

EMPLOYMENT INVESTIGATIONS: FIGURING IT OUT & AVOIDING LIABILITY

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Lawyers are often called on to conduct internal company investigations of employment disputes, sometimes in anticipation of litigation. Employers hope to obtain an independent and thorough investigation of sensitive workplace matters to assess liability. For the lawyer, there many challenges: Choosing the right investigator, asking the right questions, preserving evidence, ensuring that privacy rights are not violated, and producing a practically useful report for the employer. There are also substantial issues of preserving the attorney-client privilege. Often, the investigation can be as sensitive as the underlying matter. This program will provide you with a real world guide to planning and conducting an employment investigation and limiting employer liability.

- Planning employment investigation – know your goals and the risks
- Investigation liability – invasions of privacy, defamation, and more
- Select who to interview, format of interview, and how to record it
- What questions to ask/information to obtain from interviewees
- Litigation holds – what you should put in place?
- Preserving the attorney-client privilege
- Preparing your final report – what to include or not include

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INTERNAL INVESTIGATIONS: PITFALLS, PRATFALLS AND PRACTICAL POINTERS

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I. HALLMARKS OF AN ADEQUATE INVESTIGATION

Employment investigations must be appropriately tailored for the circumstances of the question or dispute at issue. The cases discussed below provide illustrative guidance.

A. Guidance from the California Supreme Court on investigation parameters.

In its January 1998 decision in *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998), the California Supreme Court held that the proper inquiry in adjudicating a breach of contract claim is not whether “the employee in fact commit[ted] the act leading to dismissal.” *Id.* at 107. Rather, it is whether “the factual basis on which the employer concluded a dischargeable act had been committed [was] reached honestly, *after an appropriate investigation* and for reasons that are not arbitrary or pretextual.” *Id.* (emphasis added). An “adequate investigation,” the Court held, “includes notice of the claimed misconduct and a chance for the employee to respond.” *Id.* at 108.

The Court, however, declined to dictate detailed parameters for employer investigations. The Court simply explained:

The law of wrongful discharge is largely a creature of the common law. Hence, it would be imprudent to specify in detail the essentials of an adequate investigation. It is better, we believe, to adhere to the common law’s incremental, case-by-case jurisprudence, adjusting the standard as its sufficiency is tested in practice. Two descriptions, however – one from turn-of-the-century English common law, the other from an opinion of this court only a little over twenty years ago – provide a sense of what investigative fairness in this context contemplates. In *Board of Education v. Rice* (1911) App. Cas. 179, 182, Lord Halsbury, describing the duties of a school board in resolving a claim of salary discrimination, wrote “I need not add that . . . [the board] must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial *They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.*”

Closer to home, Justice Tobriner wrote on behalf of a unanimous court in *Pinsker v. Pacific Coast Society of Orthodontists*, 12 Cal. 3d 541, 116 Cal. Rptr. 245, 526 P.2d 253 (1974), that “[t]he common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial [citation], nor adherence to a single mode of process. *It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position*

. . . . [T]his court should not attempt to fix a rigid procedure that must invariably be observed.” (*Id.* at 555; *see also* Friendly, ‘Some Kind of Hearing’ (1975) 123 U. Pa. L. Rev. 1267, 1269-1270 n.10 [“The precise content of the common law ‘fair procedure’ requirement is far more flexible than that which the Supreme Court has found to be mandated by due process”].)

Id. (emphasis added).

B. Appellate court guidance on investigation standards.

1. California appellate court decisions.

a. The Silva court analysis of an appropriate sexual harassment investigation.

In *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256 (1998), decided six months after *Cotran*, the California Court of Appeal addressed whether a long-term employee had raised a triable issue of fact regarding Lucky’s decision to terminate him for violating the store’s sexual harassment policy. *Id.* at 259.

In this case, a courtesy clerk told the head clerk that Silva, a store manager, had crouched down and grabbed her buttocks as she entered a hallway. *Id.* at 260. The head clerk promptly requested Lucky’s human resources representative to investigate the incident.¹ *Id.* Approximately two hours later, the human resources representative interviewed the courtesy clerk. *Id.* During that interview, the courtesy clerk identified a checker who had been inappropriately touched by Silva. *Id.* The human resources representative then interviewed the checker, who complained that Silva had slapped her buttocks while she was bending into a melon bin. *Id.*

Following these interviews, the human resources representative conducted a month-long investigation, and concluded in a written report that “it is reasonable to assume that both of the incidents . . . took place.” *Id.* at 271. Based on the investigation, Lucky Stores’ review board concluded that Silva had violated Lucky’s sexual harassment policy because he

¹ California’s Fair Employment and Housing Act (FEHA) mandates that: “It shall be unlawful employment practice . . . for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” Cal. Gov’t Code § 12940(k) (West 2004). Mere posting of bulletins mandated by law and provided by state agencies does not fulfill requirement to take all reasonable steps necessary to prevent discrimination under Section 12940(h). *Cal. Fair Employment and Hous. Comm’n v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004, 1024-25 (2004) (employer violated its duty to investigate religious discrimination under FEHA).

had “improperly touched female employees in the workplace, made inappropriate comments of a sexual or offensive nature, intimidated subordinate employees, and demonstrated a willful disregard for company policy regarding sexual harassment.” *Id.* at 261.

Silva filed a wrongful termination action claiming breach of an implied contract not to terminate except for good cause, and breach of the implied covenant of good faith and fair dealing. *Id.* at 259. Silva argued, among other things, that Lucky’s good faith belief that he had engaged in misconduct was not a defense to his breach of contract claim. *Id.* at 259. In affirming summary judgment in Lucky’s favor, the court concluded that there were no triable issues of fact under the *Cotran* standard. *Id.* at 264.

The court began its analysis by setting forth the *Cotran* standard for good cause in termination decisions:

- (1) Did the employer act with good faith in making the decision to terminate?
- (2) Did the decision follow an investigation that was appropriate under the circumstances?
- (3) Did the employer have reasonable grounds for believing the employee had engaged in the misconduct? *Id.*

There was no triable issue as to the first element because Silva conceded that Lucky had determined in good faith that good cause existed for the discharge. *Id.*

As to the investigation, the court concluded that “Lucky’s investigation . . . [met] *Cotran*’s fairness requirements.” *Id.* at 273. The court based its conclusion on the following aspects of the investigation:

- Lucky had a written policy on how to investigate sexual harassment complaints. “The policy directed: treat complaints seriously, investigate immediately, treat the matter confidentially, conduct interviews in a private area, listen to the allegations and make complete notes, attempt to identify all persons involved as well as possible witnesses, and interview the accused employee.” *Id.* at 265.
- Lucky designated an uninvolved, human resources representative to conduct the investigation. *Id.* at 272. The representative had been trained by in-house counsel on how to investigate allegations of sexual harassment. *Id.*
- The investigator’s practice was to interview the complainant, the employee against whom the allegation was made, and any witnesses as soon as possible after the reported incident. *Id.* at 265.

- The investigator promptly interviewed fifteen employees and recorded the information obtained from each witness on an interview form and/or obtained a written statement. *Id.* He asked important witnesses to provide their own written statement about the incidents. *Id.* at 272.
- “The witness interview forms and written statements demonstrate[d] the appropriateness” of the investigation. *Id.* at 265.
- The investigator asked “relevant, open-ended, nonleading questions. He attempted to elicit facts as opposed to opinions or supposition.” *Id.* at 272.
- The investigator maintained confidentiality by conducting several of the interviews off the store premises or by telephone. *Id.*
- The investigator encouraged interviewees to page him if they wanted to speak further. *Id.*
- The investigator promptly notified the alleged harasser of the charges and gave him an opportunity to present his version of the events. *Id.*
- The investigator encouraged the alleged harasser to contact him if he wanted to speak further. *Id.*
- The investigator provided the critical witnesses with an opportunity to clarify, correct or challenge the information presented by other witnesses. *Id.*
- After interviewing all the witnesses, the investigator gave the alleged harasser a final opportunity to comment on the information obtained from the investigation. *Id.* at 273.

Although Silva alleged investigatory flaws, the court dismissed each of them,² concluding, “[w]hile the investigation was not perfect, it was appropriate given that it was

² For example, the investigator did not interview every witness or check store records to confirm who was in attendance on the day of the alleged harassment. *Id.* at 275.

conducted ‘under the exigencies of the workaday world and without benefit of the slow-moving machinery of a contested trial.’” *Id.* at 275 (quoting *Cotran*, 17 Cal. 4th at 105-06).³

Finally, the court found that Lucky’s determination that Silva had engaged in the alleged sexual harassment was a reasoned conclusion supported by substantial evidence. *Id.* at 276-78. The court relied on the following evidence: (1) the alleged conduct undisputedly constituted sexual harassment under Lucky’s policy; (2) the allegations were corroborated by witnesses; (3) Silva admitted he had physical contact with both women; and (4) several other employees had reported conduct by Silva that violated Lucky’s sexual harassment policy. *Id.*

b. Other California decisions.

- *Northrop Grumman Corp. v. Workers’ Comp. App. Bd.*, 103 Cal. App. 4th 1021, 1035-36 (2002) (California employers have an “affirmative and mandatory duty to conduct a prompt investigation of a discrimination claim”).

- *American Airlines, Inc. v. Super. Ct.*, 114 Cal. App. 4th 881 (2003) (to carry out the obligation to investigate claims, “an employer likely will need to obtain information from a wrongdoer’s coworkers who were in a position to witness the misconduct and identify the wrongdoer”).

2. New York appellate guidance.

a. *Present v. Avon Products, Inc.*

Employer investigations sometimes prompt defamation claims against an employer or its investigators. In *Present v. Avon Products, Inc.*, 687 N.Y.S.2d 330, 253 A.D.2d 183 (N.Y. App. Div. 1999), plaintiff brought defamation claims against defendant employer Avon and various co-workers in connection with Avon’s internal investigation of plaintiff’s alleged misconduct. *Id.* at 332. Plaintiff’s fellow employees initially notified management of his misconduct and provided supporting documentation, which an outside vendor also substantiated. *Id.* Plaintiff’s immediate supervisor interviewed all of the employees in his department and advised his superiors of his findings. *Id.* at 332–33. Avon’s in-house counsel thereafter reviewed the salient documents, independently interviewed the employees to confirm what they had reported, and obtained their signed affidavits. *Id.* at 333. When Human Resource and Legal Department executives confronted plaintiff with the accusations

³ See also *Reed v. AT & T*, No. C 94-4125 THE, 1998 WL 514043, at *7 (N.D. Cal. Aug. 14, 1998) (court rejected plaintiff’s argument that security investigator “should have done a more thorough job” and, therefore, the investigation was conducted in bad faith; “This is precisely the type of judicial inquiry *Cotran* set out to prevent Although the investigation may not have been perfect, or even reached the correct result, [plaintiff] has not put forth evidence to suggest that [the employer’s] investigation was conducted in bad faith.”).

and he offered no convincing explanation, Avon suspended him pending further investigation. *Id.* After two other outside vendors confirmed that plaintiff's billing records were falsified, Avon terminated him for falsifying billing records and stealing company property. *Id.* Avon's Internal Audit and Security Departments reached the same conclusions from their own internal investigations. Thus, Avon submitted the matter to the police, who ultimately referred it to the District Attorney's office. *Id.* Plaintiff was charged with seven misdemeanor counts, all later dismissed. *Id.*

The court dismissed plaintiff's defamation claims against Avon and the individual defendants, finding that all of the statements at issue furthered the purpose of a qualified privilege, namely, to allow companies to investigate employees' criminal misconduct and to share this information with law enforcement authorities.⁴ The court added, "The accusations were specific and verifiable and were not so vituperative or over broad as to raise a question of malice. Nor were they published so widely as to fall outside the scope of the privilege." *Id.* at 334-35. (internal citations omitted).

Rejecting plaintiff's criticism of Avon's internal investigation, the court stated:

In the case at bar, all the evidence points to the contrary. Avon was commendably cautious and thorough in conducting its internal investigation. It made no disclosures to the police until several managers had cross-checked the employees' accusations and compiled a significant file of supporting documentation. Several outside vendors who had no motive to collude confirmed the employees' stories in all major details. Only then did Avon take action.

Id.

3. Federal appellate court decisions.

a. *Baldwin v. Blue Cross/Blue Shield of Alabama.*

In *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287 (11th Cir. 2007), the plaintiff argued that the employer's investigation of a harassment complaint suffered from five separate deficiencies which made it unreasonable: (1) the head investigator failed to speak with the complainant; (2) the head investigator failed to take notes while interviewing one of the witnesses; (3) the investigators interviewed the complainant's colleagues in a

⁴ Plaintiff predicated his defamation claim against the individual defendants on their reports about him to Avon management, and based his claim against Avon on its statements to the police. *Id.* at 333-34. The court rejected plaintiff's claims because he failed to set forth evidence that the individual defendants doubted the truth of their statements or that Avon had substantial reason to question the accuracy of its sources. *Id.*

restaurant at which an alleged offender, who was their superior, was present; (4) the head investigator did not conduct an adequately thorough discussion with the other two investigators after the interviews; and (5) the head investigator did not give enough weight to notes another investigator took during the investigation which indicated that one of the witnesses gave answers that the investigator thought sounded rehearsed. *Id.* at 1304.

The Eleventh Circuit rejected the challenges, holding that “there is nothing in the Supreme Court’s *Faragher*⁵ or *Ellertb*⁶ decisions that require an employer to conduct a full-blown, due process, trial-type proceeding, in response to complaints of sexual harassment”; only a reasonable investigation under the circumstances is required. *Id.* at 1304. Because the circumstances surrounding each investigation differ, an informal inquiry may be reasonable in some cases to “arrive at a reasonably fair estimate of truth” without disrupting business. *Id.*

Examining only “the overall reasonableness of the investigation under the circumstances,” *id.* at 1304-05, the court stated:

We will not hold that the investigation does not count, as Baldwin urges us to, because the investigators did not take more notes, because the discussion among them was not more thorough, or because they did not give more weight to a particular factor, such as Barclay’s initial impression that the answers of one of the employees seemed rehearsed. To second guess investigations like those would put us in the business of supervising internal investigations conducted by company officials into sexual harassment complaints.

Id. at 1304.⁷

b. *Loughman v. Malnati Organization, Inc.*

In *Loughman v. Malnati*, 395 F.3d 404 (7th Cir. 2005), the Seventh Circuit reversed summary judgment for the employer in a harassment case, holding that a jury could determine that an employer’s response to allegations of physical assault required a more substantial response than “simply talking to people involved.” *Id.* at 407. The court noted

⁵ 524 U.S. 775 (1998).

⁶ 524 U.S. 742 (1998).

⁷ The court further held that “a reasonable result cures an unreasonable process . . . because Title VII is concerned with preventing discrimination, not with perfecting process.” *Id.* at 1305 (citing *Faragher*, 524 U.S. at 805-06). Here the court determined that warning, counseling and monitoring the alleged harasser constituted an adequate response, particularly here where the employer did not find substantiation for the complainant’s allegations. *Id.* at 1305-06.

that “when it comes to remedying a bad situation, greater vigor is necessary when the harassment is physically assaultive.” *Id.*⁸

c. *Smith v. America Online.*

In *Smith v. America Online*, 499 F. Supp. 2d 1251 (M.D. Fla. 2007), the court scrutinized an investigation of a harassment complaint by an AOL Human Resources Director. The investigator interviewed the complainant and alleged harasser within a few hours of the complaint, but was unable to corroborate the complainant’s statements, so she issued only a verbal warning to the alleged harasser. *Id.* at 1265.

Plaintiff attacked the investigation because the investigator spent less than three hours on it and did not interview a potential witness to the harassment. *Id.* at 1265. The court disagreed, finding the prompt investigation reasonable in view of the “he said/she said” nature of the claim.⁹

d. *Williams v. Consolidated Edison Corp. of New York.*

In *Williams v. Consolidated Edison Corp. of New York*, 255 Fed. Appx. 546 (2d Cir. 2007), the court vacated the district court’s grant of summary judgment for the employer and remanded for further proceedings, finding the employer’s reaction to a harassment complaint “a perfunctory and inappropriate response.” *Id.* at 551. The human resources investigator spoke only to the supervisor. The report summarizing the investigation omitted discussion of co-workers’ corroborating accounts of discriminatory practices – creating a reasonable dispute as to whether the employer’s response constituted “appropriate remedial action.” *Id.* at 550.

e. *EEOC v. R&R Ventures.*

In *EEOC v. R & R Ventures*, 244 F.3d 334 (4th Cir. 2001), the Fourth Circuit found that the employer’s failure to interview the alleged victim and the victim’s supervisor rendered its investigation defective.

⁸ The court turned against the employer its own evidence that it often issued warnings for harassment and spoke with employees about how to treat female employees. It observed that more significant investigation and action may be needed to remedy “the consistent stream of harassment.” *Id.* at 407.

⁹ The court further noted that even if there had been deficiencies, plaintiff’s claims still would fail because the employer provided an adequate remedy: (1) a verbal warning to the alleged harasser that any future complaints could lead to formal discipline and possibly termination; and (2) multiple options to the complainant, who failed to respond to them. *Id.* at 1265-66.

II. OVERVIEW

It is critical to examine the relevant laws and regulations of the nation, state and locale where the investigation is conducted, as well as the employer's policies and procedures and any applicable labor union contracts or works council requirements. Some of the techniques set forth in this outline will be well-suited for a particular investigation in one country but may not be lawful in another. Even within the same jurisdiction, a given process is not necessarily appropriate or best suited for each situation. However, promptness and thoroughness are important in all investigations.

III. LITIGATION HOLD TO PRESERVE EVIDENCE: WHAT YOU SHOULD PUT INTO PLACE

When a complaint or report is made that triggers a need for an investigation, the duty to issue a litigation hold to preserve documents may arise.

Evidence preservation requirements are beyond the scope of this paper, but must be assessed as soon as the employer becomes aware of facts that may give rise to a legal claim. *See, e.g., Quinby v. WestLB AG*, 245 F.R.D. 94, 105 (S.D. N.Y. 2006) (employer should have reasonably anticipated litigation “no later than . . . when plaintiff filed an internal complaint to defendant alleging sexual discrimination”); *Hamilton v. Signature Flight Support*, No. C 05-0490CW (MEJ), 2005 WL 3481423, at *5 (N.D. Cal. Dec. 20, 2005) (employer was obligated to preserve surveillance recordings that allegedly contained evidence relating to employee's internal complaints of racial discrimination before it received notice of EEOC charge because employer knew that employee had made an internal complaint, had been told that the video surveillance would support employee's version of disputed events, and had made conscious decision to excerpt two segments from the surveillance recording; thus, litigation was sufficiently foreseeable to create a duty to preserve evidence); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-217, 220 (S.D.N.Y. 2003) (obligation to preserve evidence arises before litigation when employer “reasonably should know that the evidence may be relevant to anticipated litigation”; “relevant people” at company anticipated litigation approximately four months before EEOC charge was filed).

Under federal law, potential litigants owe an uncompromising duty to preserve what they know, or reasonably should know, will be relevant evidence in a pending lawsuit or one in the offing. *Kronisch v. U.S.*, 150 F.3d 112, 126-127 (2d Cir. 1998).¹⁰

¹⁰ While a litigant is under no duty to “keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.” *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991). Employers must carefully assess responsibilities under applicable state laws as well.

When the duty to preserve evidence arises, the employer must “suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Zubulake*, 220 F.R.D. at 218.¹¹

IV. THE ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT DOCTRINE: DETERMINING WHETHER THEY CAN AND SHOULD APPLY

Employers often prefer to cover sensitive investigations by the attorney-client privilege. Yet, if harassment or discrimination litigation ensues, for example, the defendant employer typically will be forced to waive the privilege so it can demonstrate that it properly investigated the allegations, considered the facts and took the appropriate action to prevent a recurrence upon learning of alleged harassment, discrimination or other wrongdoing. If a terminated employee challenges his or her discharge, the defendant employer likewise often will find it necessary to waive the privilege on its investigation to establish good cause or a legitimate nondiscriminatory reason for its decision. Accordingly, the employer may need to disclose the investigation process, the evidence collected, the notes and investigative report, and possibly the legal advice rendered by counsel,¹² even if such information constitutes or contains privileged communications or work-product.

Claimants often challenge employer attempts to preserve the application of the attorney-client privilege to an investigation. *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844 (1997), is an example. The trial court granted the plaintiff’s motion to compel production of the prelitigation investigation conducted by the attorney hired by the employer. The defendant employer filed a petition for writ of mandate requesting an immediate stay so it could challenge the blanket ruling. Finding that there was no substantial evidence to support the ruling, the court held that it could find a waiver as to a prelitigation investigation only if an answer or discovery response indicates the possibility of a defense based on a thorough investigation and appropriate corrective response. In this

¹¹ The “litigation hold should be periodically reissued.” *Id.* See also *EEOC v. Phillips Coll., Inc.*, 984 F. Supp. 1464 (M.D. Fl. 1997) (noting that even though it took the EEOC four years to file a lawsuit in a race discrimination case, the defendant employer was under a continuing obligation to preserve documents).

¹² See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (waiver of the privilege with respect to counsel’s opinion as to the lawfulness of the seniority practices at issue was critical to the defense of willfulness; court specifically found that since TWA had in good faith relied on an opinion of counsel as to the lawfulness of its practice, it could not be held liable for a willful violation of the ADEA); *EEOC v. Fox Point-Bayside Sch. Dist.*, 31 Empl. Prac. Dec. ¶ 33,609 at pp. 29,864-65 (E.D. Wis. 1983) (if a defendant is going to claim it did not knowingly violate the law, relied on advice of counsel and thus did not willfully violate the ADEA, the opposing party must have access to the attorney-client communication and advice relied upon), *rev’d on other grounds*, 772 F.2d 1294 (7th Cir. 1985).

case, the demurrer to the complaint had been sustained, there was no complaint on file and there was no indication of a defense strategy. *Id.* at 129. The court stated:

If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of an investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived.

Id. at 128.

In *Kaiser Foundation Hospital v. Superior Court*, 66 Cal. App. 4th 1217, 78 Cal. Rptr. 2d 543 (1998), the court interpreted *Wellpoint* in the context of a sex discrimination and sexual harassment investigation conducted by non-attorney personnel. The hospital directed its human resources consultant to conduct an investigation into the allegations made against a physician. *Id.* at 1220. The investigator interviewed more than 10 witnesses, made notes of his interviews and completed an investigation report. *Id.* When plaintiffs sued for sex discrimination and harassment, they demanded production of "[t]he complete investigation files . . . for any and all complaints of sex discrimination or harassment involving Dr. [F]." *Id.* Kaiser agreed to produce certain documents provided there was a written stipulation between counsel that the production did not waive the attorney-client privilege or the work product doctrine as to other communications involving counsel. *Id.* at 1221.

Kaiser subsequently produced more than 350 pages of documents from its investigation files, including the consultant's investigation report, notes and documents that did not relate to communications with counsel, investigation reports, and notes and documents of other non-attorney personnel who participated in the investigation. *Id.* Kaiser also produced a privilege log identifying 38 pages of documents that either were withheld or partially redacted due to the attorney-client privilege, the attorney work-product doctrine and/or the California right to privacy. *Id.*

Relying on *Wellpoint*, plaintiffs' attorney argued that as long as Kaiser was placing at issue the scope and adequacy of its investigation and remedial action, it could not selectively produce documents. *Id.* at 1221-22. The court disagreed:

Wellpoint does not hold that, once a defendant claims it has investigated a complaint of harassment and taken appropriate remedial action based on its own investigation, a plaintiff is entitled to discover all communications involving the employer's internal investigation, whether or not the investigation was conducted by a nonattorney and regardless of the employer's invocation of the

attorney-client privilege with respect to the nonattorney's confidential communications with the employer's counsel.

Id. at 1223.

The court thus held:

[W]here a nonattorney has conducted an in-house investigation of employee complaints and the employee has been afforded full discovery of all aspects of that investigation with the exception of specified communications and documents protected by the attorney-client privilege and the work product doctrine, then no waiver of either the attorney-client privilege or the work product doctrine has been made unless a substantial part of any particular communication has already been disclosed to third parties.

Id. at 1228. Accordingly, the court granted Kaiser's petition for issuance of a peremptory writ of mandate directing the trial court to vacate its order granting plaintiffs' motion to compel production of documents assertedly protected by the attorney-client privilege or the attorney work product doctrine. *Id.* at 1229. The court further ordered a review of the privilege log to determine whether the documents relating to the investigation were in fact privileged or protected by the work-product doctrine. *Id.*

In *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524, 691 A.2d 321, 73 Fair Empl. Prac. Cas. (BNA) 1149 (1997), an action brought under New Jersey's Law Against Discrimination, the plaintiff alleged that she was sexually harassed by two of her male supervisors. After several years of the alleged harassment, the plaintiff filed an internal complaint with her employer. During the next seven months the harassment continued and the employer took no action against the supervisors. The plaintiff then filed her lawsuit. Shortly thereafter the employer disciplined the supervisors by suspending them without pay, demoting them and reducing their salaries. In her complaint the plaintiff alleged that her employer failed to take appropriate remedial action. The employer pleaded its investigative and remedial actions as an affirmative defense. *Id.* at 325.

During the discovery phase of the case, the plaintiff sought documents relating to the employer's investigation, including a final investigative report written by its EEO officer, minutes of a confidential review of that report by its Sexual Harassment Advisory Committee and minutes of an executive session of the employer's commissioners. *Id.* When the employer resisted the plaintiff's efforts to discover this information, the discovery dispute made its way to the New Jersey Supreme Court.

In rejecting a blanket privilege for these investigative documents, the New Jersey Supreme Court ruled that:

The efficacy of an employer's remedial program is highly relevant to both an employee's claim against the employer and the employer's defense to liability.

Id. at 327. In determining the effectiveness of an employer's remedial action, the court reasoned that the process itself – *i.e.*, timeliness, thoroughness, attitude toward the harassed employee – as well as the results of the investigation – are relevant and discoverable.

[A] remedial scheme that reaches the correct result through a process that is unduly prolonged or that unnecessarily and unreasonably leaves the employee exposed to continued hostility in the workplace is an ineffective remedial scheme. Such a process, in reality, indirectly punishes employees with the temerity to complain about sexual harassment and cannot constitute “effective” remediation.

Id. at 328. Rather than adopt a blanket privilege, the court recognized a conditional privilege and favored the use of other confidentiality devices such as redaction and gag orders. *Id.* at 330. The court specifically rejected the privilege of “self critical analysis in favor of a case-by-case balancing approach.” *Id.* at 332. The court further held that because the investigation had begun long before the plaintiff filed her claim, the attorney's work was not in anticipation of litigation and therefore was not privileged. *Id.* at 334. In any event, the court ruled that the employer had waived any privilege when it raised its remedial action as an affirmative defense. *Id.* at 336.¹³

¹³ See also *Walker v. County of Contra Costa*, 227 F.R.D. 529, 535 (N.D. Cal. 2005) (as an affirmative defense to plaintiff's race discrimination and retaliation claims, defendants asserted that they “took and had taken reasonable steps to prevent and promptly correct any discrimination and/or harassment in the workplace,” *id.* at 532; court held that defendants waived attorney-client privilege and work product protection with respect to documents reflecting the investigation and the investigation report, but not with respect to the legal analysis in the findings and conclusions of the investigation prepared by the attorney who led the investigation). Cf. *Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252 (W.D. Va. 1999) (witness statements taken by independent investigator at direction of counsel were protected by work product doctrine, absent a showing of substantial need and undue hardship); *Welland v. Citigroup, Inc.*, 2001 U.S. Dist. LEXIS 15556 at *10 (S.D.N.Y. Sept. 28, 2001) (documents relating to communications between investigator and in-house counsel were protected by the attorney-client privilege because investigator was obtaining confidential legal advice regarding investigation, *id.* at *7; document containing notes from a witness interview which was “sought and obtained at the direction of in-house counsel” was protected by the attorney-client privilege because the purpose was to assist counsel in

(continued...)

If the employer desires to attempt to protect the investigation under the attorney-client privilege and/or attorney work-product doctrine, it should retain counsel to give legal advice and to determine what evidence it will need in order to prepare and deliver such advice. Appendix A sets forth some of the points the employer should consider making in its request to counsel to initiate the investigation and advice project. Appendix B sets forth some typical points that counsel may make to the employer when it requests information and witness interviews necessary to formulate the requested legal advice.

V. PREPARING FOR THE INVESTIGATION: WHAT TO DO BEFORE YOU START

A. Select the most appropriate investigator.

Employers should choose the most appropriate investigator available for a specific case with full knowledge that the investigator later may be called as a witness. The following are among the types of investigators typically considered:

- Member of the human resources department.
- In-house attorney.
- Member of line management.
- Internal audit, corporate compliance or security department staff member.
- Private investigator or other outside consultant. *But see infra* Section IV on the possible applicability of the Fair Credit Reporting Act (“FCRA”).
- Regular outside or special outside counsel.

If it is possible or desirable to cover the investigation by the attorney-client privilege or the attorney work-product doctrine, the investigator should be an attorney or a person acting throughout the investigation at the direction of an attorney.

In making a final selection, employers may find it helpful to consider the attributes required by the case. These may include:

(...continued)

preparation for the imminent termination that would lead to litigation; *id.* at *9; notes taken by investigator who conducted an interview to investigate allegations before any documented communication with in-house counsel were not protected by the attorney-client privilege because they were not taken to assist attorney in rendering legal advice to the client).

- Competence and ability to understand the purpose and the issues such that the interviewer can formulate appropriate follow-up questions when new facts or issues arise during the interview.
- Knowledge of company policies, procedures, practices, rules and labor agreements.
- Interviewing skills.
- Effectiveness as an interviewer in view of the personalities and background of the potential interviewees (*e.g.*, ability to develop rapport, to press for admissions, to understand interviewees).
- Credibility (*e.g.*, no record of a conviction, revocation of a license, history of termination for misconduct or incompetence, or history of moral turpitude).
- Objectivity and impartiality (*e.g.*, no bias or grudge).
- Ability to take thorough, accurate notes which can be used as evidence.
- Ability to maintain confidentiality to the extent appropriate.
- Ability to instill confidence in and work with the complainant and the accused.
- Ability to testify clearly in a jury trial or other legal proceeding and be received by the trier of fact as knowledgeable, impartial, thorough and honest.
- If the selection of an outside investigator will trigger obligations under the FCRA, the potential downside of the procedures it requires.

B. Identify the issues raised by the complaint.

Before you can begin an investigation, you must understand the particular issues that require investigation. What are the allegations? At a minimum the employer's complaint intake process should capture the topics listed in Appendix C, content from a sample complaint intake form. Below are some examples of the types of issues you should be looking to identify:

- Does the employee allege that he or she is being treated differently than other employees because of his or her race, ethnicity, national origin, gender, age, religion, sexual orientation, marital status, disability, veteran's status or

other protected group affiliation? If so, what different treatment has the employee identified?

- Does the employee allege that he or she is being harassed or treated in an abusive manner?
- Does the employee claim that he or she is not being paid properly?
- Is the employee alleging a violation of the employer's Code of Business Conduct?
- Does the employee allege that he or she is being retaliated against for having previously engaged in protected activity?
- Does the employee claim that he or she needs a job modification to perform his or her job because of an injury, illness or disability? If so, does the employee claim that he or she has already been denied that accommodation?
- Does the employee contend that he or she needs an accommodation at work because of his or her religious beliefs or practices?
- Does the employee contend that he or she is being treated in a way that violates a labor or collective bargaining agreement? If so, what violation does the employee allege?

It is important to document the reason for commencing the investigation and define its scope before you proceed. If new issues surface once the investigation is underway, you or the appropriate employer authority will need to determine whether they should be added to the investigation or should be examined in a separate investigation, perhaps by a different investigator. Keep in mind the fact that your investigation may be produced in discovery.

Before you take the next step, map out a tentative investigation plan. Appendix D lists some of the topics that a typical investigation plan would include.

C. Identify all applicable laws, regulations and policy or labor requirements; shape the investigation scope and process accordingly.

Remember that unique obligations impact investigations. In various countries outside of the United States, laws and labor agreements may both prescribe and limit the employer's investigation. Thus:

- Ensure the scope of the investigation and methods employed are permissible.
 - Ensure the source of the complaint is permissible (*e.g.*, hotline, anonymous).

- Ensure the means of documentation are permissible.
- If applicable, ensure that the employee has provided consent.
- Ensure compliance with any rules concerning the duration and completion of the investigation.
- Ensure compliance with any applicable data collection, data privacy and data transfer laws.
 - Many countries limit or prohibit cross-border data transfer. This in turn may limit disclosure or transfer of reports, findings and evidence. Thus, assess to whom and where information is being sent.
 - France: Strictly protects employee privacy. An employer must consult with the works council and provide advance notification to impacted employees before monitoring their internet or telephone use.
 - Spain: Allows an employer to access employee email and items of other company property if the employer has a separate policy providing that they are company property and may be monitored, *and* the employer has evidence of indicia of misconduct.
 - U.K.: Generally permits searching and monitoring, but employees can raise a Human Rights Act claim that their right to privacy has been compromised through the collection of data. They also may claim that data collection infringed their rights under the Data Protection Act of 1998, particularly when data are obtained covertly.
- Notification: Ensure that the subject and appropriate individuals or entities, including a union or works council, are notified of the investigation, if required, within the required time period. In some jurisdictions the employer must give notice of the “means” of investigation it will use.
 - Argentina: Employers must inform the subject of the complaint within a reasonable time frame to allow the subject to defend himself or herself.
 - France: The subject must be informed as soon as a complaint is filed. This gives the subject the opportunity to exercise his or her rights regarding the opposition, access and modification of recorded data.
 - Ireland: An employer that recognizes a trade union may be required to notify it.

- Italy: An employer must notify the trade union so that it can be present during the investigation.
- Spain: An employer must notify the works council only if the subject is a member of the works council.
- Right to representation: In some countries the employee has a right to a representative, such as an attorney, works council member, trade union representative, fellow employee, colleague or friend.
 - Argentina: An employee may bring an attorney, trade union representative or member of the works council.
 - France: An interviewee may be accompanied by a fellow employee, but not an attorney.
 - Germany: An interviewee may bring an attorney or member of the works council.
 - Japan: An interviewee may bring an attorney or trade union representative.
 - Italy: An employee may bring an attorney to the interview.
- Right to decline to participate in an interview: In some countries an employee has the right to refuse to submit to the interview.
 - Argentina and Italy: The complainant, third party witness and subject all may refuse to submit to an interview.
 - Japan: Any party may refuse to submit to an interview, but such refusal may weaken that individual's credibility.

D. Finalize other administrative arrangements.

- Discuss the reason, parameters and potential objectives of the investigation with the appropriate management representative(s) and counsel. Remind all members of the team that the investigation should be kept confidential to the extent possible to minimize the potential for rumors, misinformation, business disruption and influencing witness testimony.
- Determine which persons should be part of the investigation team.

- Determine whether coordination with or notification to other business organizations (*e.g.*, corporate compliance, security, corporate legal, labor relations) is appropriate.
- Determine through whom and how contacts with interviewees should be made.
- Determine the appropriate deadline for completing the investigation. The deadline will need to be flexible in the event that the scope of the investigation changes or the investigation process takes longer than expected. Your goal is to complete the investigation process and pave the way for any appropriate action as promptly as possible.

E. Identify documents to be reviewed.

As part of the investigation, you will need to identify up front – and throughout the investigation – the relevant documents that you should have to investigate *each factual allegation*. Relevant documents include documents that support or refute the substance of an employee’s allegations, provide insight into a witness’ credibility, or explain the meaning of other documents or witness statements.

The documents you need may be in a variety of places. Some of them, such as personnel records or prior complaints, may be maintained by human resources, inside or outside counsel, corporate compliance, or corporate security. Others may be filed in individual offices, on personal office or home computers, on servers, on handheld devices or in voicemail. On occasion you may need documents from a vendor or other third party.

For example, if an employee alleges that he was wrongfully denied a promotion, the following are examples of the types of potentially relevant documents you should obtain and review when available:

- The employee’s personnel file.
- Documents that comment upon the employee’s work performance, such as performance reviews.
- Documents that reflect the employee’s work performance, such as the employee’s own work product.
- The personnel file of the employee who received the promotion.
- Documents that comment upon the work performance of the employee who received the promotion, such as performance reviews.

- Documents that reflect the work performance of the employee who received the promotion, such as the employee's own work product.
- Any documents that reflect the decision-maker's thoughts or opinions about the work performance of the employee who was denied the promotion and the employee who received the promotion.
- Any documents that contradict the decision-maker's thoughts or opinions about the work performance of the employee who was denied the promotion and the employee who received the promotion.
- Prior similar complaints against the decision-maker.
- Promotion assessment and tracking documents.
- Statistics on the race/gender of applicants, officers and selectees during a legally relevant time.
- Documents that reflect the company's promotion policies and/or procedures.
- Applicable collective bargaining agreements.
- Possibly documents that comment upon or reflect the work performance of other unsuccessful candidates for the position at issue.

Also consider whether the following categories of documents are pertinent:

- Complaint and notes regarding it.
- Other relevant rules, policies, procedures and instructions.
- Memoranda or notes about the incident(s).
- Managers' notes and files.
- Prior investigation files.
- Records of prior complaints by the complainant.
- Statements written by or obtained from witnesses.
- Relevant business records, such as time cards, calendars, diaries, tape recordings, photographs, logs, etc.

- Physical evidence, such as samples.

It is very important that you retain all documents and other evidence that you come upon during the course of your investigation. You should not alter, mark up, re-order or destroy original documents, or permit anyone else to do so. All original documents should be kept in a secure location and carefully preserved.

F. Identify potential interviewees and their relationship to the matter under investigation.

In order to discover the relevant facts, you will need to interview all witnesses with information relevant to the allegations raised by the employee. Where the complaint alleges that certain employees engaged in improper or unlawful conduct, you will need to identify each of the alleged wrongdoers, their supervisors and all witnesses to the conduct, including those identified by the complaining employee as having information about the matter being investigated. Where the complaint challenges a certain job decision, you will need to determine who made the decision, which person(s) provided input into the decision, if applicable, who approved the decision and the complainant's comparator(s) who won the job. The witnesses who potentially may be pertinent may include:

- Person(s) who raised the issue(s).
- Persons identified by person(s) who raised the issue(s).¹⁴
- Persons identified by person(s) being investigated.
- Supervisors of persons involved.
- Observers of the incident(s).
- Others with relevant information.
- Authors of relevant documents.
- Co-workers or comparators of persons involved.
- If appropriate, other persons who reportedly have been subjected to similar activity.

¹⁴ Sometimes complainants and persons accused identify dozens of "good character" witnesses. If a potential witness's utility is simply that, you will need to determine whether it is appropriate to assume that the information the witness would have provided would be unduly cumulative or irrelevant to the issues.

Names of other potential witnesses will come up during the course of the investigation. You should always be prepared to add names to your list of witnesses to interview.

G. Decide the order of interviews.

- Is there any reason not to interview the complainant(s) first?
- Should the alleged wrongdoer(s) be interviewed second, last or in some other order?

H. Determine the format for recording information from witnesses.

- Contemporaneous handwritten or typed notes of key points obtained from each witness.
- Dictated, typed write-up of key points obtained from each witness, prepared based upon the contemporaneous handwritten or typed notes referenced above.
- Signed declaration under penalty of perjury.
- Statement written out by witness in his/her own words.
- Contemporaneous shorthand/virtually verbatim notes of words spoken by each witness.
- Transcript of interview prepared by a court reporter.
- Tape-recorded interview.
- Videotaped interview.

I. Establish a system for organizing and maintaining files.

- A log of all activities conducted is important. Appendix D reflects a sample investigations plan template and activity log.

J. Determine the format for and matters to be addressed in the investigator's report, if any.

- A critical threshold issue is whether the investigator's role is simply to investigate the evidence bearing on each allegation and report findings and conclusions on those issues, or whether the investigator also is expected to make recommendations for discipline and other follow-up actions. There are

significant advantages to separating the roles so that those imposing discipline can take into account the employer's history in handling similar situations and the wrongdoer's entire record.

K. Identify other investigatory steps.

L. Notify the appropriate managers and witnesses of the investigation.

- Appendix E contain points that you may wish to include in notifying the complainant that you have commenced the investigation.
- Appendix F is a sample notification to the managers of the complainant and accused to confirm points you made orally when you informed them you would be commencing an investigation.
- Appendix G is a sample notification to the accused to confirm points you made orally when you informed him or her that you would be commencing an investigation.
- Appendix H is a communication to a fact witness to schedule an interview or to confirm scheduling.

M. Review the investigation plan periodically to ensure that it is comprehensive.

VI. INTERVIEW DYNAMICS: HOW TO CONDUCT THE INTERVIEW

A. What are some of the techniques that investigators find helpful for recording information obtained during witness interviews?

- Typically it is appropriate to take detailed notes, as close to verbatim as possible, during each interview. This is important for a number of reasons. It ensures that you have a record of what the witness said so that you can reconstruct the events as accurately as possible. Moreover, in the event that a witness later denies having made a certain statement, you will have a written record of the interview.
- Start a new document for each interview.
- At the top, place the names of those present at an interview, as well as the date, time, place and duration of the interview. Sign and date the notes.
- Report matters asked of the interviewee as well as words spoken and facts provided by the interviewee.

- Differentiate counsel's interpretations, beliefs, assumptions and conclusions about the facts stated from the actual facts provided. Rather than guess at the witness's reasons or intentions, ask the interviewee to explain why he or she said or did something, and write down the response.
- In some investigations, the investigator may need to resolve conflicts in information by making determinations about the credibility of witnesses. Factors such as evasiveness, contradictions in statements, blushing, other facial expressions, potential signs of anxiety such as shaking or perspiration, defensiveness and other demeanor at specific points in the interview may be important in making credibility determinations in disputed un-witnessed cases – particularly when the observations are matched up to the witness's statements (or absence of any statement) at those moments. However, non-legal personnel should *record observations* about matters that reflect upon one's credibility, *not conclusions about observations* unless otherwise instructed by counsel. Counsel must be guided by the applicable law of the jurisdiction at issue in determining whether it is advisable to record its conclusions about witness credibility and conflicts in statements in the interview notes themselves or in a separate document labeled "attorney work product – produced at the direction of counsel."
- At the conclusion of an interview, review with the witness the points contained in your notes to confirm their accuracy and determine whether the interviewee has anything to add.
- Review and finalize the notes immediately upon completion of the interview or other communication. The notes should be legible and provide enough information to understand, when reviewed later, what was asked and what information was provided. Although it is not necessary to write in complete sentences, the notes should be free from misspellings or grammatical errors so that the interviewer is not discredited in the course of litigation.
- Generally, tape recording of interviews is not advisable. Tape recorders often frighten interviewees and make them hesitant to share the facts they have. The recordings arguably will not constitute work product and the interviewer's voice, tone and failure to ask specific questions will be easier to criticize. Experienced investigators may prefer to record all interviews.
- If an interview is to be recorded, check applicable laws for restrictions. Place the recorder in plain view on the table in front of the witness and obtain the witness's consent to turn it on. As soon as the recorder is turned on, indicate the date, time, place and participants, and have the witness affirm on tape his/her knowledge of and consent to the recording.

B. What general interview techniques may be useful?

- Determine the issues that should be explored with each witness.
- Have a full understanding of the law, policy, guideline or agreement that will be critical in reaching a resolution of the issue when the facts are ascertained.
- Understand what facts are necessary to reach a conclusion.
- Determine what written documents or other evidence will assist you in reaching a conclusion or in determining certain facts, and have copies available to review with the witness.
- Prepare a detailed outline of key questions.
 - All incident(s) or matters the witness should be asked about and all details regarding each.
 - Information the witness is believed to have.
 - Information from others the witness may be able to corroborate or refute.

C. What disclosures are appropriate at the commencement of the interview?

Make appropriate disclosures at the commencement of the interview and retain a written record indicating they were made (*e.g.*, a signed memorandum from the interviewee acknowledging the disclosures were made or from two witnesses indicating the disclosures were made). These typically include:

- State what is being investigated, *i.e.*, why the interview is taking place.
- Advise what role the interviewee may play in the investigation.
- Tell how the information received may be used.
- Explain that information obtained during the interview will be reported to those within and possibly outside the company who have a “need to know” of it. Do not promise confidentiality. *See, e.g., Finnerty v. William H. Sadlier, Inc.*, 176 Fed. Appx. 158, 163 (2d Cir. 2006) (“Indeed, it is hard to imagine how a company could keep a complaint confidential and also conduct a fair and thorough investigation.”).

- Explain that the employer takes the allegations seriously and intends to investigate fully, consistent with its policy. Be careful to avoid any suggestion that the employer has already determined that the alleged wrongdoer is guilty or that the matter being investigated lacks merit.
- Explain the importance of accurate information and the individual's obligation to provide truthful, thorough information.
- Caution that attempting to influence the investigation, for example, by pressuring others to support a particular viewpoint or implying retribution if they fail to do so, is improper and may be cause for disciplinary action.
- If applicable law or a collective bargaining agreement covering the interviewee requires that the interviewee be offered union representation, offer it.
- If a union employee requests a representative and has a reasonable belief that the interview may result in disciplinary action, do not proceed without a representative. If a nonunion employee requests a representative, consider whether it is appropriate to allow a representative.
- If counsel/representative is conducting this investigatory interview as an attorney/representative for the company and is not acting as an attorney for the interviewee, so indicate.
- If applicable, indicate that the purpose of the communication is to allow counsel to formulate legal advice for the employer, the interview is privileged and confidential and the witness may not disclose any portion of it to anyone else. Also specify steps the individual must take to protect the privilege. (However, legal counsel and government officials investigating compliance may be advised of facts the witness has and truthful testimony regarding those facts certainly can be given in a legal proceeding.)
- Indicate whether the employee must, may or is encouraged to have his/her own lawyer present.
- Caution that discipline may result. If an attorney is conducting the interview, consider whether it is necessary or at least appropriate to tell the "accused" that he or she may have private counsel present if desired.¹⁵ If criminal prosecution may result, consult legal counsel for advice on any specific disclosures you must make, should make or cannot make.

¹⁵ See ABA Model Rule 1.13(d) (1983 commentary).

- In *TRW, Inc. v. Superior Court*, 25 Cal. App. 4th 1834, 31 Cal. Rptr. 2d 460 (Cal. Ct. App. 1994), the California Court of Appeal granted the defendant employer's writ of mandate to decide whether a privately-owned employer was a governmental actor when its internal security department requested an interview with an employee suspected of violating security rules, and thus, whether the employee had a Fifth Amendment right to counsel at the interview.

TRW, a defense contractor, was required by its contract with the federal government, to establish procedures for reporting suspected security compromises to its internal security department. *Id.* at 1837. TRW learned that employee Ma may have violated security regulations and therefore requested that he participate in an interview with its security department. *Id.* at 1839–41. After Ma retained a private attorney to represent him at the interview, TRW informed Ma that the internal investigation was not a criminal investigation and that an attorney was not necessary. *Id.* at 1841. Ma declined to meet with TRW's security department to answer questions about his alleged security violations without his own attorney. *Id.* TRW therefore suspended Ma and then terminated him for insubordination. *Id.* at 1842.

The court of appeal held that TRW's federal government contract did not convert its conduct into governmental action. *Id.* at 1844. The court concluded that TRW's decision not to allow Ma's attorney to attend the interview was a private decision, not governmental action, since government agents did not participate in such interviews or specify how TRW was to conduct them. *Id.* at 1847. Since TRW was not a governmental actor, the Fifth Amendment did not apply. *Id.* at 1849.

The court explained that as a private employer, TRW:

had the right to question Ma about alleged breaches of security committed by him in the course of his employment. If Ma feared that his answers might tend to incriminate him, he of course could refuse to discuss the matter with his employer; but he cannot in reason or law expect an employer to retain confidence in an employee who refuses to discuss legitimate employer questions about the employee's job performance.

Id. at 1853–54.16.

The court noted that even if TRW had been a governmental actor, its security interviews did not constitute a custodial interrogation; thus, Ma's termination would not have been an unlawful punishment for asserting the privilege against self-incrimination. *Id.* at 1849. The court stated, “[T]he Fifth Amendment right to the presence of counsel under *Miranda* arises only if the person subjected to interrogation is in custody, which has been defined as the equivalent of formal arrest.” *Id.*

“Custody” refers to loss of freedom of movement, not merely a situation with coercive aspects. *Id.* at 1849–50 (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). “The fear that Ma could lose his job or security clearance, or be subjected to criminal prosecution as a future result of the interrogation, is insufficient to covert a noncustodial interrogation into a custodial one.” *Id.* at 1850 (citing *United States v. Bowers*, 739 F.2d 1050, 1055–1056 (6th Cir. 1984)). An objective test, based on what a reasonable person in the suspect's circumstances would perceive, governs whether circumstances are custodial.

The TRW court concluded that “no reasonable person in [the plaintiff's] circumstances could reasonably conclude [that TRW's] proposed security interview would be custodial as defined by the law, i.e., that if he attended the interview he would be under arrest and not free to leave the interview” because “TRW's letters to Ma sought an appointment for an interview as a ‘condition of employment,’ but did not refer to arrest” and Ma was free to leave the interview. *Id.* at 1851–52 (citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)).

- In *Debnam v. Dep't of Correction*, 334 N.C. 380, 432 S.E.2d 324 (N.C. 1993), public employer defendant North Carolina Department of Correction interviewed employee Debnam after he was accused of theft by a colleague. *Id.* at 381. During the interview, Debnam expressed concern that he might be criminally prosecuted and thus refused to answer questions unless and until the employer gave him a written decision as to whether he would face criminal prosecution. *Id.* at 381–82. Defendant informed Debnam that it could terminate him if he failed to cooperate with its internal investigation. *Id.* at 382. After Debnam

¹⁶ In *dicta* the court noted that even “a public employer may terminate a public employee who refuses to answer questions directly, specifically, and narrowly relating to the performance of the employee's duties.” *Id.* at 1853 (citing *Gardner v. Broderick*, 392 U.S. 273, 278 (1968)).

persisted in refusing to respond to any questions, defendant suspended and then terminated him for failure to cooperate with its internal investigation. *Id.*

The North Carolina Supreme Court held that an employer does not violate a public employee's Fifth Amendment right against self-incrimination by terminating him for refusing to answer questions relating to his employment, when the employee is informed that failure to answer may result in his dismissal and the State does not seek a waiver of the employee's immunity from the use of his answers in any criminal action against him. *Id.* at 385, 388-89.

- If the interviewee refuses to participate in the interview or answer questions, explain the consequences.
- Indicate to the "accused" that the interview is designed to give the individual an opportunity to relate his/her version of the events and to advise management of any information it should consider before it finalizes its investigation. If the accused refuses to participate, management should tell the interviewee that the company will base its decision on the other information gathered during the investigation, the inferences drawn from that evidence and the unwillingness of the accused to cooperate in the interview.
- Ask legal counsel whether you must or should advise uncooperative union employee witnesses that you would appreciate their talking with you on a voluntary basis, that they are not required to do so, that they may stop talking at any time, that you are only interested in the facts, that you do not care if they support or do not support the union, that you are not making any promises or threats and/or that their employment will not be impacted simply because they were or were not willing to participate.
- Indicate that the employer's policy prohibits retaliation for participating in an investigation such as this.

VII. INTERVIEW QUESTIONS: THE INFORMATION TO OBTAIN FROM EACH WITNESS

The purpose of the interview is to obtain as much relevant information as possible. You therefore should ensure that your questions adequately cover all of the issues you identified in your initial review of the allegations, and answer “who,” “what,” “when,” “where,” “how” and “why.” Your questions should focus on the witness’ personal knowledge, not speculation.

You should begin your questioning with the broadest, least sensitive questions. This allows the witness to become more comfortable with the interview process. You should ask the most probing, difficult questions last. Finally, you should ask a “catch-all” question to find out if the witness has any other information and/or knows of anyone else with information.

You must emphasize to the witness that you need a sufficiently thorough description of the facts to recreate the scene in a video – enough detail about who was on the scene, where each person was positioned at the start, how and where he/she moved, and what each person said.

Remember, every fact exists at a certain point in time. Therefore, you must note the time frame with respect to each of the facts the witness gives to you. Ask the witness to assign a date (and, where appropriate, time) to everything he or she heard, saw, said, did or thought.

A. General pointers.

- Once you have identified the names of potential witnesses, reviewed relevant documents and other evidence, and examined the relevant provisions of applicable laws, regulations, employer policies and procedures, and collective bargaining agreements, you should outline your interview questions. This is an important step because it will help you think through the issues you need to cover with the witness in a coherent manner.
- You should also consider the order of the interviews you are going to conduct. For example, you may want to interview one witness before another because the first witness could provide information that is helpful in the second interview.
- In investigations regarding specific events, cover all events which occurred during the relevant time frame in chronological blocks of time. Typically it is best not to leave the time block until all details necessary to recreate the scene have been established. For each block of time cover:
 - Exactly what occurred? Who said what? In what order?

- You will need to understand all the events that surrounded each incident of the alleged wrongful conduct. Factually, what did each person do or say?
- When did it happen?
 - Remember that every fact exists at a certain point in time. Therefore, you should attempt to pinpoint when each fact (*i.e.*, each event, decision, comment, conversation or writing) occurred. What happened next?
 - Dates are important because they may have legal significance (*e.g.*, did the employer make an adverse employment decision before or after the employee's complaint). Dates also may trigger certain time limits contained in an applicable collective bargaining agreement or a statutory limitations period or charge-filing deadline, for example.
- Where did it happen?
 - It is always important to identify where the alleged improper conduct occurred. Did the conduct occur at work or away from work? If the conduct occurred at work, did it take place in an open office with other people present, behind closed doors, or in a car? This information will help you identify other possible witnesses. Where the complaint alleges that an employee engaged in a course of inappropriate conduct, you will need to identify where each specific event took place.
- Who was involved or otherwise present?
- Who else may know of relevant information?
- How did it happen?
 - In conducting your investigation, you will need to gather relevant facts that will allow you to understand how the events occurred. How do each of the events relate to each other? For example, if an employee alleges that he has been given more difficult work assignments than other employees, you should gather the facts necessary to allow you to understand the process by which work was assigned.
- Why did it happen?
 - Events do not occur in a vacuum. What motivated each of the

employees involved? For example, if an employee complains that she was improperly denied a promotion, for what reasons did the company not select the employee?

- Who is to blame?
- Could it have been avoided?
- Was this an isolated event or part of a pattern? If there has been a pattern, cover each prior incident.
- What impact, if any, has the event had?
- With whom has the event been discussed?
- Are there any notes, recordings, photographs, physical evidence or other documentation?
- Pin the witness down to facts: specifically what the witness saw, heard, did, smelled or felt (if physical contact was made with or by the witness). Distinguish matters of which the witness has *personal knowledge* from hearsay. Avoid conclusions (*e.g.*, he hurt her); focus on detailed facts (*e.g.*, when I was looking directly at George and standing three feet in front of George, I saw him raise his right arm above his head, clench his fist, and punch Betty in the stomach with his right fist; Betty screamed, “Don’t,” and then she fell backwards, landing with her bottom on the floor.”).
- If you hear unsubstantiated information (rumors), you need to probe for facts that support or refute the rumor. You should write down everything the witness tells you, even if you are not sure the information ultimately will be useful. Where the information provided to you is second or third hand information, you must note that fact in your notes.
- Remember to ask the witness about any documents or physical objects he or she has seen that may relate to, support or refute the allegations you are investigating.
- Note things or events the witness did not see. For example, if you are investigating an allegation that a complainant worked overtime without being paid for it, you would want to note the fact that the witness usually worked at his desk until 6:00 p.m. daily but never saw the complainant, who worked at the adjoining desk, after 5:00 p.m.
- In addition to asking the witness about every action he or she took with

respect to each of the allegations you are investigating, be sure to obtain information about everything the witness did not do. For example, where you are investigating an employee's allegation that he was improperly demoted, you should ask the alleged wrongdoer (or the alleged wrongdoer's supervisor) whether the employee was ever counseled about the activity that prompted the demotion. If the answer is no, you should note the fact that the alleged wrongdoer never counseled or disciplined the employee before demoting him.

- Where you are questioning a witness about his or her own conduct, you should ask about everything the witness considered while engaging in that conduct. For example, where you are investigating a complaint that an employee was discriminatorily denied a promotion, you should ask the decision-maker to explain everything he considered when deciding not to promote the employee. This is another way of obtaining the reasons why the alleged wrongdoer decided not to promote the employee.
- Follow up on answers given with appropriate additional questions.
- Develop questions to corroborate or refute information provided by other witnesses or evidence, typically without disclosing the source.
- If appropriate, develop questions such as: "If your position is accurate, then how can you explain _____?"
- Ask the witness to list all individuals who may have knowledge of any of the events.
 - What knowledge does the witness believe the individual possesses?
 - From what source?
 - Does the witness have reason to believe the individual was present when the incident took place, or did the witness hear it second-hand from someone else?
- Use appropriate question formats.
 - Typically start with open-ended questions. Move to more narrow, focused and even leading questions after the witness has sketched the limits of the events as he/she recalls them.
 - Do not ask compound questions; ask one question at a time.

- Typically ask questions which force the person to relate events chronologically to ensure thorough coverage. Comparing different witnesses' chronological versions will help assess credibility.
- Try to save unfriendly or embarrassing questions until the end; beginning with hostile or tough questions usually causes the interviewee to be defensive.
- Do not conclude the interview without asking the tough questions, even if the interviewee is uncomfortable.
- During this fact-gathering process, neither give the impression that you disbelieve any witness nor express an opinion as to whether something inappropriate occurred.
- Ask additional questions based on the answers to the preplanned questions.
- Obtain confirmation that the interviewer has a complete and accurate understanding of the interviewee's factual knowledge.
- Before excusing the interviewee, repeat to the interviewee the significant points obtained and ask him/her to confirm that the information is accurate and complete. Indicate that confirmation in the notes.
- Ask if the witness has any other information which may be relevant.
- Ask for all corrections the witness has.
- Ask if there are any questions which were not asked that the witness feels should have been asked.
- If any information is not based on personal information, appropriately label it as hearsay, rumor or conjecture.
- Let the witness know that if he/she has forgotten and later recalls any information or documents, the witness should call you immediately when additional information comes to mind.
- If you will be sending the witness a statement, declaration or memorandum for review and signature, explain what you will be doing and obtain a promise of cooperation. Appendix I is a sample transmittal memorandum to a complainant about his or her witness statement. Alternatively, prepare and have the witness read, correct and sign the declaration before leaving the meeting.

- Confirm with the interviewee that no threats or promises have been made.
- Stress the importance of not disclosing the questions asked, information given or other information about the interview to others, to facilitate a thorough, impartial investigation. However, be careful not to threaten discipline or say anything that would limit the witness's right to engage in protected concerted activity (*e.g.*, to discuss with others information the witness possesses about alleged discrimination).
- If appropriate, make a general comment about the process of the investigation from that point on.
- Listen to any questions the person may have and answer if appropriate.
- Be cautious in making statements to the witness because they could be discovered. Be careful not disseminate more information than necessary to ask the questions for which you need answers. Avoid discussing theories, strategy, assessment or other evidence with the witness.

B. What additional strategies may be appropriate in interviewing complainants or purported victims?

1. United States investigations.

- Explain the objective of the meeting.
- The company is committed to compliance with the law and its policies.
- The company will conduct a prompt and thorough investigation to determine whether inappropriate action has occurred.
- If so, it will be stopped and appropriate corrective action will be taken.
- There will be no retaliation against an individual for making a complaint under the company's procedure or to a governmental agency or court.
- The interviewee is expected to provide a thorough, truthful accounting of what has occurred, and to identify all evidence and all individuals who may have knowledge.

- Do not promise confidentiality. Confirm that information will be shared with those who have a need to know.
- Make sure the complainant feels comfortable with you as the investigator.
- Explain the fact you have been trained on how to conduct investigations and do so regularly as part of your job.
- Have the employee articulate that comfort level to you by asking the employee if there is any reason she/he feels you cannot be fair and objective.
- In sexual harassment investigations, consider the desirability of including a female investigator as the sole investigator or as a team member for a female alleged victim because disclosure of information about sexual matters may be embarrassing.
- Consider asking the complainant/alleged victim to write down, either before or at the start of the interview, all incidents of improper conduct and all facts and witnesses which establish that they occurred. (A handwritten statement by the complainant/alleged victim is desirable at this early stage before she/he has counsel who may recast the events in a more negative light.)
- In harassment, discrimination or retaliation investigations, for example, obtain a complete list of each act and each statement that the individual construed as harassment, discrimination, retaliation, offensive, constituting a hostile environment or otherwise improper.
- For each act and for each statement determine:
 - When did this occur?
 - Where did this occur?
 - Who was present when this occurred?
 - Exactly what happened or exactly what was said? (Get a description of the scene, from the first word or gesture up through the end of the incident or conversation.)
 - What conversation occurred with the accused before the incident occurred or the offensive statement was made?

- What acts between the complainant and the accused occurred before the incident occurred or the offensive statement was made?
- What response did the complainant make to the accused when the offensive act was occurring and when it ended?
- What response did the complainant make to the accused when the offensive statement was concluded?
- What did the complainant say to the accused the next time the complainant met him or her?
- Was anyone else present during any of these incidents or conversations? If so, who was present for each of them?
- Did the complainant ever indicate that he or she was offended or somehow displeased by the act or offensive statement?
- Did the complainant ever specifically tell the accused to stop? Did the complainant ever specifically say that he or she found the conduct to be offensive or to constitute harassment? What did the complainant do or say to show his or her displeasure? What was the response of the accused to the complainant's act or statement expressing displeasure? When did the complainant indicate his or her displeasure?
- Did the complainant speak with anyone else about the offensive behavior or statement? With whom did he or she speak? When did this conversation take place? What did the complainant and the others to the conversation say?
- Did the complainant ever make any notes or record of the incident? Did the complainant tape record it? When? What do the complainant's notes or recordings say? Where is a copy? Can we obtain one?
- What did the complainant do after the offensive incident or statement? (Find out whether the individual was able to continue with normal activities.)
- Did the complainant ever seek any medical treatment or counseling as a result of the incident or offensive statement?

- When did the complainant first learn of the employer's discrimination, harassment, retaliation and/or other applicable policy and complaint procedure? To whom did the complainant first report the offensive incident or statement? If the individual did not use the complaint procedure promptly: Why did the complainant wait so long to use the complaint procedure to report the incident or statement?
- Did the accused treat anyone else in a different (*i.e.*, more or less favorable) manner? Who? In what ways was the treatment different? Does the complainant know of any reason why the accused treated the other person(s) in a different manner?
- Did the complainant ever do anything which he or she believes may have caused the accused to believe the complainant would welcome or at least not be offended by the incident or statement that the complainant has found to be offensive? (Although this may be a very sensitive issue, in some cases, you may need to ask about gifts or cards the individual has given to the accused; social interaction, dating or sexual relations the individual has had with the accused; any dirty jokes or profane language the individual has uttered in the presence of the accused; and any invitations the individual has extended to the accused. But, see caution, *supra* at page 40, about investigations abroad.)
- Does the complainant believe that he or she can work with the accused? If so, is there anything the employer can do to assist the complainant in resuming a positive working relationship with the accused? If not, why does the complainant believe that he or she cannot work with the accused? Is the complainant willing to try to work with the accused if a skilled professional meets jointly with the two to discuss the situation and their future working relationship? Does the complainant have any other suggestions which may allow him or her and the accused to work together successfully? Note: These questions may not be appropriate in all cases, particularly where the facts suggest that it is wise to separate the complainant and the accused. Be careful not to leave an impression that the employer is putting pressure on the complainant to agree to lenient treatment of the accused.
- What action does the complainant want the employer to take? Why has the complainant identified this particular action? Note: This is risky but may be appropriate in some cases. See note above and be careful not to make any promises at the interview stage.

- Review important points before concluding the interview.
- Thank the complainant for using the employer's procedure.
- Reaffirm to the complainant that the employer does not permit retaliation or reprisal for making a complaint and to notify you immediately if any occurs. Provide your contact information to the complainant, including 24-hour emergency contact information for a responsible human resources or management representative in appropriate cases.
- Ask the complainant to keep the questions asked and information provided during the interview confidential (except, of course, that legal counsel and government officials responsible for investigating compliance may be advised, the complainant may testify in a legal proceeding regarding the alleged harassment and the complainant retains the right to engage in protected concerted activity).
- Tell the complainant that you may be in contact from time to time and that the complainant's continued cooperation is essential. Circle back to the complainant with any new evidence that calls into question the complainant's position on an issue or credibility.
- Express the employer's commitment to conclude the matter in a timely manner.
- Explain what follow-up documentation, if any, the complainant likely will receive and what the complainant should do with it.
- Confirm that all facts, evidence and persons with potential information have been disclosed to the best of the complainant's ability.
- Following the initial interview, consider whether it would be helpful to send a communication to the complainant/purported victim with a memorandum or declaration setting forth the important facts provided. A sample is set forth in Appendices I and J to this outline. Ask the individual to read, review for accuracy and thoroughness, correct, make appropriate additions to and sign the document before returning it to you no later than a specified date. The signed document can be very useful in ensuring a thorough investigation, discrediting later inconsistent claims and responding to legal claims.

2. International investigations: caution.

Some countries limit or prohibit investigation of some matters. For example:

- France, Germany, Italy, and Spain: Do not permit investigation into romantic and family relationships; such investigation would constitute a breach of the employee's privacy.
- Argentina: Bars investigation into an employee's romantic and family relationships, and an employer may not take action against an employee for engaging in any conduct outside of the employer's premises, unless it is related to the job itself or the employee engages in activity invoking the employer's name or representation.
- Japan: Prohibits employers from interfering in any aspect of an employee's private life unless the employer has highly reasonable grounds which are strongly related to the employer's operation or interests.
- Some countries have detailed laws around prevention and investigation of sexual harassment specifically.
 - Phillipines: Requires employers to have rules on workplace conduct, a written procedure for investigations of same and a committee that is charged with preventing sexual harassment and investigating it.
 - India: Has a statutorily mandated "hearing" process with a panel that must be used for sexual harassment complaints; panel makes recommendation to management.

C. What other matters should be covered with alleged wrongdoers?

- Specifically identify and give the individual an opportunity to respond to each alleged improper statement or action.
- Determine whether any law, policy, collective bargaining agreement or other provision requires or permits you to disclose the source of your information.
- France: The subject may have access to his/her personal data records, but not to the investigation file in its entirety.

- Italy: Access to records is limited in order to protect the privacy of the subject.
- You should disclose the incidents/words in full detail so that the accused has a full opportunity to refute and disprove them. If complicated, state them in writing to facilitate understanding by the accused. Allow the accused to provide additional information within two days after the interview if additional facts come to mind.
- Ascertain the extent and nature of the interactions the accused has had with the alleged victim(s), consistent with applicable law.
 - Have gifts, cards or notes been exchanged?
 - Has there been a dating, sexual, social or working relationship?
 - Has the alleged victim initiated or participated in any sexual discussions, jokes, gestures, *etc.*?
 - Has the alleged victim ever indicated any displeasure with anything the accused has said or done, or ever asked the accused to stop?
- Ask the accused for any facts which show anyone else may have a motive to fabricate the allegations against the accused.
- If the accused denies wrongdoing and claims that the person raising the issue is lying, explore possible reasons.
 - Ask why the accuser would make the claim.
 - Ask if anything has happened between the two individuals which would explain why one would make a meritless complaint.
- Give the accused an opportunity to provide any alibis or mitigating circumstances.
- Ask the accused to identify all persons he/she believes should be interviewed as part of the investigation and what relevant information each is likely to have.
- Request that the accused provide to you all relevant documents and other evidence.

- Ask the accused what steps he/she believes should be taken to ensure a thorough investigation.
- Circle back to the accused with any new evidence that comes to light after the initial interview that calls into question the accused's position on an issue or credibility.

Answers to the following questions during the investigation of employee misconduct may assist managers in determining the appropriate action at the conclusion of the process.

- Is there a rule? Does it prohibit or require certain conduct?
- Did the employee know the rule?
- If not, should the employee have known the rule?
 - Was the rule set out in writing?
 - Was that writing ever provided to the employee?
 - Was the employee ever told to review a handbook or guideline which discussed the rule, policy or procedure?
 - Was the writing ever posted anywhere?
 - Was the rule, policy or procedure discussed at any meetings attended by the employee?
 - Was the rule, policy, or procedure so fundamental that it is an obvious principle?
- Did the employee break the rule? Did the employee "bend" the rule? Did the employee do neither one?

VIII. CONCLUDING THE INVESTIGATION: THE INFORMATION TO INCLUDE IN YOUR FILE AND REPORT

A. What documentation may be appropriate?

Each investigation should have a separate file. Because the investigator's file may not be protected by the attorney-client privilege or the company may choose to waive the privilege, accurate documentation should be carefully created and maintained.

Typical components of an investigation file include:

- Log of investigator's actions and calls by date. *See* Appendix C for a sample.
- All complaints.
- Contemporaneous and final interview notes for each witness.
- All communications to and from witnesses, including complainants.
- All draft and final witness statements.
- All documents and computer records which establish or refute the issues investigated.
- Relevant physical evidence, such as tape recordings, work samples, etc.
- Investigator's report, if any.
- Documents reflecting notification of investigation results and any remedial action.

In creating notes, remember:

- Preserve the attorney-client privilege or attorney work-product protection if available and desired. *See infra* Section IV. Label such documents as "privileged attorney-client communication," "attorney work-product." and/or "attorney-directed communication – attorney work product."
- Think before writing. If no privilege or work product protection is desired, only place facts received on paper and avoid investigator's opinions or conclusions (unless requested in a final report or required to assess credibility), doodles and notes on extraneous matters. If the objective of an attorney-conducted or attorney-directed investigation is to cover it under the attorney-client privilege and/or attorney work product doctrine, make strategic decisions about where in the investigation documents to record mental impressions and privileged advice.
- Review all notes promptly after creation for factual, spelling and grammar errors. Correct errors to avoid embarrassment to the investigator and employer.

- Documents, other than possibly working drafts, should not be destroyed once an investigation has commenced.¹⁷ Whether working drafts (of documents other than statements sent to witnesses) can be destroyed when the next version is prepared will depend on the applicable law in the jurisdiction, whether a legal claim has been asserted and the employer's document retention policy.
- Inform persons who may have relevant documents to maintain them.

B. Is a summary report of the investigation required?

Some investigations require no written summary report because the managers responsible for employment decisions interview the percipient witnesses and/or read the investigation file, including the witness interview notes. In more complicated cases, a summary report is a useful introduction for the decision-makers.

C. What points should an investigation report typically address?

Once you have completed your investigation of the allegations, you need to prepare a report documenting your findings. Your report should be neutral, objective, precise and thorough. Typically it will include the items listed in Appendix K, including the date the investigation commenced, actions taken to investigate, persons interviewed, persons from whom written statements were obtained, documents reviewed, other evidence reviewed, the allegations, and the evidence and findings for each allegation. If you are asked to make recommendations for discipline and other follow-up action, set them out, along with the basis for each of them.

With respect to each allegation you should state the allegation, followed by:

- The complainant's relevant evidence related to that allegation.
- The relevant evidence provided by the accused related to that allegation.
- The relevant evidence of other witnesses by name related to that allegation.
- The relevant evidence you found in documents and other evidence related to that allegation.
- Your findings as to each allegation and the basis for those findings.

¹⁷ See *Cappellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989) (severe sanctions imposed for destruction of documents).

Where there are factual disputes, you should set forth a statement of facts relating to the credibility of each witness and/or document. For example, if you observed during a witness interview that the witness evaded answering pointed questions related to the allegation, you should note that fact. However, you are noting factual observations in this section, not your conclusions about whether you think the witness was telling the truth. Thus, you should write “John Smith looked directly at the interviewer and sat calmly throughout the interview except during one question. When asked if he placed the money from customer Jones into the cash drawer, his hands started shaking, his face turned bright red and he stared at the ceiling.” Do not say “John Smith was lying.”

Similarly, you should note facts relating to the credibility of documents. For example, you should note the fact that a certain document is missing a signature (if a signature should normally appear on the document), or that a document referencing a particular event is dated before the event actually happened.

Your conclusion regarding the merit of each allegation should be based upon the specific evidence revealed during the investigation. In this conclusion, you should explain how you resolved any factual disputes or inconsistencies in the information you gathered. You should do this by (1) identifying each factual dispute (i.e., whether John Smith improperly touched Mary Jones); (2) identifying the witnesses or documents that corroborate or refute each point; (3) stating your conclusion with respect to each factual dispute (i.e., John Smith improperly touched Mary Jones); and (4) explaining what factors helped you resolve the factual conflict (i.e., numerous employees witnessed the improper touching).

However, there may be times when you are unable to reach any conclusion regarding the merit of the allegations, either because you are unable to obtain sufficient information about the allegations (for example, if the complaining employee refuses to cooperate with the investigation) or because your investigation reveals facts that call into question the truthfulness or accuracy of each witness’s statements. In those instances, you should state that you are unable to reach a conclusion regarding the allegation, and explain why.

Avoid mention of the content of any privileged communication with counsel.

Once you have prepared the report, you should send it to the designated manager and/or legal counsel, along with the underlying investigation file. The employer should have a designated location for storing all such investigations for a specified period (or through the duration of any litigation hold if longer).

It also may be appropriate for the investigator to meet with the appropriate employer representatives (e.g., human resources department, appropriate line management representative, and/or legal counsel) to discuss the facts then known and any additional questions which should be asked or facts which should be obtained.

D. Special considerations outside of the United States.

1. Dismissal protection and fair process.

- Right to appeal or respond to findings: Some countries require the employer to give the employee who is the subject of the investigation the right to appeal, either to higher management, a works council or a court.
- Timing and termination/discipline notification requirements: Some countries limit the period of time that can elapse between the discovery phase of an investigation and action resulting from the investigation; the employer will lose its right to demote or terminate in connection with an investigation if it takes too long.
- Involvement of employee representatives: Employees may have a right to be accompanied in the investigation (including notification of results) by a representative, works council member, and/or coworker.
- Disciplinary action for refusal to cooperate: Review local law. For example, in Japan, such discipline is appropriate but such a policy must be stated in the work rules.

2. Data and other privacy restrictions.

- Data and other privacy restrictions are beyond the scope of this paper but may impose both affirmative requirements and present limitations on employers in employment investigations.

IX. MANAGEMENT'S CONSIDERATION AND USE OF THE INVESTIGATION

The decision-makers should read the investigator's report and consider not only the evidence and actual statements of the witnesses but also their reputation, motive to fabricate and other conduct as reported by eyewitnesses.¹⁸

The decision-makers would be well-advised to read the actual interview notes, declarations or other statements, other important documents gathered during the

¹⁸ See *Martin v. Norbar, Inc.*, 537 F. Supp. 1260, 1262 (S.D. Ohio 1982) (court held that it would be reasonable for the employer to credit the alleged harasser's version over plaintiff's version only if it could demonstrate that it considered factors such as the parties' motives to lie and the alleged harasser's reputation for sexual harassment in reaching its conclusion).

investigation and personnel files of critical witnesses if credibility is at issue. The importance of this review is illustrated by *Kestenbaum v. Pennzoil*.¹⁹ Pennzoil had received an anonymous letter claiming that the plaintiff engaged in sexual harassment, illegal conduct and mismanagement of one of its resort ranches. A company investigator initiated an internal investigation. The investigator interviewed several employees and prepared a written summary report to Pennzoil officials. Pennzoil confronted the plaintiff with the allegations and allowed him to respond, to comment about each of the persons interviewed and to name witnesses who would speak on his behalf. The plaintiff was terminated based upon the summary report. He then sued for wrongful termination, claiming “that without fair investigation and consideration of the allegations and his response, he was terminated on the grounds of sexual harassment for which he was innocent.”²⁰ A seven figure judgment for the plaintiff was affirmed by the New Mexico Supreme Court.²¹

The quality of the investigation and the extent of the decision-makers’ knowledge were critical factors in the case. The court stated:

[T]here was substantial evidence to support the jury finding that Pennzoil did not act upon reasonable grounds. In her deposition, Pennzoil’s investigator admitted on cross-examination that her summary was not intended to stand alone, that it failed to differentiate between first-hand knowledge, attributed hearsay or mere gossip or rumor, and no attempt was made to evaluate the credibility of the persons interviewed. Nevertheless, the only document reviewed by vice-president Rundle before he fired Kestenbaum was his investigator’s summary of interviews.

Moreover, he did not take a close look at the way the investigation had been handled, but relied upon the professionalism of his investigators. At trial, Kestenbaum presented an expert who testified that Pennzoil’s investigators did not observe the standards of good investigative practice and who identified numerous deficiencies in the investigation.²²

Management, not a neutral investigator, should determine the most appropriate action to be taken in light of the facts available, which may of course be inconclusive. If

¹⁹ 108 N.M. 20, 4 IER Cas. (BNA) 67 (1988), *cert. denied*, 490 U.S. 1109 (1989).

²⁰ *Kestenbaum*, 4 IER Cas. (BNA) at 68.

²¹ *Id.* at 74.

²² *Id.* at 73.

harassment has been alleged, the employer must take action which is “reasonably calculated to end the harassment.”²³ The options to be considered include:

- Discharge of the accused, if the investigation reveals that the activity in question occurred and violated law or company policy, and there are no mitigating circumstances.
- A strong written warning to the accused, making clear that bad judgment was used and any recurrence will not be tolerated.
- A written memo to the accused stating that the company has not been able to determine whether any unlawful or policy-prohibited action occurred, but reiterating the company’s policy against whatever action was alleged, and making clear that any such activity in the future, if proven, will not be tolerated.
- Transferring one or both of the persons involved to a different reporting relationship, job or facility in order to prevent any recurrence, keeping in mind, of course, that the determination of which of the two persons should be transferred is often a difficult and sensitive issue itself, with potential legal consequences if either person is transferred. Given the legal consequences of your decision, legal counsel often should give advice before this decision is made.

Once the tentative decision has been made in light of the available facts, make certain again that all of the relevant facts have been obtained and thoroughly considered, that any person who is to be adversely affected by the decision has been given a full opportunity to explain his or her position on the events in question, and that the facts which support the decision have been documented appropriately in writing.

Management, not the investigator, should communicate the decision to all of the persons in question in a discreet and confidential manner, accompanied by a written statement to each person indicating the conclusion reached and the employer’s opposition to the kind of activity which was alleged to have occurred (whether or not the investigation concluded that it occurred). The communication should explain to the complainant and the accused any disciplinary action or other corrective steps to be taken, and urge the complainant to come forward immediately if there is any recurrence of the activity or retaliation. Sample provisions for these notices are in Appendices L, M and N.

²³ *Katz v. Dole*, 709 F. 2d 251, 256 (4th Cir. 1983).

If the results of the investigation are inconclusive, the company should not indicate that it concludes that no [harassment] occurred because that is tantamount to accusing the complainant of lying (unless such dishonesty has been established by clear and convincing evidence).

It typically is advisable to have a designated representative contact a complainant periodically for at least two months to ensure the absence of harassment, discrimination, retaliation and other unlawful conduct.

In some cases it may be appropriate for the decision-makers to issue a written and/or oral communication to all management and/or non-management personnel, or other persons who may have had some involvement in the particular incident or activity in question, again reiterating in writing the importance of compliance with the employer's policy. If refresher training is needed, present it.

Remember that decisions regarding harassment and other misconduct claims must be made carefully in concert with officials (*e.g.*, senior human resources personnel) familiar with past cases and employer policy. Resolution of these claims should not be left solely to operational personnel who may not be familiar with employer resolution of other cases and other known incidents involving the same accused.

It is important to log the concluding and follow-up actions in the file. A sample log is included at Appendix O.

X. EXTERNAL INVESTIGATIONS: EMPLOYER OBLIGATIONS UNDER THE AMENDED FAIR CREDIT REPORTING ACT

Many employers hire outsiders, such as private investigators, outside counsel and human resources contract professionals, to conduct workplace investigations or aspects of those investigations. Amendments to the Fair Credit Reporting Act ("FCRA" or the "Act") that went into effect on September 30, 1997 and were further refined in November of 1998 (made retroactively effective as of September 30, 1998), may impact aspects of investigations that are conducted by non-employees.²⁴ On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act of 2003,²⁵ 15 U.S.C. § 1681a, *et seq* ("FACT Act"). It lessens former-FCRA restrictions on third-party investigations of alleged employee wrongdoing but strengthens the FCRA's prohibition on the reporting of medical information by consumer reporting agencies to an employer unless the employee or prospective employee provides prior consent. The law also reauthorizes the FCRA.

²⁴ It is important to check applicable state laws as well.

²⁵ Pub. L. No. 108-159, 117 Stat. 1952 (2003).

Section 611 of the FACT Act, 15 U.S.C. § 1681a(x), effective March 31, 2004, exempts third-party investigations of alleged employee wrongdoings from the FCRA's notice and disclosure requirements. Employers that hire outside investigators will not have to notify targeted employees before conducting an investigation, obtain the employee's prior consent or fully disclose investigative reports before taking any adverse action against the employee. Instead, employers must only disclose, after taking adverse action, a summary of the report that does not disclose the sources of information.

A. To whom does the FCRA apply?

1. Broad definitions

Unwary employers run the risk of violating the FCRA because, although its title implies that its application is limited to traditional "credit reports," the Act defines its terms broadly. These broad definitions mean that the Act now applies to information not traditionally considered a "credit report" and to an individual or entity not traditionally considered a "credit reporting agency." Thus, while conducting a background check or conducting an investigation through an outside investigator, an employer may unknowingly gather certain types of information in a way that subjects it to the FCRA, its related duties and obligations, and liability under the Act. Thus, the title of the Act – the "Fair Credit Reporting Act" – itself is misleading.

2. Specific examples.

- a. "Person": "any individual, partnership, corporation, trust, estate, cooperative, association, government or government subdivision or agency, or other entity." 15 U.S.C. § 1681a(b) (emphasis added).
- b. "Consumer": "an individual." 15 U.S.C. § 1681a(c) (emphasis added).
- c. "Consumer report": "any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . (b) employment purposes (2) [T]he term does not include (A)(i) any report containing information solely as to transactions or experiences between the consumer and the person making the report" 15 U.S.C. § 1681a(d) (emphasis added).

- d. “Investigative consumer report”: “a consumer report or portion thereof in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.²⁶ However, such information shall not include specific factual information on a consumer’s credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.” 15 U.S.C. § 1681a(e) (emphasis added).
- e. “Consumer reporting agency”: “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purposes of furnishing consumer reports to third parties” 15 U.S.C. § 1681a(f) (emphasis added).
- f. “Employment purposes”: “evaluating a consumer for employment, promotion, reassignment, or retention as an employee.” 15 U.S.C. § 1681a(h) (emphasis added).

²⁶ See Thomas E. Kane, [FCRA Staff Opinion: Kane-Hinkle](http://www.ftc.gov/os/statutes/fcra/hinkle.shtml) (visited July 9, 1998) <http://www.ftc.gov/os/statutes/fcra/hinkle.shtml>. (If the investigator intends only to fact check such objective, nonadverse matters as dates of employment or education, for example, but the information provider “offers opinions or other unsolicited information, such as statements that the individual had a drug habit or was reprimanded for poor job performance, the conversation would become an interview for purposes of the FCRA. Nonetheless, if the [Consumer Reporting Agency] does not include the opinions or other unsolicited information in its consumer report, the consumer report . . . would not be an investigative consumer report. If, however, the CRA includes the opinions or other unsolicited information in the report, the report would become an investigative consumer report, despite the fact that the CRA did not originally intend to obtain the information.” Before the employer takes an adverse action based upon an investigative consumer report, it must give the employee a copy of the report and the summary of consumer rights prescribed by the Federal Trade Commission – even though “former employers as well as other interviewees may be hesitant to respond to CRA inquiries.”).

B. What is a “consumer reporting agency”?

1. **Non-governmental agencies only.** The language of the Act indicates it applies to the use of any non-governmental outside source used to collect criminal background information regardless of the type or size of the source. The Act does not apply to an employer’s direct use of a governmental agency to obtain public records.²⁷

2. **May include individuals.** As the Act defines a “consumer reporting agency” as a “person,” the Act conceivably could apply to an employer’s use of any private outside agent regardless of the size of the agency. Even an individual, such as a private investigator, could be construed as a “consumer reporting agency.”

3. **Must regularly engage in practice of assembling or evaluating information.** An agency under the Act must regularly assemble or evaluate consumer information, rather than doing so on a one-time or rare basis. “Regularly” has not been defined.

4. **Must actually distribute consumer reports.** An agency under the Act cannot merely assemble information; it must actually furnish “consumer reports” to third parties.

5. **The FACT Act negated a 1999 Federal Trade Commission staff interpretation that was troublesome for employers.** On April 5, 1999, the staff of the Federal Trade Commission (“FTC”), the agency charged with enforcing provisions of the Act, issued an opinion letter stating that “once an employer turns to an outside organization for assistance in investigation of harassment claims . . . the assisting entity is a CRA because it furnishes ‘consumer reports’ to a ‘third party’ (the employer).” See Christopher W. Keller, FCRA Staff Opinion: Keller-Vail (visited April 5, 1999) <http://www.ftc.gov/os/statutes/fcra/vail.shtm>.²⁸

²⁷ See, e.g., *Ollestad v. Kelley*, 573 F.2d 1109, 1110 (9th Cir. 1978) (“The Act does not apply to records held by federal agencies and does not provide a basis for compelling the Federal Bureau of Investigation to amend records containing allegedly false information about a former Bureau employee.”); Clarke W. Brinckerhoff, FCRA Staff Opinion: Brinckerhoff-Slyter (visited June 12, 1998) <http://www.ftc.gov/os/statutes/fcra/slyter.shtm>. (FCRA applies to private investigator’s search of criminal or civil court records as part of a company internal investigation, even if investigator simply forwards the records to the employer); Clarke W. Brinckerhoff, FCRA Staff Opinion: Brinckerhoff-Leathers (visited September 9, 1998) <http://www.ftc.gov/os/statutes/fcra/leathers.shtm>. (if report is given orally to employer, the employer may comply with the Act by orally telling the affected individual the content before taking adverse action).

²⁸ The FTC staff opinion letters are advisory in nature and do not necessarily reflect the views of the Commission or any particular Commissioner.

Congress responded to employer protests that the integrity of investigations would be compromised if they had to disclose the report and investigator's file by amending the FCRA to require only disclosure of a summary containing the nature and substance of the report (and not the sources). The December 2003 amendment, 15 U.S.C. § 1681(a), provides:

(x) Exclusion of Certain Communications for Employee Investigations. –

(1) Communications described in this subsection. – A communication is described in this subsection if –

(A) but for subsection (d)(2)(D) of this section, the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of – (i) suspected misconduct relating to employment; or (ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and

(D) the communication is not provided to any person except – (i) to the employer or an agent of the employer; (ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government; (iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee; (iv) as otherwise required by law; or (v) pursuant to section 1681f of this title.

(2) Subsequent disclosure. – After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) of this section an investigative consumer report need not be disclosed.

C. What is a “consumer report”?

1. Includes criminal background reports. The FCRA applies to an employer's use of criminal background checks in the hiring process and all phases of the employment relationship. Although the legislative history of the Act does not specifically address its application to criminal background checks, the language of the Act clearly implies that the drafters contemplated such an application, and courts have agreed.

- a. **Definition extends to criminal background information.** The definition of “consumer report” is not limited to a traditional credit report. A “consumer report” includes information on the individual’s “character,” “general reputation” and “personal characteristics.” Criminal background information falls within one or more of these categories.
- b. **Scope.** Civil litigation and arrest history can only be sought for seven years prior to the date of the report. This limitation was lifted as to criminal convictions by the 1998 amendments to the Act. An employer may now seek information about criminal convictions regardless of date. 15 U.S.C. § 1681c(2).²⁹
- c. **Case law.** Courts have found that criminal background checks are the proper subject of a claim under the Act.³⁰

2. **Includes motor vehicle records.** Many employers who employ a professional driving force routinely request information regarding the applicant’s or employee’s driving history from non-governmental third-party sources. The FTC has interpreted it to apply to state motor vehicle department records. *Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1095 (5th Cir. 1992).

3. **Does not include reports of transactions between consumer and information provider.** Courts have held that the Act does not apply

²⁹ Information regarding bankruptcy filings where the date of entry of the order for relief or the date of adjudication is within up to ten years of the date of the consumer report may also be included. 15 U.S.C. § 1681c(a)(1). **But note:** An individual may not be discriminated against with respect to employment or discharged from employment because he/she has filed for bankruptcy or failed to pay a debt discharged in bankruptcy. 11 U.S.C. § 525(b).

³⁰ See, e.g., *Wiggins v. District Cablevision, Inc.*, 853 F. Supp. 484, 489-92 (D.D.C. 1994) (An employer requested a criminal background check on a Mr. James Russell Wiggins. A “consumer reporting agency” obtained records from the superior court criminal records division that a Mr. James Ray Wiggins had a prior cocaine conviction. The plaintiff alleged that this misidentification and the defendant’s failure to hire him constituted a violation under the Act. The court denied the defendant’s motion to dismiss as to some of plaintiff’s claims under the FCRA.).

to reports containing only information about a transaction between the consumer and the person or entity making the report.³¹

4. **Applicants and employees only.** An employer may not obtain a consumer report on family members, friends or relatives of an applicant or employee.³²

5. **Blanket authorization for employer procurement of a consumer report in connection with employee's continued employment has been held to be permissible.** In a recent case, a U.S. District court upheld an employer's requirement that its employees sign a blanket authorization, which would permit the employer to obtain consumer reports on such employees without further authorization on the part of the employees. However, the court also noted that once an employer decides to use these reports and take adverse action against their employees, they must follow procedures to ensure that they are being used fairly and accurately.³³

D. What is an "investigative consumer report"?

1. **Information obtained through interviews performed by outside agency.** In "investigative consumer reports," information is obtained through interviews with "neighbors, friends, or associates" of the current or potential employee, as opposed to traditional "consumer reports" where information is obtained from databases and other printed records. The common employer practice of

³¹ See, e.g., *Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1096-97 (5th Cir. 1992) (Testing laboratory's report to employer regarding drug test results performed on employee's urine was not covered by the Act. Although the laboratory did not collect the urine sample, the report comprised the laboratory's first-hand experience in testing the sample, not information gathered from outside sources.).

³² See, e.g., *Zamora v. Valley Federal Sav. & Loan Ass'n of Grand Junction*, 811 F.2d 1368, 1370 (10th Cir. 1987) (Even where the intended purpose and actual use of a credit report on the spouse of an employee being considered for a security-sensitive position is to evaluate the employee's own trustworthiness for the employment position, the employer still may not obtain a credit report on an employee's spouse.).

³³ See, e.g., *Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429 (M.D. Pa. 2004) (FCRA does not prohibit blanket authorizations that permit the employer to obtain written consumer reports on employees in the future without further employee authorization; subject to strict compliance with FCRA, an employer can require employee authorization as a condition of employment).

checking references could constitute an “investigative consumer report” if the employer uses an outside agency to perform the reference check.³⁴

2. **Act does not apply to reference checking performed by employer.** If an employer personally checks references of job applicants or current employees, the Act would not apply. The Act only applies to the use of a “consumer reporting agency.”

3. **Act does not apply unless investigation is actually performed.** If an investigation is requested but never performed, the duties and obligations of the Act do not apply.³⁵

E. The “reasonable procedures” defense.

1. **Users of consumer reports.** Employers may avoid liability under the Act by taking steps to insure compliance with the procedures mandated by the Act for the users of “consumer reports.” The Act provides:

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

15 U.S.C. § 1681m(c) (emphasis added). To qualify for the reasonable procedures defense, the following steps should be followed:

Step 1: Provide clear, conspicuous written disclosure to employee. Before a report is procured or caused to be procured, the

³⁴ Clarke W. Brinkerhoff, FCRA Staff Opinion: Brinkerhoff-Pickett (visited July 10, 1998) <http://www.ftc.gov/os/statutes/fcra/pickett.shtm>. (FCRA applied to background investigatory interviews completed by private investigator, who contacts persons identified by the applicant and/or others identified as inquiries are made, to verify “dates of employment, positions held, reasons for leaving, performance, character, whether the person would be rehired and the like.” Act would not apply to same inquiries made by employees of employer for whom the investigation is being conducted.)

³⁵ See, e.g., *Kates v. Crocker Nat’l Bank*, 776 F.2d 1396, 1398 (9th Cir. 1985) (Where a bank notified a customer that an investigation might be made, but the investigation was never actually performed, even though the bank failed to respond to the customer’s written request for disclosure of the nature and scope of the investigation, the bank did not violate the Act.).

employer must provide a clear and conspicuous disclosure in writing to the consumer informing him/her that a consumer report may be obtained for employment purposes. 15 U.S.C. § 1681b(b)(2)(A)(i).

The employer may make this disclosure at the commencement of or any time during employment so long as it is within three (3) days from the date the report is first requested.

David Medine, FCRA Staff Opinion: Medine-Meisinger (visited August 31, 1999)
<http://www.ftc.gov/os/statutes/fcra/meisinger.shtm>.

Step 2: Obtain prior written authorization from employee. The employer must obtain prior authorization in writing from the applicant or employee to procure the report. 15 U.S.C. § 1681b(b)(2)(A)(ii).³⁶

[A]n employee's consent...can be routinely obtained at the start of employment, thereby relieving the employer of the awkward prospect of having to ask a suspected wrongdoer for permission to allow a third party to provide an investigative (or other) consumer report to the employer. . . . Another way for an employer to comply with these FCRA requirements without alerting a suspected wrongdoer is to ask all current employees to sign a consent form, and provide them any required notice, at the same time.

David Medine, FCRA Staff Opinion: Medine-Meisinger (visited August 31, 1999)
<http://www.ftc.gov/os/statutes/fcra/meisinger.shtm>.

More recently, the FTC staff opined that the FCRA “does not prohibit an employer from taking adverse action against an employee or applicant who refuses to authorize the employer to procure a consumer report.” Nor does the FCRA specifically authorize such action.

FCRA Staff Opinion: Brinckerhoff-Fischel (visited October 1, 1999)
<http://www.ftc.gov/os/statutes/fcra/fischel.shtm>.

³⁶ The 1998 amendments allow the disclosure and authorization to be in one document.

- Step 3: Provide certification of compliance to agency. Before obtaining the report, the employer must certify to the “consumer reporting agency” that the above steps have been followed, that the information being obtained will not be used in violation of any federal or state equal opportunity law or regulation, and that, if any adverse action is taken based on the consumer report, a copy of the report (if not excepted by 15 U.S.C. § 1681a(x) which requires only a summary) and a summary of the consumer’s rights will be provided to the consumer. 15 U.S.C. § 1681b(b)(1).³⁷
- Step 4: Provide required materials to employee. In most cases, before using the report to take any adverse action against an applicant or current employee (*e.g.*, a decision regarding the hiring, promotion, reassignment, or retention), the employer must provide to the applicant or employee:
- a. A copy of the report (or a summary if 15 U.S.C. § 1681a(x) applies); and
 - b. A description in writing of the individual’s rights under the FCRA.³⁸ 15 U.S.C. § 1681b(b)(3)(A)(i) and (ii).

The Act requires that the above information be provided before using the report to make an adverse employment decision *unless* 15 U.S.C. § 1681a(x) applies (in which case the employer need only provide a summary *after* taking adverse action). Conceptually, this implies that the applicant or employee will be given the chance to explain any information contained in the report. Ironically, the Act does not require an employer to actually take into account the applicant’s or employee’s explanation in making the employment decision.

The FTC staff has suggested that “an investigative agency may draft its report to the employer to minimize

³⁷ The entity or person providing the “consumer report” should offer a customer certification form that complies with the Act. If such a form is not offered, it should be sought from the “consumer reporting agency” when requesting a consumer report.

³⁸ A copy of the “Summary of Rights” form promulgated by the Federal Trade Commission is Appendix P. Please note that this “Summary of Rights” is the most current version provided by the FTC, however, it is not complete in light of the recent legislation. The FTC is currently updating the “Summary of Rights”.

risks attendant to such disclosure, most importantly by not naming parties that provide negative information regarding the employee.” David Medine, FCRA Staff Opinion: Medine-Meisinger (visited August 31, 1999) <http://www.ftc.gov/os/statutes/fcra/meisinger.shtm>.

However, a report that excludes such information may be subject to attack. *See, e.g., Kestenbaum v. Pennzoil*, 108 N.M. 20 (1988), *cert. denied*, 490 U.S. 1109 (1989).

- Step 5: Provide written notice to employee.³⁹ If an employer decides to take an adverse action based on information contained in a “consumer report,” the employer must provide:
- a. Oral, written or electronic notice of the adverse action to the consumer;
 - b. The name, address and telephone number of the “consumer reporting agency” (including a toll-free number, if the consumer reporting agency is a nationwide consumer reporting agency) that provided the report;
 - c. A statement that the “consumer reporting agency” did not take the adverse action and is not able to explain why the decision was made;
 - d. A statement setting forth the consumer’s rights to obtain free disclosure of the consumer’s file from the “consumer reporting agency” if the consumer requests the report within sixty (60) days (unless 15 U.S.C. § 1681a(x) applies in which case the employer provides only a summary without sources); and
 - e. A statement setting forth the consumer’s right to dispute directly with the “consumer reporting agency” the

³⁹ *See Mathews v. Gov’t Employees Ins. Co.*, 23 F. Supp. 2d 1160, 1161 (S.D. Cal. 1998) (Company admitted violation of 15 U.S.C. § 1681m(a) when its local office’s policy was to make adverse employment decisions based on credit reports without providing notice to the affected applicants; court rejected reasonable procedures defense on ground that it “does not protect intentional policy decisions made by senior level managers who are reasonably expected either to know the corporate policy or the law or to consult with those who do.”).

accuracy or completeness of any information provided by the “consumer reporting agency.” 15 U.S.C. § 1681m(a).⁴⁰

Note: Steps 4 and 5 are required only if the employer’s adverse action is at least partially due to information provided by the “consumer reporting agency.” If an adverse action is taken and the consumer report did not influence the employment decision, the employer does not have to provide the information required by these steps. However, the employer must ensure that it gives the employee no reason to believe that the consumer report influenced the decision. It cannot rely on the defense that the decision was not based on the information in the report if its actions suggest that the decision was influenced by the report.

2. Special rules for commercial drivers. The 1998 amendments relaxed the requirements of Steps 1, 2 and 4 where the employer is obtaining a consumer report on an applicant for a commercial driving position, and there has been no personal contact between employer and applicant before the employer’s consumer report request (*e.g.*, communication was only by telephone, mail or electronic mail). 15 U.S.C. § 1681b(b)(2)(B)(i) and (ii).

- a. The employer may give oral or electronic notice of its intent to obtain a consumer report, and can act on oral or electronic consent of the applicant; and
- b. The employer may implement an adverse employment action before providing a copy of the summary of rights and consumer report to the applicant. However, within three (3) days after taking the adverse employment action, the employer must give oral, electronic or written notice: (a) disclosing that an adverse action was taken in whole, or in part, based on a consumer report; (b) listing the name, address and telephone number of the “consumer reporting agency” (including a toll-free number, if the consumer reporting agency is a nationwide consumer reporting agency) that provided the report; (c) stating that the “consumer reporting agency” did not take the adverse action and is not able to explain why the decision was made; and (d) setting forth the consumer’s rights to obtain free disclosure of the consumer’s file from the “consumer reporting agency” if the

⁴⁰ Although this information can be communicated orally, it is prudent to communicate the information in writing so that there can be no dispute that the information was provided.

consumer requests the report within sixty (60) days. 15 U.S.C. § 1681b(b)(3)(B)(i)(I-IV).

3. Users of investigative consumer reports. To qualify for the reasonable procedures defense where an investigative consumer report will be obtained, the employer must show it complied with the Act by following these steps:

- Step 1: Provide written disclosure and statement of rights to employee. The employer must disclose to the applicant or employee that an “investigative consumer report” may be obtained. This written disclosure must be mailed, or otherwise delivered, to the consumer not later than three (3) days after the date on which the report is first requested. The disclosure may be on the employment application itself. The disclosure must include a statement informing the consumer of his/her right to request additional disclosures of the nature and scope of the investigation, and must include a copy of the “summary of rights” form.
- Step 2: Provide complete disclosure to employee upon written request. Upon written request of the applicant or employee made within a reasonable period of time of the required written disclosures, the employer must make a complete disclosure of the nature and scope of the investigation that was requested. This information must be made in a written statement that is mailed, or otherwise delivered, to the applicant or employee no later than five (5) days after the date on which the request was received or the report was first requested, whichever is later in time. 15 U.S.C. § 1681d(b).
- Step 3: Same as for consumer reports. *See, supra*, Section E.1.
- Step 4: Same as for consumer reports (except that summary of rights need not be provided again). *Id.*
- Step 5: Same as for consumer reports. *Id.*

4. Express consent for release of medical information required. A “consumer reporting agency” may no longer provide “consumer reports” for employment purposes that contain medical information unless the applicant or employee expressly consents to the release of the medical information in addition to authorizing the employer to obtain a “consumer report” generally. 15 U.S.C. § 1681b(g).

5. **Bottom line.** To maximize the ability to qualify for the reasonable procedures defense, it is not enough for the employer to adopt a policy to adhere to the foregoing procedures; it also should implement safeguards to ensure that employees and agents who make the request for consumer reports and use the information actually follow the procedures.⁴¹

F. Penalties under the FCRA.

1. **Civil liability.** The Act contains two provisions imposing civil liability for violations.

a. **Willful noncompliance.**

- (1) Required showing. The affected applicant or employee need not show malicious conduct.⁴²
- (2) Remedies. An applicant or employee who proves a willful violation can recover nominal damages (up to \$1,000 if no actual damages exist) or actual damages, punitive damages and attorney's fees and costs. 15 U.S.C. § 1681n.⁴³

⁴¹ See, e.g., *Carroll v. Exxon Co., U.S.A.*, 434 F. Supp. 557, 560 n.6 (E.D. La. 1977) (finding willful noncompliance with FCRA despite asserted reasonable procedures defense). Cf. *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 878 (7th Cir. 1976) (overruled on other grounds) (The court, construing the “reasonable procedures” defense in the Truth in Lending Act, held that the “reasonable procedures defense” requires “more than just the maintenance of procedures,” but also an “extra preventive step, a safety catch, or a re-checking mechanism.”).

⁴² See *Wiggins*, 853 F. Supp. at 490 (where the employer fired the plaintiff based on information in the consumer report and made no disclosure of the name and address of the consumer reporting agency, the court denied the employer's motion to dismiss, and held that willfulness did not require a showing of malice or evil motive, but did require a showing of “knowingly and intentionally committing an act in conscious disregard for the rights of others”).

⁴³ *Mathews*, 23 F. Supp. 2d at 1165 (reasonable fact-finder could find that the company acted willfully because it recklessly disregarded its FCRA responsibilities where officers at headquarters knew FCRA requirements but did not know about the local office's illegal policy and where local officers were completely unaware of the company's policies and the FCRA requirements).

b. Negligent noncompliance.

- (1) Remedies. The affected applicant or employee can recover actual damages and attorney's fees and costs. 15 U.S.C. § 1681o. Actual damages could include many elements, including out-of-pocket expenses, back pay, front pay, future damages or damages of alleged emotional distress. Courts have allowed plaintiffs to recover for their mental distress under the Act.⁴⁴

2. Criminal liability. The Act also imposes criminal liability on any person “who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses.” 15 U.S.C. § 1681q.

- a. Penalties.** Such knowing and willful procurement of information under false pretenses is punishable by a fine under Title 18 of the United States Code or imprisonment for not more than two years, or both. *Id.*
- b. Must have legitimate employment purpose to avoid criminal liability.** “False pretenses” are generally determined by whether the consumer report was obtained for a permissible purpose as defined under 15 U.S.C. § 1681b. *See Hansen v. Morgan*, 582 F.2d 1214 (9th Cir. 1978). An employment purpose is generally considered a permissible purpose for obtaining a “consumer report.” However, if the information in the consumer report was used in violation of any applicable federal or state equal employment opportunity law or regulation, the criminal penalties section conceivably could apply.

XI. APPENDIX OF SAMPLE FORMS

The “forms” that follow are excerpts of content that may be useful. Each form should be assessed against and appropriately tailored to the applicable laws and regulations, employer policies and procedures, employment contracts, and labor contracts and requirements.

⁴⁴ *See Bryant v. TRW, Inc.*, 689 F.2d 72, 79 (6th Cir. 1982) (upholding jury award of damages for anguish and humiliation); *Jones v. Credit Bureau of Huntington, Inc.*, 399 S.E.2d 694, 699 (W. Va. 1990) (same).

Appendix A

Request to counsel for privileged advice

**PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION
AND REQUEST FOR PRIVILEGED LEGAL ADVICE; ATTORNEY WORK PRODUCT**

Dear [Counsel]:

On behalf of [client name], I am writing to retain you and your law firm to render attorney-client privileged legal advice to our company with regard to a complaint made by [insert name] dated [insert date]. It alleges [describe type of complaint.] A copy of the complaint is attached to this letter. We believe that there is a reasonable likelihood that [complainant] will file a charge with a governmental agency and/or a lawsuit based upon the issues raised in the complaint. Thus, the work you will perform for us is in anticipation of litigation.

You have confirmed that you have no conflict that would preclude your taking on this engagement.

In anticipation of legal action, please review the complaint and let me know in an attorney-client privileged communication what information you will need from our company, and the initial witnesses you believe you will need to interview, to gather the facts that you will need as a predicate to the legal advice we have requested below:

[insert legal advice requested]

We expect your information request also to be protected by the attorney work product doctrine as it will reflect your initial legal impressions.

We ask that you take all necessary steps to preserve the attorney-client privilege and attorney work product protection with regard to your work on this engagement. All documents that you and your team members create as part of this engagement should bear the following legend in the header on each page: "PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION AND LEGAL ADVICE; ATTORNEY WORK PRODUCT." Your written communications should be addressed and sent only to [insert].

[Insert other points]

Sincerely,

Counsel's request to client for information

**PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION;
ATTORNEY WORK PRODUCT**

Dear [Client]:

We have reviewed the complaint submitted to you by [name of complainant] that is dated [insert date] and alleges [describe]. To assist us in gathering the facts that we will need to render the legal advice you requested in anticipation of litigation, we request that you forward the following information to me:

[insert list]

We would appreciate your ensuring that your transmittal letter to your responsible client representatives for this information reflects the fact that (1) this information is being prepared and assembled under the attorney-client privilege and attorney work product protection so that our firm can provide legal advice to your company, (2) your communication is an attorney-directed communication, (3) your request to your client representatives should not be forwarded or discussed with persons other than those to whom it is addressed, and (4) the information your client representatives supply must be packaged and transmitted in a confidential manner (you will describe) to preserve the privilege.

As soon as we have received and reviewed the information described above, we will provide to you the initial list of individuals we would like to interview and the communication we would like you to use to inform them of our meeting.

Thank you.

Sincerely,

Complaint intake form

COMPLAINT INTAKE FORM

Date of complaint	
Name of complainant	
Department	
Supervisor and chain of command above supervisor	
Work address	
Work telephone	
Work email	
Home telephone	
Other contact information	
Name of HR or corporate compliance intake representative	
Persons complaint made against (and their title, department, supervisor and manager) <i>(i.e., list all persons involved and all persons responsible)</i>	
Summary of allegations as stated by complaining party, including supporting facts/incidents <i>(Attach any supporting documentation provided by complainant)</i>	
Previous communications by complainant to anyone about the matters asserted in the complaint and gist/date of them	
Potential witnesses <i>(e.g., name, title, organization, contact information and information complainant believes each has)</i>	
Potential documents and other evidence <i>(e.g., description, custodian and perceived relevance to complaint)</i>	
Other information	

Appendix E

Communication to complainant initiating investigation

Dear [name of complainant]:

On [date], you [came to/called/e-mailed] our Human Resources organization with a complaint about [name of accused]. My understanding is that you are concerned about [paraphrase the alleged misconduct based upon your understanding]. [If the complainant set it out in writing, add: It also is my understanding that you set out your concern in a writing to [insert] dated [insert date].]

I am going to investigate your concerns, which the Company takes very seriously. As part of that important process, I have scheduled a meeting with you for [insert date] at [insert place]. If you are not able to meet at this time, please call my office at [insert] so that we may promptly select a different date and time.

I would like to obtain untainted information from the persons who have knowledge bearing on your complaint. Therefore, I would appreciate your avoiding any communication that may taint the recollections of others while I am conducting this investigation.

[Insert name of company] prohibits retaliation against all individuals who have complained about conduct they believe is unlawful or in violation of company policy, or who have participated in or cooperated with investigations related to such complaints. If you come to believe that someone has retaliated against you as a result of your complaint, you should immediately report your concerns to me, or to someone else in Human Resources at [insert telephone number]. Any violation of our policy prohibiting retaliation will result in termination or other disciplinary action.

If you have questions or concerns about the investigation in advance of our discussion, or if you have any additional information relevant to your complaint after we meet, please let me know as soon as possible.

Thank you in advance for your cooperation.

Sincerely,

Appendix F

Communication to managers of complainant and accused regarding investigation*

Dear [name of manager]:

This message is to inform you that I have initiated an internal investigation of a complaint raised by [name of complainant] against [name of accused]. As part of my investigation, I will be interviewing [complainant], [accused] and other individuals who may have information that is relevant for the investigation.

During the course of the investigation, my role will be that of the fact finder to determine whether the allegations raised are supported by the information obtained, and then to determine whether any of our Company policies were violated. Once I have completed that work, [name of Human Resources Manager] will work with you to determine appropriate follow-up actions. At this time I do not know whether any follow-up action will be required or what it will be if action is appropriate. (Follow-up actions may take many forms, including additional training and coaching, changes in job assignments, use of a coach to facilitate more productive working relations and/or termination or other disciplinary action(s).)

It is important that I obtain untainted information from the persons who have knowledge bearing on the matter I am investigating. It also is critical that we avoid any appearance that we are attempting to coerce or otherwise influence any witness. Therefore, I ask that you avoid any communication with anyone about the fact or nature of the investigation, or my intention to speak with him or her. If you believe that you need to speak with anyone else about this investigation, please call me so that the appropriate authority can determine whether the communication is appropriate and who should make it. All questions regarding the investigation should be referred to me.

[Insert name of company] prohibits retaliation against all individuals who have complained about conduct they believe is unlawful or in violation of company policy, or who have participated in or cooperated with investigations related to such complaints. If you come to believe that someone has retaliated against anyone who made this (or any other) complaint or has participated in the investigation of this matter, please notify me or my manager, [name], immediately. Any violation of our policy prohibiting retaliation will result in termination or other disciplinary action.

Please feel free to contact me if you have any questions. Thank you in advance for your cooperation.

Sincerely,

*Note: In some cases it may be necessary to refrain from disclosing the fact of the investigation to managers while it is in process.

Appendix G

Communication to accused regarding investigation*

Dear [name of accused]:

As a [insert title], I investigate employee concerns. On [date] at [time] at [insert location] I would like to speak with you regarding an issue that has been brought to my attention that pertains to you.

I appreciate the fact that you are very busy, but I would appreciate your doing your best to juggle your schedule to facilitate this scheduled appointment. If you have an unavoidable conflict, please call me at [telephone number] as soon as you receive this message so that we can determine how to handle it.

[Insert name of company] prohibits retaliation against all individuals who have complained about conduct they believe is unlawful or in violation of company policy, or who have participated in or cooperated with investigations related to such complaints. If you come to believe that someone has retaliated against you, or against anyone who made such a complaint or has participated in the investigation of this matter, please notify me or my manager, [name], immediately. Likewise, it is imperative that you not retaliate against anyone you believe has made a complaint about you or who has participated in an investigation related to any such complaint. Any violation of our policy prohibiting retaliation will result in termination or other disciplinary action.

It is important that I obtain untainted information from the persons who have knowledge bearing on the matter I am investigating. It also is critical that we avoid any appearance that we are attempting to coerce or otherwise influence any witness. Therefore, I ask that you avoid any communication with anyone about the fact or nature of the investigation so that the investigation is fair. [You do have a right to discuss this matter with your legal counsel or labor union representative.] All questions regarding the investigation should be referred to me.

If you have questions or concerns about the investigation in advance of our discussion, or if you have any additional information relevant to the allegations after we meet, please contact me.

Thank you in advance for your cooperation.

Sincerely,

*Note: The first contact with an accused typically should be an in-person conversation, and if that is not possible, a telephone conversation. A written communication of this nature to the accused should confirm the substance of the conversation.

Appendix H

Communication to fact witness scheduling interview*

Dear [name of witness]:

As a [insert title], I investigate employee concerns. I would like to speak with you regarding an issue that has been brought to my attention on [date] at [time] at [insert location]. You have been identified as someone who may have information relevant to my investigation. Please note that you are not the focus of my investigation.

I appreciate the fact that you are very busy, but I would appreciate your doing your best to juggle your schedule to facilitate this scheduled appointment. If you have an unavoidable conflict, please call me at [telephone number] as soon as you receive this message so that we can reschedule our meeting.

[Insert name of company] prohibits retaliation against all individuals who have complained about conduct they believe is unlawful or in violation of company policy, or who have participated in or cooperated with investigations related to such complaints. If you come to believe that someone has retaliated against you or against anyone who made such a complaint or has participated in the investigation of this matter, please notify me or my manager, [name], immediately. Any violation of our policy prohibiting retaliation will result in termination or other disciplinary action.

It is important that I obtain untainted information from the persons who have knowledge bearing on the matter I am investigating. It also is critical that we avoid any appearance that we are attempting to coerce or otherwise influence any witness. Therefore, I ask that you avoid any communication with anyone about the fact or nature of the investigation so that the investigation is fair. [If applicable: You do have a right to discuss this matter with your legal counsel or labor union representative.] All questions regarding the investigation should be referred to me.

Please feel free to contact me if you have any questions. Thank you in advance for your cooperation.

Sincerely,

* Note: Initial notifications to potential fact witnesses typically are made by telephone, not in writing.

Appendix I

Communication to interviewee to review and correct interview notes

TO: [Complainant]
FROM: [Company]
SUBJECT: Your Complaint of Harassment

Thank you for taking time to meet with me on [date] at the [place] in [city]. As you know, I took detailed notes during our meeting and reviewed with you at the conclusion of our interview the key points that you shared with me. I have had those notes typed and have enclosed them for your review.

I would appreciate your carefully reviewing the attached notes to ensure that I have accurately recorded each incident of harassment and each statement that you found to be offensive, along with all of the details you can remember about each. I would appreciate your marking any necessary corrections. In addition, if there is additional information you have recalled since we met, please add it. Any additional details about the incidents and statements, including (1) the date, (2) the place, (3) the names of any persons present, (4) the particular words spoken and actions taken and (5) your response to the accused at the time and later, would be particularly helpful if these details are not included.

I would appreciate your sending the final edited notes to me at your earliest convenience. A self-addressed stamped envelope is enclosed for your convenience. As you will see on the envelope, I will open this envelope personally.

As I emphasized to you during our meeting, our company has a strong commitment to a harassment-free work environment. If you experience any offensive conduct or statements in the future, please call me immediately.

In addition, I also emphasized to you that [insert name of company] prohibits retaliation against all individuals who have complained about conduct they believe is unlawful or in violation of company policy, or who have participated in or cooperated with investigations related to such complaints. If you come to believe that someone has retaliated against you as a result of your complaint, you should immediately report your concerns to me, to someone else in Human Resources, or to your management.

If you have any questions, please call me at your earliest convenience. Thank you for assisting us with this investigation. We will advise you when it has been completed.

Sincerely,

Appendix J

Communication to complainant listing conduct

Report of Actions and Statements

The following is a complete list of all actions and statements that [name] has reported to the Company for investigation, along with all details [name] recalls about each reported action and statement:

1. On May 3, 2008, Max Jones walked into [name]’s office and started the conversation by saying, “You know, I’d like to sleep with you. How about it?” [Name] immediately stood up at her desk and said, “Please get out of my office right now.” Jones turned around to walk out and said, “Don’t be a prude.” He then walked out. [Name] does not believe anyone would have been in a position to hear Jones’s remarks. However, [name] believes Sam Neighbor was in the adjacent office at the time. [Name] did not tell anyone about Jones’s remarks until she spoke with Jean Muldoon on August 1, 2008.

2. etc.

3. etc.

Certification

I, [name], have carefully reviewed this memorandum. To the best of my recollection, it contains all of the actions and statements I have found offensive.

Date of signature

[Name]

Date of signature

[Name of witness]

Appendix K

Investigations Report Elements

Case No.:
Lead Investigator:
Other Members of Investigations Team:
Complainant(s):
Accused:
Date and Means (<i>e.g., hotline, oral to HR, email, written, EEOC, to manager</i>) of Complaint:
Date Investigation Commenced:
Actions Taken to Investigate (attach investigations log):
Persons Interviewed, Date, By Whom, How Long (attach notes to file):
Persons from Whom Written Statements Obtained (attach):
Documents Reviewed (attach list and include documents in file – electronically stored if appropriate):
Other Evidence Reviewed (attach list and where evidence is retained):
Detail Each Allegation and Present <u>for Each One</u>: <ul style="list-style-type: none">• Complainant’s Relevant Evidence:• Accused’s Relevant Evidence:• Relevant Evidence of Other Witnesses by Name:• Investigator’s Finding and Basis:

Appendix L

**Communication to manager of complainant/
accused summarizing investigation results**

[Date]

To: [Name of manager]

From:

Subject: Investigation regarding complaint of [complainant] regarding [accused]

This memo summarizes the results of the company's investigation of a complaint that [complainant] made regarding the conduct of [accused] on [insert date]. The company's investigation included interviews with those believed to have pertinent information, as well as a review of [documents, electronic records and other pertinent evidence].

The company reached the following conclusions regarding each of the principal issues raised:

[insert each principal issue and findings as to each]

Based on these findings, the company, following discussions with you, has decided to take the following actions:

[insert them – including any training, coaching, discipline, reaffirmation of applicable policies or other follow-up]

Specifically, you will be responsible for [insert actions for which manager is personally responsible – with clear details on what the manager must do and when]. [Indicate which managers will be responsible for meeting with the complainant and the accused.]

As you know, [name of company] prohibits retaliation against all individuals who have complained about conduct they believe is unlawful or in violation of company policy, or who have participated in or cooperated with investigations related to such complaints. Please be vigilant to ensure that neither managers nor co-workers engages in any conduct or commentary that may be viewed as retaliation. If you come to believe that any retaliation may be occurring, please stop it immediately and contact me, my manager [name] or anyone else at [insert telephone number]. Any violation of this policy will result in termination or other disciplinary action.

Please feel free to contact me if you have any questions. Thank you for your assistance.

Appendix M

Communication to complainant summarizing investigation results

[Date]

[Name and address of complainant]

Subject: Investigation regarding your complaint

Dear [name]:

This letter summarizes the discussion of [date] that [name of witness] and I had with you about the company's investigation of a complaint that you made regarding [insert subject] on [insert date]. The company's investigation included interviews with you and others believed to have pertinent information, as well as a review of [documents, electronic records and other pertinent evidence].

The company reached the following conclusions regarding each of the principal issues raised:

[insert each principal issue and findings as to each]

Based on these findings, the company has decided to take the following actions:

[insert them – including any training, coaching, discipline, reaffirmation of applicable policies or other follow-up]

We have enclosed for your future reference a copy of [insert policies enclosed]. The Company is fully committed to compliance with them.

As you know, [name of company] prohibits retaliation against all individuals who have complained about conduct they believe is unlawful or in violation of company policy, or who have participated in or cooperated with investigations related to such complaints. If you come to believe that someone has retaliated against you or anyone who participated in the investigation of this matter, please notify me or my manager, [name], immediately. Any violation of this policy will result in termination or other disciplinary action.

I or another representative of our Human Resources Department will follow up with you periodically for the next [insert number] months.

Please feel free to contact me if you have any questions.

Sincerely,

Appendix N

Communication to accused summarizing investigation results

[Date]

[Name and address of accused]

Subject: Investigation regarding your conduct

Dear [name]:

This letter summarizes the discussion of [date] that [name of witness] and I had with you about the company's investigation of a complaint regarding your [conduct]. The company's investigation included interviews with you and others believed to have pertinent information, as well as a review of [documents, electronic records and other pertinent evidence].

The company reached the following conclusions regarding each of the principal issues raised:

[insert each principal issue and findings as to each]

Based on these findings, the company has decided to take the following actions:

[insert them – including any training, coaching, discipline, reaffirmation of applicable policies or other follow-up]

We have enclosed for your future reference a copy of [insert policies enclosed]. The Company is fully committed to and requires your full compliance with them.

As you know, [name of company] prohibits retaliation against all individuals who have complained about conduct they believe is unlawful or in violation of company policy, or who have participated in or cooperated with investigations related to such complaints. If you come to believe that someone has retaliated against you or anyone who made such a complaint or has participated in the investigation of this matter, please notify me or my manager, [name], immediately. Likewise, it is imperative that you not retaliate against anyone you believe has made a complaint about you or who has participated in an investigation related to any such complaint. Any violation of this policy will result in termination or other disciplinary action.

Please feel free to contact me if you have any questions. Thank you in advance for your cooperation.

Sincerely,

Appendix O

Investigations closure form

Investigation/action team	
Lead investigator	
Other investigation team members	
Inside/outside counsel	
HR manager	
Decision-maker(s)	
Persons involved <i>(Complainant = Person raising complaint / Subject = Person who is the subject of the complaint)</i>	
Complainant(s) • Grade, title, Organization	
Subject(s) • Grade, title, organization	
Complaint(s) <i>(Description of each complaint as described by Complainant)</i>	Summary of investigator's findings
• Allegation:	• Findings:
• Allegation:	• Findings:
Communication of investigation results	
<ul style="list-style-type: none"> • Date/complainant/by whom • Date/accused/by whom 	
Disciplinary actions, training or other follow-up with subject(s) of action/others	
<ul style="list-style-type: none"> • Date/action by/subject/description: • Date/action by/subject/description: • Date/action by/subject/description: 	
Follow-up with complainant	
<ul style="list-style-type: none"> • Date/caller/substance: • Date/caller/substance: • Date/caller/substance: 	

Appendix P

A Summary of Your Rights Under the Fair Credit Reporting Act

Para informacion en espanol, visite www.ftc.gov/credit o escribe a la FTC Consumer Response Center, Room 130-A 600 Pennsylvania Ave. N.W., Washington, D.C. 20580.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. **For more information, including information about additional rights, go to www.ftc.gov/credit or write to: Consumer Response Center, Room 130-A, Federal Trade Commission, 600 Pennsylvania Ave. N.W., Washington, D.C. 20580.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information.
- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your “file disclosure”). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
 - a person has taken adverse action against you because of information in your credit report;
 - you are the victim of identify theft and place a fraud alert in your file;
 - your file contains inaccurate information as a result of fraud;
 - you are on public assistance;
 - you are unemployed but expect to apply for employment within 60 days.

In addition, by September 2005 all consumers will be entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.ftc.gov/credit for additional information.

Appendix P, Page 2

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.
- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous. See www.ftc.gov/credit for an explanation of dispute procedures.
- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.
- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.
- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need -- usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.
- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.ftc.gov/credit.
- **You may limit “prescreened” offers of credit and insurance you get based on information in your credit report.** Unsolicited “prescreened” offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt-out with the nationwide credit bureaus at 1-888-5-OPTOUT (1-888-567-8688).

- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.
- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.ftc.gov/credit.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. Federal enforcers are:

TYPE OF BUSINESS:	CONTACT:
Consumer reporting agencies, creditors and others not listed below.	Federal Trade Commission: Consumer Response Center – FCRA Washington, DC 20580 1-877-382-4357
National banks, federal branches/agencies of foreign banks (word “National” or initials “N.A.” appear in or after bank’s name)	Office of the Comptroller of the Currency Compliance Management, Mail Stop 6-6 Washington, DC 20219 800-613-6743
Federal Reserve System member banks (except national banks, and federal branches/agencies of foreign banks)	Federal Reserve Board Division of Consumer & Community Affairs Washington, DC 20551 202-452-3693
Savings associations and federally chartered savings banks (word “Federal” or initials “F.S.B.” appear in federal institution’s name)	Office of Thrift Supervision Consumer Complaints Washington, DC 20552 800-842-6929
Federal credit unions (words “Federal Credit Union” appear in institution’s name)	National Credit Union Administration 1775 Duke Street Alexandria, VA 22314 703-519-4600
State-chartered banks that are not members of the Federal Reserve System	Federal Deposit Insurance Corporation Consumer Response Center, 2345 Grand Avenue, Suite 100 Kansas City, Missouri 64108-2638 1-877-275-3342
Air, surface, or rail common carriers regulated by former Civil Aeronautics Board of Interstate Commerce Commission	Department of Transportation, Office of Financial Management Washington, DC 20590 202-366-1306
Activities subject to the Packers and Stockyards Act, 1921	Department of Agriculture Office of Deputy Administrator – GIPSA Washington, DC 20250 202-720-7051

INTERNAL INVESTIGATIONS: PITFALLS, PRATFALLS AND PRACTICAL POINTERS

ADMIN_US # 6821425.3

PROFESSIONAL EDUCATION BROADCAST NETWORK

Speaker Contact Information

**EMPLOYMENT INVESTIGATIONS:
FIGURING IT OUT & AVOIDING LIABILITY**

Emily Pidot

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