prompt” manner.<sup>13</sup> From a decision-maker’s standpoint, the longer an investigation takes, the longer the employer has to wait to make a business decision on the appropriate action. This can, in many instances, impact the business. Consider, for example, allegations against a C-Suite executive or allegations by a current litigant. Thus, the employer has an interest in finding an optimum balance point between organizational efficiency and adequately responding to complaints. Defense counsel’s advice to the employer must be fully informed, which necessarily requires the investigator and defense counsel discuss the facts in detail during the pendency of the investigation – hence, a strategic discussion.

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<sup>13</sup> Standard practices require an investigation be conducted promptly, thoroughly and impartially. See for e.g., *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html> at V.C.

**The Process For Obtaining Evidence.** Once the scope is set, the investigator should be given discretion to plan the investigation and gather relevant evidence.

Of course, that is not unfettered discretion. It must be within the confines of right-sizing the investigation. An investigator should not interview 35 employees if the allegation is a single ageist joke made in the breakroom heard by one person.

Discretion to plan and gather evidence also must be done with some discussion about internal policies. For example, an investigator should not charge in and ask for a forensic review of the respondent's cell phone if the company does not have policies that allow for this. Nor should an investigator make a wholesale demand for all of the Chief Financial Officer's emails for the last year without conferring with defense counsel about a variety of issues, such as proprietary information.

The investigator's discretion to plan and gather evidence cannot ignore business realities. There may be business-related reasons not to interview a witness. For example, a former employee may have separated her employment with a severance agreement that contains confidentiality and non-disparagement clauses. In the end, if the investigator believes a witness is critical to the outcome, and the employer makes a business decision not to allow it, there is a remedy, as set forth by the AWI Guiding Principles:

If the investigator requests evidence from the employer that the employer declines to produce, the investigator may wish to document this.

**Investigative Updates.** It is not uncommon – particularly in highly sensitive or high-stakes investigations – for outside counsel to request updates from the investigator during the pendency of the investigation. Sometimes this includes granular detail about the facts as they come in. On its face, this can cause an investigator to feel too aligned with the advocate. But handled correctly, this can be a valuable process. Consider the employer's interest in having these discussions. Sometimes the employer is making decisions in real time, long before the conclusion of the investigation. After the complainant's interview, for example, defense counsel may be advising the employer about whether to expand the scope of the investigation, or whether to take interim action against the respondent, or even in some cases, the complainant. Because we know that taking action against the complainant can be presumed to be retaliatory, having all the facts to make that decision is exceedingly important to the decision-makers.

Sometimes the employer is concurrently responding to an EEOC charge, or preparing discovery in litigation, or strategizing settlement discussions – all during the pendency of investigation. Keeping outside counsel up-to-speed allows the employer to be strategic.

**Type Of Investigative Report To Be Produced.** The employer decides the type of investigative report it would like to be produced upon conclusion of the investigation. What are the types of investigative reports? Without limiting the types or attempting to define them in one way, here is one way to delineate the types of reports.

- **Oral Report.** This is just as the name implies, an oral report presented to defense counsel and the employer's decision-maker.

- Notification of Findings. This may be in the form of a report or letter, generally prepared to give to the complainant and the respondent. The complainant and the respondent are entitled to two things: (1) notification that the investigation has been concluded; and (2) a summary of the findings. The Notification of Findings can stop there, or in some cases, decision-makers request that the parties are given the investigator's analysis. This can be a helpful tool to show the parties that their positions were taken seriously, and to show why the investigator reached the conclusions he or she did.
- Executive Summary. This type of report is something shy of the Investigative Report, yet something more than the Notification of Findings. What it contains depends on the type of audience. (See discussion below under Section IV.)
- Investigative Report. This is the most common type of report. It is usually a comprehensive document. The Investigative Report typically is given only to outside counsel and the decision-maker. Unless compelled by law (for example, a subpoena or public records act request) or otherwise strategically determined otherwise by defense counsel, the complainant and the respondent receive only an Executive Summary. This is because the Investigative Report usually contains a summary of witness statements, and other information that is useful to the decision-maker, but goes beyond what the parties need to know, and also puts the parties at risk for later claims of retaliation.
- Operational Report. This type of report advises the decision-maker about information that was uncovered during the investigation, but that is unrelated to the scope of the investigation. The operational report can cover any number of matters. It may be related to other complaints that were raised; to concerns raised about poor performance or a bullying manager; or, to operational issues.

Of course, there are other ways to present information to defense counsel. Consider for example, outlining all the factors that weigh for or against a claim, without reaching a conclusion. Defense counsel can then do the analysis and strategically plan how to resolve the internal issue and defend the claims in possible litigation.

In the end, the employer decides the type of report it would like produced. This decision sometimes does not occur until the employer knows how the facts shake out, through regular updates and perhaps an oral report on the findings.<sup>14</sup> At first blush, this may seem suspect. If the employer does not like the facts and the anticipated findings – it gets to hide it by saying, “No report, please?” But if the employer does like the facts and anticipated findings, it gets to showcase it by saying, “Report, please?”

We look at it with a less suspect lens for a couple of reasons. Even in the absence of a written investigative report, the evidence still exists. The investigator's conclusions still exist. The witness notes that were memorialized still exist. Presumably, this same evidence will come out during discovery and trial. There is thus little chance to hide anything. (We also note there is some risk for the employer here. Without a report, the employer is relying on the fact that the

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<sup>14</sup> The reality of an “oral report” is that the investigator typically has to write *something*. In most cases it is difficult to really grasp the full analysis without, at a minimum, outlining the facts for and against the allegations, or creating a chart or timeline that can help organize what is typically a great deal of evidence.

investigator is a good witness when called to present the findings a year later without the benefit of a written analysis.)

Furthermore, bearing in mind the ultimate goal – to create a safe working environment – sometimes the money spent on an investigative report is better spent making the complainant whole. Without a doubt, one of the most costly parts of an investigation includes the preparation of an investigative report (sometimes rivaled by the cost of witness interviews, depending on the number). Putting resources towards settlement is arguably to the complainant's benefit (and perhaps the employer's as well).

In deciding the type of report it wants, outside counsel and the employer should also consider the audience and the purpose for which the report is used. Is the report being prepared simply for internal use to allow the decision-makers to take appropriate responsive action? Is the report being distributed to the parties? Is the report likely going to be produced, after a waiver of the attorney-client privilege, related to impending litigation, or an administrative charge or hearing? Is the report likely going to be disseminated publicly, perhaps under a public records act request? The audience and purpose of the report can depend on the level of detail and structure of the report (see Section IV.)

**Kinds of Conclusions.** In addition to determining the form of the report, the employer and its counsel should also decide what conclusions it is seeking from the investigator. Basic options include: Findings of fact only; factual findings and a determination whether any company policies were violated; and, factual findings and a determination whether any laws were violated. The latter is rarely recommended. However, in some cases it may be in the employer's interest to have the investigator determine whether the conduct the investigator finds to have occurred constitutes a violation of company policy. In other cases, this determination is best left for the company. And in very rare cases, an employer may decide to request that the investigator recommend remedial action.

Each of these kinds of investigations requires a very different effort. It is vital to determine at the outset what the employer wants its investigator to do. Defense counsel is typically intimately involved in these decisions, and is usually charged with communicating the company's decision to the investigator.

**Tips For Strategic Discussions.** When considering strategic discussions, investigators and defense counsel need to bear a few things in mind.

First, the entirety of the communications will likely be discoverable if the employer one day waives the privilege to rely on the good faith nature of the investigation. Indeed, if the communications are indeed strategic – and not an effort by defense counsel to influence the findings – both the investigator and defense counsel have little reason to withhold these communications. We say this, of course, knowing that individual plaintiff or defendant advocates understandably look to any evidence to suggest a lack of impartiality, perhaps most notably the number and nature of the communications with defense counsel. Strategic communications between the investigator and defense counsel, then, should be ... strategic. Limit the number, and document the discussion.

Second, there is a fine line between strategy and influence. Having these discussions requires a level of sophistication on both sides, recognizing the potential perils of doing so if both the impartial investigator and the advocate defense counsel do not stay in their respective lanes. As a result, it is incumbent on the investigator and defense counsel to clearly set parameters for interim discussions. Defense counsel should not discuss its own defense or trial strategy, nor otherwise disclose any privileged conversations he or she has with the client. And the investigator should studiously avoid falling into the role of legal advisor during these discussions.

Third, it is our experience that employee advocates are now requesting similar discussions, particularly investigative updates and debriefs of facts as they come in. While this seemingly checks the “fairness” box, the attorney-investigator is typically not in a position to do this. They are retained by and paid for by the employer, usually under an attorney-client privilege. Only the employer can waive that privilege. In the end, however, the investigator should pose this type of inquiry to defense counsel, who can either communicate the response to the employee advocate or advise the investigator on his or her position in this regard.

Next, it is critical that, during the course of these discussions, the investigator feel no pressure or influence to reach a certain finding about any relevant or irrelevant fact. Investigators are keenly aware that defense counsel views facts from the lens of advocacy and minimizing liability. An investigator’s lens, however, is impartiality – giving credence to facts that support both sides. Both parties should maintain their own lenses without collaborating or influencing the other’s lens.

Finally, all strategic discussions should be framed in the context of the common interests of all players – to ensure a work environment free of harassment, discrimination, retaliation and other misconduct. If the aim on both sides is for this goal, the strategic discussions have a noble purpose.

## **II. Trauma-Informed Interviews**

The emergence of trauma-informed interviewing is now impacting workplace investigations. Investigators need to be aware of the impact of psychological or emotional trauma on the witness, and gain knowledge about how to employ trauma-informed interviewing when relevant.

An investigative interview is designed to gather information about particular events. Investigators heavily rely upon testimonial evidence from witnesses. Even though other types of evidence – documentary, physical, demonstrative – are often more reliable, the reality is that most of the evidence gathered comes from witnesses. They tell us what they personally observed, experienced or heard. They tell us their perceptions and opinions. All of this is filtered through the limitations of memory.

Developing effective interviewing skills involves training and practice. Studying the elements of human communication is a great way to work on these skills. Some of the most important concepts in investigation interviews include building rapport; employing the funnel method (starting with broad open-ended questions, narrowing to more specific questions); and detecting deceptive indicators. The latter can include, for example, a non-specific denial, reluctance or

refusal to answer, qualifier words, repeating the question, attacking the investigator, providing an overly specific answer, invoking religion, or using convincing statements. (See Appendix for a full list of deceptive indicators and corresponding examples).

In the face of all this, investigators must be aware of the science behind the impact of trauma on memory. What was previously considered a deceptive indicator – such as inconsistent statements – may not be a reliable indicator of deception. This has resulted in a body of work called trauma-informed forensic interviewing.

While traditionally employed in the area of law enforcement investigations into a victim's claim of sexual assault, this body of work may also impact the workplace investigator. How? Trauma can come into play for the workplace investigator in one of two ways – either the witness has suffered from a traumatic event independent of the reason for the investigation (such as a car accident); or the witness has suffered from a traumatic event that is the subject of the investigation (for example, sexual assault in the workplace). A trauma-informed approach helps eliminate preconceptions or misconceptions about how a witness “should” behave.

Here, we define broadly what trauma is, its impact on the witness, and techniques for employing trauma-informed interviewing skills.

**What is Trauma?** As a starting point, experts say that understanding trauma is a paradigm shift. According to Dr. Brenda Ingram,<sup>15</sup> Director of Clinical Services for Peace Over Violence:

Understanding trauma is not just about acquiring knowledge - it's about changing the way you view the world. It's about changing the helping paradigm from “What is wrong with you?” to “What happened to you?”<sup>16</sup>

According to Esther Giller, President and Director of the Sidran Institute,<sup>17</sup> “trauma” is defined by different experts in different ways. Broadly, Ms. Giller summarizes “psychological trauma” as the unique individual experience of an event or enduring conditions, in which:

- The individual's ability to integrate his/her emotional experience is overwhelmed, or
- The individual experiences (subjectively) a threat to life, bodily integrity, or sanity.<sup>18</sup>

Trauma can be induced by any of several events, such as sexual abuse and assault, car accidents, surgery, violence, diagnosis of a terminal illness, suicide or murder of a loved one, or natural

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<sup>15</sup> Brenda Ingram is a licensed clinical social worker who has over 25 years of working in the mental health and education fields specializing in trauma and cultural competence. She is the Director of Clinical Services for Peace Over Violence, a non-profit that provides prevention and intervention for survivors of interpersonal violence, and the Clinical Consultant/Coordinator for the YWCA Sexual Assault Crisis Services Program.

<sup>16</sup> See also, Sandra L. Bloom, *Trauma-Informed Systems Transformation: Recovery as a Public Health Concern*, THE SANCTUARY MODEL (2007), <http://sanctuaryweb.com/Portals/0/Bloom%20Pubs/2007%20Bloom%20Trauma-Informed%20Systems%20Transformation%20in%20Philadelphia.pdf>.

<sup>17</sup> Esther Giller, *What is Psychological Trauma?*, SIDRAN INSTITUTE (1999), <https://www.sidran.org/resources/for-survivors-and-loved-ones/what-is-psychological-trauma/>.

<sup>18</sup> LAURIE ANNE PEARLMAN & Karen W. SAAKVITNE, *TRAUMA AND THE THERAPIST: COUNTERTRANSFERENCE AND VICARIOUS TRAUMATIZATION IN PSYCHOTHERAPY WITH INCEST SURVIVORS* (1995).



disasters. It is estimated that at least half of all adults in the United States have experienced one incident that was caused by a major traumatizing event.<sup>19</sup>

**Impact of Trauma.** Experts say the effects of trauma have a direct impact on memory.<sup>20</sup> As set forth by the Leadership Council on Child Abuse & Interpersonal Violence, individuals who suffer trauma “push the pain away.”

Research has shown that traumatized individuals respond by using a variety of psychological mechanisms. One of the most common means of dealing with the pain is to try and push it out of awareness. Some label the phenomenon of the process whereby the mind avoids conscious acknowledgment of traumatic experiences as *dissociative amnesia*. Others use terms such as *repression*, *dissociative state*, *traumatic amnesia*, *psychogenic shock*, or *motivated forgetting*. Semantics aside, there is near-universal scientific acceptance of the fact that the mind is capable of avoiding conscious recall of traumatic experiences.<sup>21</sup>

According to Dr. Ingram, this requires a shift in our approach to interviewing witnesses:

Trauma shapes memory due to the abundance of stress hormones that inhibits recollection of highly stressful events including the accuracy of details. The body and brain react to and record trauma in a different way than we have traditionally been led to believe.

When trauma occurs, the cognitive (prefrontal cortex) brain will frequently shut down leaving the more primitive portions of the brain to experience and record the event. The more primitive areas of the brain do a great job recording experiential and sensory information but don't do very well recording the information many professionals have been trained to obtain.

Most interview techniques have been developed to interview the more advanced portion of the brain (prefrontal cortex) and obtain specific detail/peripheral information such as the color of shirt, description of the suspect, time frame, and other important information.

Most trauma victims are not able to accurately provide detailed information, but when asked to do so often inadvertently provide inaccurate information and details which frequently causes the fact finder to become suspicious of the information provided.

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<sup>19</sup> JOHN. N. BRIERE & CATHERINE SCOTT, PRINCIPLES OF TRAUMA THERAPY: A GUIDE TO SYMPTOMS, EVALUATION, AND TREATMENT (1st ed. 2006).

<sup>20</sup> J. Douglas Bremner, *The Lasting Effects of Psychological Trauma on Memory and the Hippocampus*, [http://www.newriver.edu/images/stories/library/Stennett\\_Psychology\\_Articles/Lasting%20Effects%20of%20Psychological%20Trauma%20on%20Memory%20the%20Hippocampus.pdf](http://www.newriver.edu/images/stories/library/Stennett_Psychology_Articles/Lasting%20Effects%20of%20Psychological%20Trauma%20on%20Memory%20the%20Hippocampus.pdf).

<sup>21</sup> See *What is the Leadership Council?*, THE LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE, <http://www.leadershipcouncil.org/1/us/about.html>. The Leadership Council is a nonprofit independent scientific organization composed of scientists, clinicians, educators, legal scholars, and public policy analysts.

This leads us to a significant point about how investigators assess credibility. According to Dr. Ingram:

One of the mantras within the criminal justice system is “inconsistent statements equal a lie.”

Nothing could be further from the truth when stress and trauma impact memory, research shows.

In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma.<sup>22</sup>

Research reveals that memories of one who suffered a traumatic event like sexual assault are directly impacted:

[Memories are] less clear and vivid, less visually details, less likely to occur in a meaningful order, less well-remembered, less talked about and less frequently recalled either voluntarily or involuntarily, with less sensory components including sound, smell, touch, and taste; and containing slightly less re-experiencing of the physical sensations, emotions, and thoughts than were present in the original incident.<sup>23</sup>

In light of this science, no longer can investigators assume the witness is evading the truth when they do not recall or do not answer. No longer can we assume that inconsistent recollection of events means deception. Instead the investigator must employ certain interviewing techniques. As stated by the authors of “Incomplete, Inconsistent and Untrue Statements Made by Victims: Understanding the Causes and Overcoming the Challenges.”<sup>24</sup>

All too often, law enforcement professionals and others have been suspicious of sexual assault victims when they provide information that is disorganized or inconsistent – or when they recall additional information days, weeks or even months after the sexual assault. Rather than being a cause for suspicion, however, such behavior should be seen as the natural result of trauma.

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<sup>22</sup> See also Russell W. Strand, *The Forensic Experiential Trauma Interview (FETI)*, MINN. COALITION AGAINST SEXUAL ASSAULT (2013), <http://www.mncasa.org/assets/PDFs/FETI%20-%20Public%20Description.pdf>.

<sup>23</sup> Mary P. Koss, ET AL., *Traumatic Memory Characteristics: A Cross-Validated Mediation Model of Response to Rape Among Employed Women*, 105(3) J. ABNORMAL PSYCHOL. 421 (Aug. 1996); Joanne Archambault and Kimberly Lonsway, *Incomplete, Inconsistent and Untrue Statements Made by Victims: Understanding the Causes and Overcoming the Challenges*, END VIOLENCE AGAINST WOMEN INTERNATIONAL (Revised August 2008), <http://www.evawintl.org/images/uploads/Victim%20Statements%2008-10-12.pdf>.

<sup>24</sup> Joanne Archambault and Kimberly Lonsway, *Incomplete, Inconsistent and Untrue Statements Made by Victims: Understanding the Causes and Overcoming the Challenges*, END VIOLENCE AGAINST WOMEN INTERNATIONAL (Revised August 2008), <http://www.evawintl.org/images/uploads/Victim%20Statements%2008-10-12.pdf>.

**Techniques.** How does a workplace investigator conduct witness interviews in light of trauma-informed neuroscience? Investigators can employ a series of techniques that are considered trauma-informed that involve rapport building, logistics and interviewing.<sup>25</sup>

During the interview, investigators should focus on building rapport with the interviewee to build trust and create a safe and nonjudgmental space. One effective technique is to give the witnesses choices to reestablish their control over situations. According to Dr. Ingram, there are several ways to do this:<sup>26</sup>

- “May I call you by your first name, or do you prefer that I use your last name?”
- “Where would you like to do this interview?”
- “Where would you like to sit?”
- “Would you like to take break now?”
- “Can I get you something to drink, either water or tea?”
- “Would you like to have an advocate or support person present during the interview?”

Employing as many choice questions as possible in the process will help establish a connection with the witness, thereby increasing the likelihood of obtaining more reliable information.

In a trauma-informed interview, the investigator should carefully plan the details surrounding the interview. Consider environmental barriers, such as the layout of the room, the length of the interview, the availability of comforts such as tissue and water, and the privacy and security of the location.

In light of the science surrounding memory, an investigator should consider the manner in which he or she tries to elicit information. As outlined by the experts:<sup>27</sup>

- Follow the funnel method by providing the witness the time and opportunity to tell his or her story once without interruption, recognizing that re-telling it may not be linear. Witnesses who have experienced trauma may need more time to collect their emotions.
- After the witness has been given a chance to tell his or her story in narrative form, ask open-ended follow-up questions, seeking as much detail as possible. In doing so, explain your reasons for asking the questions.
- Allow the witness to tell the event over time rather than in a single interview. Although this has to be balanced with conducting a prompt investigation, the witness may need more than one interview.

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<sup>25</sup> *Id.*

<sup>26</sup> See also *Trauma-Informed Victim Interviewing*, OFFICE FOR VICTIMS OF CRIME TRAINING AND TECHNICAL ASSISTANCE CENTER, <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/53-victim-interview-preparation/trauma-informed-victim-interviewing/>.

<sup>27</sup> Heather Salko, *Trauma-Informed Investigations*, EDURISK (March 2016), <https://www.edurisksolutions.org/blogs/?Id=2772>.

Finally, the investigator needs to be mindful of trauma-informed questions during the interview. Here are some approaches to modifying what might be considered acceptable investigation questions to a trauma-informed approach:

Question	Trauma-Informed Approach
“Tell me everything you remember about the event from the beginning to the end, with as much detail as possible.”	“What are you able to tell me about your experience?” “Tell me more about that.”
“What happened next?”	“What else happened?” “What is something you cannot forget about your experience?”
Consider asking sensory questions that may help a recall of memories.	“What smells do you remember?” “Do you remember any specific sounds?”
“Why didn’t you report it?”	“What was your thought process about who to tell?”
“Are you telling the truth?”	“When I interview respondent, do you think s/he will agree with you on how this occurred?” “What do you think respondent will say when I interview him/her about this?” “Is there anything you would like to add or change about what you have told me today?”
Closing questions	“Is there anything else I should know?” “Is there anything else that would be helpful for me to know about your experience?” “Is there any other question I should have asked you but did not?”

Of course, most investigations will not require attention to trauma-informed interviewing. However, in those cases where trauma may be a factor, it is critical to employ these techniques. Doing so will demonstrate a commitment to reaching a reasoned conclusion. It is equally important when delivering the results of an investigation to include an analysis of these issues, so the reader is aware of the investigator’s approach and sensitivity to them.

### III. Credibility Analysis

In most investigations, there will be conflicting versions of material facts. It is a rare case where we have the proverbial “slam dunk” investigation. This might be an investigation where there is

video evidence, email evidence, or the facts are undisputed. For that reason, party and witness credibility will generally be at issue to some extent.

According to EEOC Guidelines,<sup>28</sup> it is permissible for the investigator to assess the credibility of parties and witnesses in determining whether the alleged conduct occurred. In many cases, a thoughtful credibility analysis is essential to a defensible investigation outcome.

What exactly is a “credibility analysis” in the context of a workplace investigation? Let’s start with what it is not. It is not reading microexpressions, or facial expressions of emotions that show up for less than a second on a person’s face. Detecting truth or deception is not assessing whether the witness is lying simply because he or she is engaging in stereotypical “lying” behavior, such as shifting in a chair, refusing to look the investigator in the eye, or nervously popping knuckles. Investigators must be cautious in using the witness’ attitude and demeanor as a factor in assessing credibility. These factors require training and expertise in psychology or behavioral assessment. Without that training, we cannot credibly rely on our own impressions of how a particular witness responded to the situation or questions. In fact, the EEOC cautions against relying upon these behaviors:

The investigator should be wary, however, of relying on physical cues to determine credibility. While cues like sweating, stammering, fidgeting, and looking up to the right could be interpreted as signs of dishonesty, the opposite may be true. Witnesses might simply be nervous about being questioned by an attorney, or they could have a medical condition of which the investigator is unaware. Further, the majority of investigators are not experts in behavioral analysis and would have difficulty supporting these assessments when testifying to support their findings.<sup>29</sup>

Instead, a credibility analysis is an assessment of a myriad of credibility factors. Investigators can find these factors by looking to the Equal Employment Opportunity Commission, state and federal jury instructions and the Evidence Code. Here is an overview of those factors, and what they mean. (See Appendix for a full list of credibility factors and corresponding examples.<sup>30</sup>)

- **Inherent Plausibility.** Is the testimony believable on its face? Does it make sense? What is the extent of the witness’ opportunity to perceive any matter about which he or she testifies? What is the extent of the witness’ capacity to perceive, to recollect, or to communicate?
- **Motive to Falsify.** Did the person have a reason to lie? Does the person have a bias, interest, or other motive? In assessing this factor, examine relationships, explore potential biases, consider reasons for self-protection, consider carelessness of expression versus intentional lying, and evaluate mistaken belief vs. untruthfulness.

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<sup>28</sup> *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html>.

<sup>29</sup> *Id.*

<sup>30</sup> In an effort to provide a stand-alone document, the Appendix contains much of the same information written here. However, it also includes examples of how to use these factors.

- **Direct Corroboration/Lack of Corroboration.** Are there witness statements that directly corroborate the party's statements? Is there physical evidence that corroborates the party's statement? Does the party have actual knowledge? What is the extent of interviewee's opportunity to perceive matters about which he or she testified?
- **Circumstantial Corroboration/Lack of Circumstantial Corroboration.** Is there witness testimony that indirectly corroborates the party's testimony? Is there physical evidence that indirectly corroborates the party's testimony? Is there documentary evidence that demonstrates contemporaneous reporting of events? Is there a lack of circumstantial corroboration when one party expected there to be some?
- **Consistency/Lack of Consistency.** Is there witness testimony or physical evidence that is consistent, or inconsistent with the party's testimony? Did the witness tell the same version of events to others, or in writing, in all material respects? (Although be aware of trauma-informed forensic interviewing, discussed above.)
- **Material Omission.** Did a party omit a material piece of evidence, despite having a reasonable opportunity to provide it, either in a narrative or response to a particular inquiry?
- **Past Record.** Does the Respondent have a history of similar behavior in the past? Does the Complainant have a relevant history? What weight do we give this in the present matter?
- **Reputation.** Does the interviewee have a reputation for honesty or veracity or their opposites? What is the person's reputation? Caution: what weight do we give character evidence? What motives do character witnesses have for their testimonies?
- **Attitude.** Did the person cooperate when participating in the interview and/or providing information?

Many workplace investigations will be determined by the credibility of one or more witnesses. Recall the *Cotran* rule – the findings need not be “right” as long as they are reached in good faith as the result of a legitimate process. If the findings are based on the investigator's conclusion about witness credibility, *Cotran* requires that the investigator apply a reasoned analysis of credibility. Diligently assessing the factors above will support investigative findings based on credibility.

#### IV. The Investigative Report

After the witnesses have been interviewed and the documents collected, the investigator turns to the final phase of the investigation: preparing the investigative report. This section reiterates (from Section II, above) the types of investigative reports; reviews the elements of a “typical” investigative report; and, identifies the necessary elements of a report.

**Types of Reports.** As a reminder, there are a series of ways in which the investigator can present his or her “report.” Reports often are defined as an “Oral Report,” “Notification of Findings,” “Executive Summary” or “Investigative Report.” Each contains a different amount of information. Often investigators have their own practices and approaches to the way in which a

report is structured and evidence is presented. As discussed above in Section II, there are strategic reasons for the type of report an employer chooses.

**Elements Of An Investigative Report.** Given the variety of allegations brought by complainants, each report is necessarily unique in both structure and content. Even then, however, there are typical elements of an Investigative Report.

- **Introduction.** The Introduction is typically brief, and provides general background information. For example, it might include the date of the complaint, the date of retention, a sentence summarizing the allegations, the names of the parties, and the scope of the investigation.
- **Summary of the Findings.** The Summary of Findings outlines both the allegations and the findings with some degree of specificity. It is a valuable tool for the employer because it distills the ultimate findings in what could be 100 pages of dense information down to one or two pages.
- **Investigative Background.** The Investigative Background summarizes the procedural aspects of the investigation. It typically includes a list of witnesses, a list of attachments, the policies considered, the evidentiary standard, information about representation, an explanation of any delays in the investigative process, and any other irregularity or unique aspect of methodology. For example, an investigator may explain the rationale for not interviewing certain witnesses, or not reviewing certain documents. It is helpful to include a statement establishing that the investigator was provided access to witnesses and documents requested, or if not, what limitations were placed on the investigation.
- **Factual Background.** The Factual Background, while not essential, is helpful to provide relevant context to the allegations. This could include employment histories, the complaint history, prior investigations, or a timeline of relevant events.
- **Allegations.** The allegations will be obtained from the written complaint and/or the complainant's interview. When drafting this section, it is important to include as much information as possible, including dates, witnesses, and relevant details. How the allegations are organized sets the structure for the remainder of the report. There are multiple ways to organize the allegations, which range from chronologically, by party, by incident (i.e. inappropriate touching, termination), or by type of allegation (i.e. retaliation, discrimination, harassment).
- **Responses.** It is critical to provide the respondent with the opportunity to respond to each of the allegations made by the complainant(s). This should be clear from the investigative report. A well-organized report will identify any gaps in responses.
- **Additional Evidence.** In almost every investigation, there is some evidence aside from the allegations and the responses that can be useful in determining whether the allegations have merit. For allegations of harassment or discrimination, it may be helpful to speak with similarly situated employees to determine whether the respondent may have subjected them to similar treatment. For allegations of financial fraud, it may be relevant to review financial records and email communications to determine whether the evidence is consistent with a finding of fraud.

- **Analysis and Findings.** This is the part of the report where the investigator has the opportunity to “show their work,” so to speak. A well-reasoned and thoughtful analysis is the hallmark of a thorough investigation. The investigator’s findings should be fully explained and supported by the evidence and credibility assessments.<sup>31</sup>

Unlike a typical legal brief, an investigative report should not be an advocacy piece. The report should objectively set forth the facts, and then analyze the evidence not in the manner most favorable to the company or one party or the other, but in the manner that respects and addresses the competing evidence. It should address, on the one hand, all the factors that might support substantiating a claim against the respondent. It should address, on the other hand, all the factors that do not support substantiating a claim against the respondent. The report is, simply put, one of the best ways to demonstrate neutrality in the manner in which the evidence is presented and analyzed. The report speaks far louder than any spoken assurances of neutrality by the investigator.

An analysis of these factors, coupled with a credibility analysis, should lead the investigator to a finding based upon the preponderance of the evidence. In short, the investigative report is what the company will rely upon to demonstrate its good faith actions in responding to the claim – whether it leads to a termination or an exoneration of the respondent. A well-reasoned and thoughtful analysis is the hallmark of a thorough investigation. While not every reader may agree with the findings, they should agree that the investigator was fair, impartial, and considered each perspective.

**Necessary Elements.** If forced to choose the most important components of an Investigative Report, we choose Methodology and the Analysis and Findings. Although there is latitude in how these are presented and in what detail, they represent the most critical aspects of the Report. Why? As for the Methodology, we know from the California Supreme Court in *Cotran* (explored above), that the investigator can get the findings wrong, as long as he or she followed a good faith process to reach a reasoned conclusion. It stands to reason, then, that the Report should detail the good faith process, and the investigator’s reasoning behind certain decisions if not apparent on their face (for example, the rationale for interviewing a relevant witness). As for the Analysis and Findings section, this demonstrates a “reasoned conclusion.” Analyzing facts both for and against the finding demonstrates impartiality.

## V. Conclusion

It is commonplace in litigation in which an investigation is important for both sides to retain expert witnesses to opine about the quality of the investigation. A shrewd expert can always find ways to criticize an investigation and report. However, staying on the right side of the advocacy/impartiality line, making sure all the evidence is gathered and considered, being mindful of trauma-informed interviewing issues, performing a thoughtful credibility assessment, and creating a thorough, well-reasoned report will put the investigator – and the employer – in the best possible position to defend the report, and therefore, the employer’s action taken based on the report.

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<sup>31</sup> As noted above, the investigator should understand what types of findings the employer is expecting – just the facts or facts plus policy violations and/or legal violations.



# **Appendix**

*to*

## **Four (Foot)Steps to Investigative Fortune: Lessons Learned From an Investigator and a Litigator**

*prepared by*

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*for the*



American Employment Law Council  
2017 Conference

October 20, 2017, Session Two  
Advanced Master Class on Effective Investigations  
2:00 p.m. – 3:15 p.m.

October 18-21, 2017

Monarch Beach Resort  
Dana Point, California

## CREDIBILITY ANALYSIS

In many workplace investigations, a credibility analysis can determine the outcome. This is particularly the case if there are conflicting versions of relevant events, such as the classic “he said, she said” situation. See for e.g., *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*.<sup>32</sup>

So what is a credibility analysis? Let’s start with what it is not. It is not reading microexpressions, or facial expressions of emotions that show up for less than a second on a person’s face. Detecting truth or deception is not assessing whether a witness is lying simply because he or she is engaging in stereotypical “lying” behavior, such as shifting in a chair, refusing to look the investigator in the eye or nervously popping knuckles. Investigators must be cautious in using the witness’ attitude and demeanor to determine credibility. These factors require training and expertise in psychology or behavioral assessment. Without that training, we cannot credibly rely on our own impressions of how a particular witness responded to the situation or questions.

### *Credibility Factors*

*Inherent Plausibility*  
*Motive to Falsify*  
*Direct Corroboration/Lack of*  
*Circumstantial Corroboration/Lack of*  
*Consistency/Lack of*  
*Material Omission*  
*Past Record*  
*Reputation*  
*Attitude*

Instead, a credibility analysis is an assessment of a myriad of credibility factors. Investigators can find these factors by looking to the Equal Employment Opportunity Commission, state and federal jury instructions and the Evidence Code. And, when credibility is important, it is critical for the investigator to base the credibility assessment on an analysis of these factors. Here is an overview:

- **Inherent Plausibility.** Is the testimony believable on its face? Does it make sense? What is the extent of the witness’ opportunity to perceive any matter about which he or she testifies? What is the extent of the witness’ capacity to perceive, to recollect, or to communicate?
- **Motive to Falsify.** Does the person have a reason to lie? Does the person have a bias, interest, or other motive? In assessing this factor, examine relationships, explore potential biases, consider reasons for self-protection, consider carelessness of expression versus intentional lying, and evaluate mistaken belief versus untruthfulness.
- **Direct Corroboration/Lack of Direct Corroboration.** Are there witness statements that directly corroborate the party’s statements? Is there physical evidence that corroborates the party’s testimony? Does the party have actual knowledge? What is the extent of the interviewee’s opportunity to perceive matters about which he or she testified?
- **Circumstantial Corroboration/Lack of Circumstantial Corroboration.** Is there witness testimony that indirectly corroborates the party’s testimony? Is there physical evidence that indirectly corroborates the party’s testimony? Is there documentary evidence that

<sup>32</sup> See *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html>.

demonstrates contemporaneous reporting of events? Is there a lack of circumstantial corroboration when one party expected there to be some?

- Consistency/Lack of Consistency. Is there witness testimony or physical evidence that is consistent, or inconsistent with the party's testimony? Did the witness tell the same version of events to others, or in writing, in all material respects? (Be aware of trauma-informed forensic interviewing).
- Material Omission. Did a party omit a material piece of evidence, despite having a reasonable opportunity to provide it, either in a narrative or response to a particular inquiry?
- Past Record. Does the Respondent have a history of similar behavior in the past? Does the Complainant have a relevant history? What weight do we give this in the present matter?
- Reputation. Does the interviewee have a reputation for honesty or veracity or their opposites? What is the person's reputation? Caution: what weight do we give character evidence? What motives do character witnesses have for their testimonies?
- Attitude. Did the person cooperate when participating in the interview and/or providing information?

Using these factors, an investigator can strengthen the analysis to determine whether conduct occurred. What follows is sample language using these factors.

### **Inherent Plausibility**

- "While difficult, it is plausible the conduct could have occurred as described. The floor area measured 5 feet 11 inches at the point nearest the desk, allowing for her 5 feet 6 inch frame to lie down fully extended as alleged."
- "Two witnesses described behavior directed at them that was similar in nature."
- "It is implausible that the witnesses could have overhead any noise, given the loud music."

### **Motive to Falsify**

- "The respondent was unable to explain why the complainant would fabricate charges against her..."
- "Every witness believed respondent to be credible, but raised significant concerns about the complainant's motives."
- "This witness may be motivated to share facts more favorable to the complainant, who is by her own admission, her best friend."

### **Direct Corroboration**

- "Two witnesses observed her remove the cash from the safe."
- "There is no direct evidence to corroborate her version of events."

- “The respondent admitted that he used profanity and kicked the door when he left the meeting.”

### **Circumstantial Corroboration**

- “The incident is indirectly corroborated by complainant’s contemporaneous documentation of the event.”
- “The incident is indirectly corroborated by complainant’s report of the incident to HR and her two closest friends within two hours of the event.”
- “The email exchanges between the two of them suggest that the two have a closer relationship than respondent would admit.”
- “One witness reported hearing a scream in a location near the vicinity at the time of the event.”
- “No other witness, including the females interviewed, attributed any sort of gender bias to him. To the contrary, they believed he treated them fairly.” (For disputed motive)
- “The timing suggests a connection between the complaint and the disciplinary action. Supervisor issued it within one calendar week of his complaint to Human Resources.” (For retaliatory nexus)

### **Inconsistencies**

- “The two witnesses at the meeting reported observing the conduct in a materially different way than the complainant.”
- “The witness reported the same event in three ways materially inconsistent with one another.”<sup>33</sup>

### **Material Omission**

- “In providing 30 pages of text messages, the complainant failed to provide the investigator with several text messages that put her in an unfavorable light. In particular, the omitted text messages demonstrate she initiated and participated in the sexual discussions on multiple occasions.”
- Despite given several opportunities to share critical information, complainant omitted and did not disclose a critical fact – that she videotaped the interaction.”

### **Past Record**

- “The respondent had three prior complaints against him with similar allegations that he used racial slurs.”
- “The evidence demonstrates this is the first complaint of this nature that Human Resources has received against the respondent in his 21-year career.”
- “The record demonstrates that the complainant has received negative performance evaluations even before her complaint to Human Resources.”
- “The witness may be motivated to share facts more favorable to the complainant, who has been by her own admission, her best friends for the past 10 years.”

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<sup>33</sup> The investigator should be aware of trauma informed interviewing, which may affect the weight given to inconsistent statements from a witness suffering from trauma.

### **Reputation**

- “All 17 of the respondent’s direct reports – all of whom have worked with him for the past 12 years on a regular basis – stated it would be out of character for him to refer to females using a derogatory slur.”
- “By all accounts, including that of his best friend, respondent does not respect women, evidenced by...”

### **Attitude**

- “Instead of directly responding to the questions, respondent challenged the investigative process, refused to answer certain questions, called multiple witnesses “liars” but acknowledged he had no objective reason to do so, and otherwise obstructed the process by leaving the interview before its conclusion.”

Although not outlined directly by the EEOC, we also recognize there may be other factors, such as:

### **Legitimate Business Reasons**

- “Respondents articulated legitimate business reasons for the decision to terminate the complainant. Specifically...”

### **Comparator Information**

- “Similarly-situated witnesses likewise believed they were treated unfairly based upon their age.”

### **Statistics**

- “As a whole, the employer employs a proportionate number of individuals who are over the protected age of 40. As a department, the employer likewise ...
- “Of the last five employees terminated in the department, four were under the age of 40, and one was over the age of 40.”

## DECEPTIVE INDICATORS

As outlined by the authors in *Spy the Lie*,<sup>34</sup> individuals who lie tend to demonstrate a cluster of deceptive behaviors. While investigators cannot – without relevant training – rely upon certain behavioral factors to determine credibility, these deceptive indicators may be helpful to consider. If a workplace investigator does observe a witness demonstrate any of these deceptive indicators, it tells the investigator only one thing – *ask more questions*. Here is a summary of some deceptive indicators, as excerpted from *Spy the Lie* by Philip Houston, Michael Floyd and Susan Carnicero.

Indicator	Example
Absence of specific denial – non-specific denial or isolated delivery of denial by burying it in long answer	“I would never do something like that” “I didn’t do anything” “That’s not the kind of language I use” “Why would I do that?” (versus: “I did not do it.”)
Reluctance or refusal to answer	“I’m not sure I’m the right person to ask that” “Gee, I’m not sure I can answer that”
Qualifiers/Exclusion qualifier – person wants to withhold certain information but without disclosing all of it	“Basically” “Fundamentally” “For the most part” “Probably” “Most often” “Frankly” “To be perfectly honest” “Candidly”
Repeating question – person repeats question as a means of buying time to formulate response	“Did I give her my password, you ask?”
Non-answer statements – responds with a statement that does not answer question but buys time	“That’s a very good question” “I’m glad you asked that” “I knew you were going to ask me that”
Attack mode – person attacks questioner as means of compelling questioner to back off line of questioning	“How long have you been doing this job?” “Do you know anything about this organization?” “What kind of a question is that?” “Why are you wasting your time?” “Why don’t you trust me?”
Inappropriate question – person responds with a question that does not directly relate to question being asked	Q: “Is there any reason we would find your fingerprints on the missing laptop?” A: “How much did it cost?”

<sup>34</sup> PHILIP HOUSTON, MICHAEL FLOYD & SUSAN CARNICERO, *SPY THE LIE: FORMER CIA OFFICERS TEACH YOU HOW TO DETECT DECEPTION* (2013).

Indicator	Example
Inappropriate level of politeness – interjects overly polite or unexpectedly kind comment directed at questioner	“Sir” or “ma’am” “That’s a great tie, by the way”
Overly specific answer – response is too narrow and technical at one extreme, or too detailed at the other	Q: “Tabloids say you had a 12-year affair.” A: “That allegation is false” [It was an 11-year affair]
Process or procedural complaints – when person takes issue with the proceedings	“How long is this going to take?” “Why are you asking me?”
Referral statements – person refers to a prior statement or message, using repetition as an advantage so questioner more open to possibility	“As I told the last guy” “As I said...” “As we explained in our report...” “I refer you to my earlier statement”
Failure to understand a simple question - effort to get you to change the question or shrink the scope of the question	“It depends on what the meaning of the word ‘is’ is.”
Invoking religion – person makes a reference to religion as a means of dressing up a lie	“I swear on a stack of Bibles, I wouldn’t do anything like that” “As God is my witness...” “I swear to God”
Selective memory – psychological alibi, difficult to break	“I don’t remember”
Convincing statements – lies of influence -tend to be reasonable -tend to be true (“I love you, why would I do that”) -incorporate emotion -consistent with investigator bias (loving moms don’t kill kids)	“I would never do that. That is perverted and I am not perverted” “That would be dishonest and I’m not that kind of person” “I have a good reputation” “You think I would jeopardize my job by doing that?” “Why would I risk my pension just to do that?” “No one would ever question my honesty” “I can’t believe you would think I would do that” “Why don’t you trust me?” “It’s not in my nature to do something like that” “My word is my bond” “I always try to do the right thing” “I have worked here for over 20 years” “I love you. I would never do anything to hurt you”
Demeanor – involuntary reactions	Throat clearing Large swallow Disconnect between verbal and non-verbal (“No” while turning head side to side)

## QUESTION TYPES AND TOOLS

The quality of a witness' answers depends on the quality of the question. An investigator must thoughtfully plan and prepare lines of questioning long before he or she ever enters the interview room. Here are some question types to consider when framing the investigative questions, followed by some question tools to assist the investigator in handling certain witness scenarios.

Question Types	
Evaluation	<ul style="list-style-type: none"> <li>• “Why do you say that?”</li> <li>• “How do you know that to be true?”</li> <li>• “On what do you base that information?”</li> </ul>
Clarification	<ul style="list-style-type: none"> <li>• “To which Sam are you referring?”</li> <li>• “Tell me again what time you left the bar.”</li> <li>• “Is it possible you were there longer?”</li> </ul>
Exploration	<ul style="list-style-type: none"> <li>• “I need to understand your position. Tell me what happened.”</li> <li>• “What else?”</li> <li>• “Tell me more.”</li> <li>• “Help me understand.”</li> <li>• “I don’t understand.”</li> <li>• “What haven’t I asked you that you think I should know about that might be a concern?”</li> <li>• “Is there anything else I should know?”</li> </ul>
Bait questions	<p>Establishes a hypothetical situation to trigger a “mind virus.” (Caution: Do not misrepresent facts to garner an admission)</p> <ul style="list-style-type: none"> <li>• “If we reviewed your email, would we find ...”</li> <li>• “Is there any reason that...” questions. E.g., “Is there any reason that your coworkers will say they saw you do x?”</li> <li>• “If we were to ask you coworkers, is there any reason they would say they saw you sitting at her computer that day?”</li> </ul>
Presumptive questions	<ul style="list-style-type: none"> <li>• Presumes that something is understood to be the case.</li> <li>• “What computers have you logged on to besides your own?”</li> </ul>
Open-ended	<p>Provides basis for discussion or explores issue.</p> <ul style="list-style-type: none"> <li>• “Tell me what you did yesterday, with detail, from the minute you arrived until you left that day.”</li> <li>• “Tell me about the concerns that led you to file your complaint.”</li> </ul>
Closed-ended	<p>Probes specific case facts.</p> <ul style="list-style-type: none"> <li>• “Did you log on to her computer yesterday?”</li> </ul>
Opinion	<p>Helps determine how a person feels about a particular issue.</p> <ul style="list-style-type: none"> <li>• “What do you think about the company’s new internal controls on computers?”</li> <li>• “How would you characterize your working relationship with your supervisor?”</li> <li>• “How would you describe her leadership style?”</li> </ul>



Question Types	
Negative	Question type to AVOID: <ul style="list-style-type: none"> <li>• “You don’t know her password do you?”</li> </ul>
Compound	Question type to AVOID – contains more than one question, with likelihood one of your questions will remain unanswered. <ul style="list-style-type: none"> <li>• “What time did you arrive, and how long were you there?”</li> </ul>
Vague	Question type to AVOID or use purposefully – allows excessive latitude in answer. <ul style="list-style-type: none"> <li>• “Can you give me some of your thoughts on what is going on?”</li> </ul>

Question Tools	
Solicit input on motive	Use when there is contradictory evidence. <ul style="list-style-type: none"> <li>• “Do you have any reason to think that anyone would make up lies about you (who and why?)”</li> <li>• “Can you think of why one of your co-workers would tell me that [outline contrary statements]?”</li> <li>• “Can you think of anything you might have said that could have been misconstrued or misunderstood by the complainant as a sexual remark?”</li> </ul>
Enumerate	Use to ensure you have thoroughly reviewed all information. <ul style="list-style-type: none"> <li>• “You have told me about four comments [list], three text messages [list] and two times that you claim she inappropriately touched you [list]. Did she do anything else that you found to be inappropriate?”</li> </ul>
Establish time	Use to pin down dates and times. <ul style="list-style-type: none"> <li>• “Do you recall whether it occurred closer in time to your date of hire or date of termination?”</li> <li>• “Can you recall if it was [near a holiday; when the weather was warm; near a point in time relevant to the claim].”</li> <li>• “Was it closer to the time you arrived at work, or lunchtime?”</li> </ul>
Memory recall	When a witness states, “I cannot recall.” <ul style="list-style-type: none"> <li>• “When you say you cannot recall, does that mean it may have occurred and you just do not remember, or does that mean it absolutely did not occur?”</li> <li>• “Can you say to a certainty that did not occur, or is it possible?”</li> </ul>
Answering questions	When a witness asks you a question, answer with a question. <ul style="list-style-type: none"> <li>• Witness: “Don’t you think that is inappropriate?”</li> <li>• Investigator: “I’d like to hear your view. Do you think it was inappropriate?”</li> </ul>
Reluctant Witness	<ul style="list-style-type: none"> <li>• “I see that you are very quiet. What are you thinking/experiencing?”</li> </ul>
Mistrustful Witness	<ul style="list-style-type: none"> <li>• “Help me understand what I did to lead you to believe that.”</li> </ul>
Angry Witness	<ul style="list-style-type: none"> <li>• “How do you feel you have lost control?”</li> </ul>

Question Tools	
The Agree-With-Me-Witness	<ul style="list-style-type: none"> <li>• “I know you are telling me your perception.”</li> </ul>
The Crier	<p>Do not offer comfort; do not agree.</p> <ul style="list-style-type: none"> <li>• [Maybe] “I can see that you are upset. Tell me about that.”</li> </ul>
The Will-I-Be-Fired Question	<ul style="list-style-type: none"> <li>• “Yes that is a possibility, although I am not involved in the decision-making.” (Unless you are.)</li> </ul>
To Determine Resolution	<ul style="list-style-type: none"> <li>• “If you could have this come out the way you would like in a perfect world, what would that be?”</li> <li>• “What do you think should happen to someone who engages in that type of conduct?”</li> </ul>
To Determine Integration	<ul style="list-style-type: none"> <li>• “What possibilities do you see about successfully working with this person?”</li> </ul>
To Reestablish Credibility	<ul style="list-style-type: none"> <li>• “I’m feeling like I have not been good at interacting with you. Can we start again?”</li> </ul>
To Probe Their Understanding	<ul style="list-style-type: none"> <li>• “If you were to look at this through X’s eyes, how do you think they might view this/describe this occurrence?”</li> </ul>
The Wrap Up Questions	<ul style="list-style-type: none"> <li>• “Do you have any other information that would be helpful for me?”</li> <li>• “Is there anything else you think I should know?”</li> <li>• “Is there anything else I should have asked you?”</li> </ul>
To Complainants and Respondents	<ul style="list-style-type: none"> <li>• “How would you like to see this resolved?”</li> <li>• “Are there any witnesses that you believe are important for me to interview (who and why)?”</li> <li>• “Do you have any documents you believe are relevant to support what you have shared with me (what and when can you get them to me)?”</li> </ul>
Introductory Question	<p>Most typically used for respondents.</p> <ul style="list-style-type: none"> <li>• “What is your understanding of why you are here today?”</li> </ul>

## INTERIM ACTION CHECKLIST

In every investigation, either the investigator or the decision-maker should consider whether interim action is appropriate. This critical decision should be part of the investigator's checklist.

Interim action may be necessary to protect the health and safety of employees, to protect the organization's property, to ensure preservation of evidence, or to protect the integrity of the organization's policies and practices.

There are several different types of interim leave. The most common action involves a paid or unpaid administrative leave pending the outcome of the investigation.

### *INTERIM LEAVE CONSIDERATIONS*

#### *Types*

- *Administrative leave*
- *Suspension*
- *Transfer*
- *Schedule adjustments*
- *Counseling*
- *Temporary restraining orders*

The question often arises: who should be placed on administrative leave – the complainant or the respondent? Putting the complainant on an administrative leave is often viewed as retaliatory. In some instances, that decision is difficult – what if the respondent is the Director of a department? The sole physician in a medical clinic? Can the organization run – either in the short- or long-term – without the respondent? The decision about interim action must be made thoughtfully and carefully, and with input from legal counsel.

There are many considerations related to interim leave:

- Who decides? The investigator? Supervisor? Legal counsel?
- What type of interim action is best suited to this particular issue? (See sidebar.)
- In what cases might interim action be necessary?
  - Violence or threats of violence (Be aware that threat assessment experts often discourage leaves in this instance for complex reasons beyond this Guide)
  - Allegations of sexual assault or physical touching
  - Ongoing concerns of misconduct, such as harassment
  - Allegations of possible criminal misconduct, such as embezzlement, theft, substance abuse
- When should it occur?
  - Always?
  - Before or after notification to the respondent?
- What should be communicated to the respondent, complainant and others about the reasons for and the nature of the leave?
- What are the terms of the leave?
  - Paid or unpaid
  - Length
  - Availability
  - Communication with supervisors while on leave
  - Communication with others while on leave
  - Access to building, computers, work materials, coworkers
  - Expectations of time, work, availability