The Ethics of Workplace Investigations

Proper attention to the numerous ethical issues confronting the attorney-investigator in the workplace will facilitate fact gathering and eliminate a basis for attacking the integrity of the investigation.

By John A. Mack

Lawyers conducting workplace investigations must be mindful of their ethical responsibilities under the Minnesota Rules of Professional Conduct (MRPC). Proper adherence to one's ethical responsibilities is an important element in conducting a thorough, informative investigation. In addition, it eliminates a basis to discredit the investigation that could subject an employer to tort liability on claims of negligent investigation,[1] or defamation,[2] for example.

Don't Hide It

If you are an attorney conducting a workplace investigation, do not hide that fact. You have a professional responsibility to disclose to all unrepresented witnesses the nature of your relationship with the employer. This includes disclosure of whether you are representing the employer, and an explanation that you are not representing witnesses. Rule 4.3(a), MRPC, entitled, "Dealing with Unrepresented Person," states:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall clearly disclose whether the client's interests are adverse to the interests of such person and shall not state or imply that the lawyer is disinterested.

Rule 4.3(b) further mandates that an attorney make reasonable efforts to correct any misunderstanding the unrepresented person has about the attorney's role in the matter.

The theory behind the rules is that unrepresented individuals, not experienced in legal matters, might assume the attorney is disinterested in the matter even though the attorney represents the employer. Individuals may also mistakenly believe that if the lawyer represents the employer, then the lawyer represents all employees.

It makes no difference whether you are a third-party neutral or a lawyer representing the employer. You are ethically obligated to inform unrepresented witnesses of your role in the investigation. A new rule in the recently amended ABA Model Rules of Professional Conduct, which are likely to be adopted in Minnesota,[3] addresses a third-party neutral's responsibility to advise unrepresented individuals of his or her role in the matter. Proposed Rule 2.4(b), entitled, "Lawyer Serving as Third-Party Neutral," states, in part:

> A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer

> shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Proposed Rule 2.4(b) further requires that where appropriate, the lawyer should explain that the attorney-client evidentiary privilege does not apply to one serving as a third-party neutral.

Accordingly, if you conduct an investigation as a third-party neutral, expressly notify unrepresented witnesses you are a licensed attorney, and you are not representing the employer or any individuals involved in the investigation. If you are providing legal advice to the employer as well as conducting the investigation, explain your role in the investigation before you begin questioning witnesses. Not only will you satisfy the requirements of Rule 4.3, such disclosures will also establish your credibility with witnesses.

Frequently, a witness will ask if he or she should consult a lawyer. Rule 4.3(c) bars a lawyer from giving advice, other than advice to secure counsel, to a person not represented by counsel on issues that have "a reasonable possibility of being in conflict with the interests of the client." Therefore, do not discourage a witness from talking to a lawyer. When asked, tell witnesses it is their right to speak with counsel, if they choose.

Don't Overdo It

Tone it down counselor. You are not in court or in a deposition. Investigatory interviews require different skills than those used in cross-examinations. The goal of the investigation is to gather as much pertinent information as possible to allow the employer to make an informed employment decision. Cross-examination tactics and attempts to "trip up" a witness run contrary to that goal. Rule 4.4, MRPC, entitled, "Respect for Rights of Third Persons," states:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

The Minnesota Supreme Court underscored the importance of personal courtesy and professional integrity in its "Professionalism Aspirations Preamble."[4] The Court wrote, in part:

> Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently.

People are often apprehensive about speaking to investigators for a variety of reasons, including embarrassment, fear of retaliation, and breaches of confidentiality. Interviewees are more likely to open up and discuss the matter with someone they perceive to be courteous and neutral. Be an active listener rather than a badgering questioner. The

seriousness of the situation should be conveyed in the professional manner in which you conduct the interview and investigation, not through intimidation. You can still pin witnesses down and ask them to clarify inconsistencies or contradictions. If they are vague or evasive, politely explain that their response does not make sense to you, or ask for an explanation because "first you said X and now you are saying Y."

On a related note, you must not play television detective. Interviews are not interrogations. Interrogation tactics, such as fabricating evidence to elicit a confession, are prohibited. Rule 4.1, MRPC, entitled, "Truthfulness in Statements to Others," states, "In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law." Accordingly, false statements made to an alleged offender, such as "there are surveillance tapes of you touching the complainant's shoulders," when no tapes exist, are not allowed.

Generally, a comfortable witness provides more information. Set the stage for comfort immediately. Pick a location for the interview that provides privacy, away from the work group involved, and minimal distractions. Glass-walled conference rooms, for example, can hinder responsiveness. Turn off cellular telephones and do not take any calls or allow interruptions. Finally, consider whether meeting at an appropriate offsite location may facilitate better communication, and whether conducting interviews at a law firm might intimidate some individuals.

Once an interview location is determined and the interviews begin, remember to use a proper tone of voice and be professional and courteous throughout the meeting. Allow breaks as needed. Remember, witness participation in an investigation is usually voluntary, with witnesses free to refrain from answering particular questions or to end the interview at any time.

Be Nice

Witnesses may request and be allowed to bring an attorney to the interview. The attorney-investigator's respectfulness of witnesses carries over to the attorneys of witnesses. The Preamble to the Minnesota Rules of Professional Conduct states, in part, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." As a fact-finder your objective is to find out what the witness knows. Being argumentative with a lawyer or witness will diminish your neutrality and credibility. In addition, raising the ire of the lawyer and witness will cause them to be uncooperative and less than forthcoming.

If an attorney instructs the witness not to answer, or otherwise attempts to direct the interview, explain that the employer has a legal obligation to investigate the allegations and the attorney's instructions not to answer are interfering with the information-gathering process. Tell the attorney you are sure he or she wants the matter resolved for their client's sake, as accurately and expeditiously as possible, and you need their cooperation in letting the witness speak freely. If the witness remains silent, note the exchange, continue with the interview, and use the information received. If you are

unable to conduct a thorough investigation, consider terminating the interview until issues obstructing the process are resolved. In the end, the presence of an attorney or other observer should not change the interview process.

Remember, since the interview is not a legal proceeding, there are no formal rules of procedure. Frequently, a lawyer or union representative attending the interview will hear a question and declare, "Objection." Politely explain that the interview is not a legal proceeding and "objections" are not appropriate. You should, however, ask about the concern and note it. Often a discussion of the concern will result in the witness answering the question.

Beware Wearing Too Many Hats

If you are acting as both investigator and legal counsel for the employer, you need to advise the employer that you could be disqualified from representing the employer at trial. Generally, Rule 3.7, MRPC, prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. The Comment to Rule 3.7 explains:

> A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

When an employer defends a lawsuit on the ground that the employer conducted a prompt, appropriate investigation, the investigator-attorney may become a necessary witness to testify about the investigation process, its conclusions, and any remedial or corrective measures that resulted. Motions to disqualify defense or plaintiff's counsel who were involved in the investigation are commonplace.[5] You therefore have to ask yourself, "Where do my clients want me to be at trial, standing beside them or sitting on the witness stand?"

Furthermore, employers may mistakenly believe that having an attorney conduct an investigation renders the investigation and the report confidential if a lawsuit is filed. Attorneys must advise employers that the attorney-client and work product privileges may be waived if the employer defends a lawsuit on the basis that the investigation was fair and proper.[6] Make sure the employer makes an informed decision before it retains its lawyer to conduct the investigation. Hiring an attorney who will not advise the company is vastly different than hiring a lawyer to both conduct the investigation and provide legal advice. The employer that hires an attorney-investigator and has separate legal counsel may preserve the privileges established with counsel during the investigation.

The attorney-investigator who is not advising the employer must also be cautious of wearing different hats. If you are hired as a neutral, stay neutral. Once an investigation is completed and the report is submitted, it is not uncommon, and perhaps natural, for employers to ask the neutral investigator what to do next. Do not bite. You could

inadvertently establish an attorney-client relationship. Furthermore, offering legal advice could also affect perceptions of your credibility and impartiality. When asked what to do next, tell employers that is a good question for their legal counsel.

Keep It Under Your Hat

You are obligated to keep information confidential during and after an investigation. Rule 1.6, MRPC, prohibits a lawyer from knowingly revealing a confidence or secrets of a client. This ethical obligation continues after termination of the employment.

It's a small world, and the world of employment law is even smaller. Employers are not eager to have news of claims of sexual harassment or discrimination spread around, even if unfounded. Be careful when talking about an investigation following its conclusion, even if you omit names and other identifiers. The facts alone might be enough for someone to place the name of the employer. Keep this in mind as well when potential clients request references. Always get the former client's permission to use them as a reference before you mention the client's name.

With respect to the confidentiality of information obtained from witnesses, do not guarantee absolute confidentiality. Explain to witnesses you will do your best to maintain confidentiality, but there will be people within the company who will need to examine the information on a "need to know" basis. If applicable, further explain that certain disclosure and confidentiality restrictions, such as the Minnesota Government Data Practices Act,[7] may apply to the report.

Occasionally interviewees ask for the interviewer's opinion. As with the giving of legal advice, proceed with caution. Do not let witnesses know your opinions or feelings about the allegations. You may be providing confidential information in doing so. Also, if a witness perceives your feelings or opinions he or she may shut down and not feel fairly treated. There is the further risk that witnesses will assume you are sharing information provided with other witnesses. Lawyers who appear to favor the complainant versus the alleged offender risk losing the confidence and cooperation of the other witnesses. If a witness asks, tell the witness you appreciate his or her comments and opinions, and you recognize the process is difficult, but your role is to impartially gather facts.

Don't Create More Conflict

Be on the lookout for perceived and actual conflicts of interest. Generally, Rule 1.7, MRPC, prohibits a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's own interests. As the Comment to Rule 1.7 emphasizes, "The lawyer's own interest should not be permitted to have an adverse effect on representation of a client." Accordingly, the investigator cannot be too closely related to the facts of the complaint or the individuals involved. The investigation will appear biased if the attorney-investigator is friendly with the complainant or alleged offender or if the alleged offender's position could influence the investigator (e.g., if the alleged offender is higher up the reporting chain than the investigator).

A lawyer-investigator who regularly represents an employer could be placed in an awkward situation should the lawyer discover wrongdoing or that a high-level manager engaged in inappropriate behavior. The high-profile Enron case shows the dangers of perceived or actual conflicts of interests with an investigation. When first notified of the allegations of financial misconduct, Enron chose the law firm of Vinson & Elkins to conduct a "preliminary investigation." Vinson & Elkins was probably not the best choice to conduct the investigation, as the law firm had a 30-year working relationship with Enron, Enron's general counsel was a former partner at Vinson & Elkins, and the law firm was apparently involved in the transactions under scrutiny. Interestingly, Enron Global Finance executive Sherron Watkins, who first raised alarms about Enron's unorthodox partnerships and their potential danger to the company's finances and public image, specifically cautioned Enron Chairman Kenneth Lay against using Vinson & Elkins "due to conflict."[8] Despite her words of caution, Vinson & Elkins proceeded with an investigation and concluded there was no reason to believe the accounting at issue was inappropriate "from a technical standpoint." Regardless of whether Vinson & Elkins conducted a thorough, neutral investigation, its long-term relationship and shared interests with Enron called into question the veracity of the investigation and report from the beginning.

To avoid conflicts and perceptions of bias, do not soften the blow if misconduct is evident, or a high-ranking officer is involved. The truth may hurt, but it will be less painful, and less costly, than a report that does not adequately -- and impartially -- present the information obtained during the investigation.

Additional Considerations

Beyond attending to the Rules of Professional Conduct, attorneys should also consider the following when conducting workplace investigations:

- Lawyer-neutrals may be subject to other codes of ethics, such as the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution. See Rule 2.4, Amended ABA Model Rules of Professional Conduct.
- There may be state and federal restrictions on video and audiotaping, telephone and computer monitoring, surveillance, polygraph testing, and obtaining credit reports and criminal records of employees.
- Employers are increasingly creating their own ethical policies. Before starting any investigation, ask the employer if it has such a policy, and, if so, examine it.

Conclusion

A competent, impartial investigator is critical to an effective workplace investigation, which can insulate an employer from liability. An essential part of conducting a successful investigation is proper observance of one's ethical responsibilities. Whether

you are an investigator-attorney representing the employer or are conducting the investigation as a neutral, you must remember to:

- Disclose the nature of your relationship with the employer to all witnesses;
- Be respectful and courteous to all individuals involved;
- Advise employers of possible attorney disqualification at trial;
- Advise employers of potential waivers of the attorney-client and work product privileges;
- Maintain confidentiality during and after the investigation;
- Stay impartial;
- Watch for and avoid conflicts of interest.

Proper observance of these ethical considerations will facilitate fact gathering and eliminate a basis for attacking the integrity of the investigation.

Notes

1 *Malik v. Carrier Corp*., 202 F.3d 97 (2nd Cir. 2000); *Karibian v. Columbia Univ*., 930 F.Supp 134 (S.D.N.Y. 1996); *Crenshaw v. Bozeman Deaconess Hosp*., 693 P.2d 487 (Mont. 1984); *Lawson v. Boeing Co*., 792 P.2d 545 (Wash. Ct. App. 1998); *Williams v. Continental Airlines*, 943 P.2d 10 (Colo. App. 1996).

2 *Duffy v. Leading Edge Prod*., 44 F.3d 308 (5th Cir. 1995); *Wirig v. Kinney Shoe*, 461 N.W.2d 374 (Minn. 1990); *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876 (Minn. 1986); *Klontz v. Puget Sound Power & Light Co*., 951 P.2d 280 (Wash. Ct. App. 1998).

3 The MSBA General Assembly considered the report and recommendations of the MSBA Task Force on the ABA Model Rules of Professional Conduct at the annual convention on June 20, 2003. The General Assembly adopted the task force's proposed amendments to the Minnesota Rules of Professional Conduct with three exceptions, not related to Rule 2.4. Accordingly, the MSBA has asked the Minnesota Supreme Court to adopt the proposed rule changes.

4 Promulgated by the Minnesota Supreme Court on January 11, 2001.

5 Harding v. Dana Transport, Inc., 914 F.Supp. 1048 (D.N.J. 1996); Conley, Lott, Nichols, Machinery Co. v. Brooks, 948 S.W.2d 345 (Tex.App. 1997); Talvy v. American Red Cross, 205 A.D.2d 143 (N.Y. App. 1994).

6 See e.g. *Brownell v. Roadway Package Sys. Inc*., 185 F.R.D. 19 (N.D.N.Y. 1999); *Harding v. Dana Transport, Inc.*, 914 F.Supp. 1048 (D.N.J. 1996).

7 Minn. Stat. §13.01 et seq.

8 Jeanne Cummings, Tom Hamburger, and Kathryn Kranhold, "Vinson & Elkins Discounted Warnings By Employee," *The Wall Street Journal* (01/21/02).

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