AWI JOURNAL

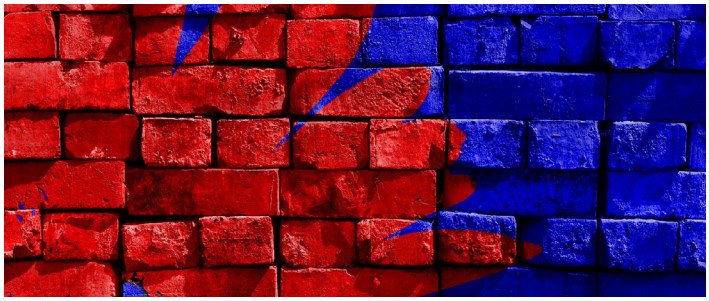
VOLUME 13 | NUMBER 1 | MARCH 2022

ASSOCIATION OF WORKPLACE INVESTIGATORS®

THE OFFICIAL PUBLICATION OF THE ASSOCIATION OF WORKPLACE INVESTIGATORS

Everything is Politics: Investigating Workplace Political Affiliation Claims

By Anne E. Garrett



Reflecting reality in the United States, workplace political divisions have exploded in recent years. These heightened tensions have led to an increase in political bias complaints—including claims of hostile environment and discrimination based on political affiliation.

Investigating these claims involves unique challenges. And workplace investigators dealing with such claims should be aware of how their questions may be misunderstood, how witnesses may misperceive—or fail to perceive—political bias, and how culture and politics may be intertwined.

This article, focused on investigating claims related to workplace conduct, provides some guidance.[1] It describes the factual and legal background for such claims, discusses practical challenges for workplace investigators, and suggests ways to overcome those challenges.

Increased Political Volatility

The past few years have seen great political and social upheaval—think: Donald Trump, COVID-19, George Floyd, January 6—and as with all societal developments, this has an impact on workplaces.[2]

Just prior to the 2020 United States presidential election, the Society for Human Resource Management (SHRM) surveyed 1,000 American workers and 500 human resources (HR) professionals. A total of 44 percent of HR professionals described intensified political volatility at work in 2020—a significant increase from a rate of 26 percent before the 2016 presidential election. And 32 percent of employees surveyed were worried about how the election's outcome would impact their workplaces. In an effort to avoid political divisions, 74 percent of HR professionals noted their organizations had prohibited political attire or accessories.[3]

A more extensive SHRM survey in 2019 found that one in ten working Americans reported personally experiencing or witnessing differential treatment based on political affiliation or political affiliation bias.[4]

Legal Background

As context, the law on employee claims of discrimination or harassment based on political affiliation is mixed and heavily dependent on jurisdiction, but a few examples given here serve as good illustrations.

Private employers

For private employers, federal statutes do not expressly protect employees' political affiliations or political activities. Although many states don't offer this protection either, legislation varies from state to state, and even by county and municipality.[5] States that offer some protection of employees' political affiliation or activity include California, Colorado,[6] Louisiana,[7] Minnesota,[8] Missouri,[9] Nebraska,[10] Nevada,[11] New York, South Carolina,[12] Utah,[13] and West Virginia.[14]

Some state statutory examples: California's Labor Code offers some protection in prohibiting employers from interfering with or influencing employees' political activity,[15] and from penalizing employees for legal off-duty conduct.[16] Likewise, New York prohibits employers from discriminating against employees for legal, off-duty "political activities."[17] The District of Columbia Human Rights Act lists "political affiliation" as a protected trait and prohibits discrimination based on "the state of belonging to or endorsing any political party."[18] Nearby Maryland counties Prince George's[19] and Howard[20] offer similar protections.

continued on page 4

THE AWI JOURNAL

Barbara Kate Repa
Managing Editor

Published quarterly by the
Association of Workplace Investigators, Inc.
1000 Westgate Drive, Suite 252
St. Paul, MN 55114 USA
844.422.2294
www.awi.org
awijournal@awi.org

The mission of the Association of Workplace Investigators is to promote and enhance the quality of impartial workplace investigations.

If you are interested in writing for the *AWI Journal,* please send an abstract describing the topic you will be covering to awijournal@awi.org. Our articles focus on the many different aspects of workplace investigations, including how the law applies to the work of investigators, practical matters, similarities and differences between workplace investigations and other fields of endeavor, developments and trends in the law and profession, and book reviews.

Letters to the editor are welcome; email awijournal@awi.org. Nothing contained in this publication constitutes legal advice.

ISSN 2328-515X (print)
ISSN 2328-5168 (online)

President's Message

As we welcome 2022, the creativity and enthusiasm of AWI volunteers continue to drive the practice of workplace investigations and AWI forward into new frontiers.

AWI's Training Institute Committee is basking in the success of the first in-person Training Institute since February 2020. This February, 70 intrepid students, 14 dedicated faculty, and two exceptional staff members gathered from around AWI's global footprint, including Canada and Australia. It was fitting that the 2022 Institute occurred in Santa Barbara, California—the same location as the last in-person Institute of 2020, when, little did we know, the reality of a global pandemic was only weeks away.

Now, with two years of this global pandemic's fluctuating lockdowns and mandates behind us, the bliss of attending an in-person AWI Institute was palpable. AWI is about community and developing relationships with like-minded professionals. In Santa Barbara, new friendships flourished, as people chatted during breaks, in the hallway, at lunches, and in mixers held outside under blue skies.

Are we back to normal? No, but only because we are wiser and more resilient. As an already strong organization, AWI capitalized on the last two years by developing virtual programming and learning how to serve members in more locations. For example, virtual Local Circle meetings brought dozens of members together where they may not have connected with only in-person options. And virtual seminars and a steady flow of webinars on cutting-edge topics expanded training and education opportunities.

While this year brings a return to in-person events, we will preserve the opportunities for learning and connection that virtual options offer. We look forward to three more in-person Institutes in 2022: in Philadelphia, Pennsylvania; Park City, Utah; and Niagara-on-the-Lake, Ontario. AWI will also hold a virtual Institute, which the Training Institute Committee developed in response to the demand for virtual programming in the last couple years. This and future virtual Institutes will offer access to participants who may otherwise not be able to participate in an in-person program. AWI continues to pursue its mission of promoting and enhancing the quality of impartial workplace investigations through new and innovative channels.

In addition, AWI continues to have an important impact in other ways. At the October 2021 meeting, the board expanded the Diversity, Equity and Inclusion Task Force into a dedicated Diversity and Inclusion (D&I) Committee. A strong team of members volunteered to join the D&I Committee, and their work is well underway. The D&I Committee is charged with the long-term goal of increasing diversity and fostering inclusiveness among the membership and leadership. To begin, its first project is coordinating a diversity, equity, and inclusion workshop for AWI leaders on the board and the various committees, which will occur at the board's spring in-person meeting in March 2022.

Speaking of that spring meeting, the board will also spend a full day on strategic planning. Much has changed since the board's last comprehensive strategic planning process in 2015. As AWI grows, so has the geographic and professional diversity of its membership. What was a California-based association of external attorney investigators has evolved into an international association with members throughout the United States, Canada, Australia, New Zealand, and beyond. Further, attorneys now make up less than half of the membership at 42 percent; human resources professionals are next at 39 percent. Private investigators, ethics and compliance professionals, and other professions make up the remaining membership.

We are better for the diversity these varied voices and perspectives bring. However, it is also challenging to ensure AWI's work adequately represents all members. A key focus of the strategic planning session will be exploring how we can effectively serve and support our evolving and growing constituency.

AWI thrives on member engagement and volunteers. We are always looking for volunteers to contribute to AWI's many committees. Speaking and writing opportunities abound as well. Unsure about where to start? Reach out to me with questions, suggestions, comments, or feedback.

Thank you for your commitment to AWI and this important work.

Eli Makus
President of the Board of Directors
erm@vmlawcorp.com

AWI RESOURCES ON BIAS

The Association of Workplace Investigators offers a number of resources to help members navigate the nuances of bias—both in webinars (accessible through the AWI Learning Center) and archived issues of the *AWI Journal*.

AWI WEBINARS

"#MeToo and #BlackAt: Investigating Anonymous Workplace Harassment and Discrimination Claims" *Presented by Dan Schorr and Alyssa-Rae McGinn*
Summarizes current industry best practices in addressing allegations of identity-based harassment, discrimination, and other misconduct at an organization when the allegations are based on anonymous, and often online, allegations.

"Addressing the Elephant in the Room: The Impact of Race in Investigations" *Presented by Christina J. Ro-Connolly, Zaneta Butscher Seidel, and Alezah Trigueros*
Identifies common issues that arise during the course of an investigation related to the race, or perceived race, of the investigator.

"Gender Identity and Gender Inclusive Best Practices for Investigators" *Presented by Nancy Jean Tubbs*
Offers help for investigators in building better rapport and considering the nuances of respectful and clear documentation related to diverse gender identities, pronouns, and lived names.

"Investigation Best Practices from a Litigator's Lens" *Presented by Lisa Brown*
Enumerates mistakes to avoid in the investigation process based on cases that have been litigated and investigators who have been deposed.

"Navigating Bias, Cultural Competence and Microaggressions" *Presented by Amy J. Oppenheimer and Vida L. Thomas*
Reviews implicit bias and confirmation bias and its impact on investigators, discussion of microaggressions and challenges of investigating them, and tips on how investigators can increase their cultural competency.

"Up Close, Yet Far Away: Tips for Assessing Credibility and Conducting Effective Video Interviews" *Presented by Allison West*
Underscores key factors used to assess credibility and the challenges that arise during video interviews when making credibility determinations.

AWI JOURNAL ARTICLES

Article: "Perception and Reality: The Appearance of Bias and the Need to Disclose", Author: Jill Switzer | Publication Date: October 2014

Article: "The Psychology of Bias: Understanding and Eliminating Bias in Investigations" (Part 1), Author: Amy Oppenheimer | Publication Date: January 2011

Article: "The Psychology of Bias: Understanding and Eliminating Bias in Investigations" (Part 2), Author: Amy Oppenheimer | Publication Date: April 2011

National Labor Relations Act protections

While no equivalent federal statutes expressly protect private sector employees' political affiliation and activities, Section 7 of the National Labor Relations Act protects "concerted activities" for "mutual aid or protection" by non-supervisory employees.[21] This is a complicated and nuanced analysis, and there is extensive case law discussing when workplace political commentary or activity may qualify for protection under Section 7.

Importantly, in 2021, the National Labor Relations Board (NLRB) issued a General Counsel memo describing workplace political activism as generally protected Section 7 conduct and observing: "Activism concerning such racial justice issues, including openly supporting the Black Lives Matter movement, directly concerns terms and conditions of employment, and is protected concerted activity."[22] This commentary has been interpreted as expanding protection of workplace political activity, and may indicate the NLRB's intent to defend workplace political activities more aggressively.

Public employers

Public employers, because they are governed by the First Amendment, are subject to more extensive restrictions related to public employees' political speech and activities.[23] For example, public employees' workplace speech regarding "matters of public of concern" may be protected, assuming the speech meets a balancing of interests test. A full description of case law on this point is beyond the scope of this article, but investigators should be aware that the U.S. Supreme Court and other courts have addressed this issue on multiple occasions.

Practical Challenges for Investigators

Workplace investigators may be asked to investigate employee claims that workplace political discussions create a hostile environment or harassment, or, in some cases, discriminate against people in protected categories. They may also be tasked with investigating claims of retaliation or preference based on political affiliation.

For example, the following descriptions may be part of complaints:

- *My boss constantly talks about politics. She supports a different candidate than I do, and I've lost out on the best work shifts because she knows my politics.*
- *My co-workers live in a different area of the country and harass me about living in a place with a "crazy lib/redneck governor."*
- *On work videoconferences, I can see my boss has a red Make America Great hat/Black Lives Matter poster behind him. I am offended by this and feel that this creates a hostile environment based on my race.*

A number of practical challenges may arise when investigating these claims.

Defining political speech

A complainant may allege that co-workers constantly discuss politics or make political comments, and that this creates a hostile environment or is otherwise discriminatory. As a threshold factual issue, the investigator must determine the actual extent of the political comments or discussions in the workplace.

This is more difficult than it may seem, however. What is "political" is often highly subjective. Does it include the observation that everyone should be vaccinated against COVID-19? Does it include a comment that an incoming president will be bad for business? All witnesses come from a specific cultural and social environment and, just as a "fish doesn't know it's wet," an individual may not identify familiar political comments or ideologies as being political at all. Importantly, "political comments" don't just pertain to policy discussions. Political speech includes passing comments that may be unnoticeable to a co-worker of the same political persuasion but are very offensive to a co-worker with a different one.

How workplace investigators frame their questions is crucial. Rather than starting with broad based questions such as: "Have you heard Boss talk about politics at work?" or "Does Boss make political comments?," a better approach may be to start with concrete examples of the language alleged to be at issue, such as: "Have you heard Boss use the words "crazy libs" or "ignorant rednecks?" After priming the witness by asking about specific phrases or comments, the investigator may then more fruitfully move to broader questions.

Another useful approach may be to ask: "Do you know what Co-worker's politics are?" If answered in the affirmative, the natural follow up is: "How do you know that they are liberal/conservative?" or "How do they show that?" At which point, witnesses commonly can provide useful details.

Perception of investigator bias

As with other types of investigations, the investigator may fall into a different category (race, gender, or sexual orientation) than the witnesses being interviewed about related claims.

With political bias investigations, the perception of an investigator's bias based on geographic location, accent, and other factors may be heightened, given the current geographic political divisions.[24] Investigators must be aware that, for example, a California-based investigator may be viewed as inherently biased and untrustworthy by some witnesses in Southern areas of the country, and vice versa. Similarly, investigators from an urban area may be viewed as inherently biased by some witnesses in a rural area. And, as with all investigations, workplace investigators must be aware of their own unconscious biases toward others from different geographic areas or political affiliations.

To address this perception, and any possible unconscious bias, investigators should use language and tone that is as neutral and non-partisan as possible. Investigators should also emphasize to witnesses that they have been hired to listen closely and thoughtfully to all points of view, and that they are not there to take any particular side. And investigators should check in frequently with themselves to make sure their own political leanings are not coloring their conclusions.

Perception of co-worker bias

Members of different political parties increasingly distrust each other.[25] This distrust may affect co-workers' views of one another, especially on the question of whether an action or comment was motivated by political affiliation. This is an additional challenge for investigators.

In interviewing witnesses regarding political bias claims, investigators may receive a high number of conclusory statements and assumptions. They will need to focus on the source of witnesses' perceptions—including whether they are factual observations, or assumptions that "all of those people" act a certain way. With political affiliation investigations, corroboration and objective data may be even more important than usual because witnesses' perceptions may be less reliable.

Culture v. political affiliation

Another complication is the overlap between culture and political affiliations. An employee may claim, for example, that she faces harassment and discrimination based on her race. As evidence, she may explain that her co-workers are passionate gun and hunting enthusiasts, that this demonstrates their identification with a particular political party, and that this shows a propensity to discriminate against Black, Indigenous, and other people of color.

Likewise, another employee may state that his manager is hostile to him based on his evangelical Christian beliefs. As evidence, he may point to his manager's use of they/their pronouns, describing it as a political stance that shows hostility or discriminates against Christians.

These claimants may sincerely believe these cultural markers demonstrate clear political affiliations and, by extension, political bias, but investigators need to work hard to determine whether such connections actually exist. In doing so, they must recognize that norms in different geographic regions may vary, and focus on relevant facts rather than witnesses' assumptions and perceptions. And, again, investigators need to be sensitive to their own possible blind spots arising from their cultural backgrounds.

Going Forward

Political divisions in the United States are not ending any time soon. And along with those divisions, it is reasonable to anticipate that workplace political volatility will continue to rise. With those tensions will come additional political affiliation claims. Workplace investigators must understand the special challenges those claims present, and be ready to meet them to conduct fair and balanced investigations.

Anne E. Garrett is principal of the Law Offices of Anne Garrett, a practice that exclusively focuses on neutral workplace investigations. With more than 25 years of experience as a labor and employment lawyer, she has conducted workplace investigations at worksites ranging from large public agencies and Fortune 100 companies to smaller nonprofits and family-owned businesses. A past chair of the AWI Weekly*, she can be reached at annegarrettlaw@gmail.com.*

[1]While this article focuses on workplace rather than off-duty conduct, there are some interesting intersections such as, for example, an employee answering a co-worker's question of "What did you do this weekend?" by describing participation in a Black Lives Matter march or a Donald Trump rally.
[2] *See, e.g.,* Rebecca Knight, *Managing a Team with Conflicting Political Views*, Harv. Bus. Rev., October 22, 2020, https://hbr.org/2020/10/managing-a-team-with-conflicting-political-views; Holly Ellyatt, *As Many Return to the Office, Tensions Flare between the 'Vaxxed and Unvaxxed,'* CNBC, September 13, 2021, https://www.cnbc.com/2021/09/13/office-tensions-rise-between-the-vaccinated-and-unvaccinated-.html.
[3]Press Release, SHRM Survey: Political Volatil*ity at Work Increases While More than Half of Organizations Are Offering Paid Time Off to Vote* (Oct. 21. 2020), https://www.shrm.org/about-shrm/press-room/press-releases/pages/shrm-survey-political-volatility-at-work-increases-while-more-than-half-of-organizations-are-offering-paid-time-off-to-vote.aspx.
[4] SHRM October 2019 Omnibus, *Politics in the Workplace*, https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM%20Politics%20in%20the%20Workplace%20Survey%20Oct%202019.pdf.
[5]*See generally,* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection against Employer Retaliation*, Tex. Rev. of Law & Politics, Vol. 16, No. 2, Spring 2012.
[6]Colo. Rev. Stat. § 8-2-108(1).
[7] La. Rev. Stat. § 23:961.
[8]Minn. Stat. Ann. § 10A.36.
[9]Mo. Ann. Stat. § 115.637.
[10]Neb. Rev. Stat. Ann. § 32-1537.
[11]Nev. Rev. Stat. Ann. § 613.040.
[12]S.C. Code Ann. § 16-17-560.
[13]Utah Code Ann. § 34A-5-112 (2).
[14]W. Va. Code Ann. § 3-8-11(b).
[15]Cal. Lab. Code §§ 1101 & 1102.
[16]Cal. Lab. Code § 96(k).
[17]N.Y. Lab. Law, ch. 31, art. 7, § 201-D.
[18]D.C. Code. Ann. §§ 2–1401.01-2-1404.
[19]Prince George's County Code § 2-185.
[20]Howard County Code § 12.200.
[21]29 U.S.C. § 157.
[22]GC 21-08, "Statutory Rights of Players at Academic Institutions (Student-Athletes) under the National Labor Relations Act," Sept. 29, 2021, https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.
[23]*See, e.g., Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).
[24]Emily Badger, Kevin Quealy, & Josh Katz, *A Close-Up Picture of Partisan Segregation, Among 180 Million Voters*, N.Y. Times, March 17, 2021.
[25]*See, e.g.,* Asher Stockler, *Democrats and Republicans Trust Each Other Less as Politics Continue to Be Deeply Partisan, Study Finds*, Newsweek, Oct. 10, 2019.

Being Deposed on Your Investigation: Strategies for Success (Part Two)

By Julie B. Yanow and Michael A. Robbins

This article is the second in a two-part series providing investigators with strategies to ensure a successful deposition experience. The previous article, published in the December 2021 issue of the *AWI Journal,* examined the first two of the four factors that influence a deposition experience: the retainer agreement and the investigation itself. This article discusses the pre-deposition process and preparing for the deposition. It also describes what you might encounter during the actual deposition—and gives some pointers on how to proceed.

Success Factor 3: The Pre-Deposition Process

After an investigation is completed, lawsuits arise in two primary ways: If the investigation substantiates the claimant's allegations, and the person accused of improper behavior (the respondent) is disciplined or terminated as a result, that individual may sue the employer. The lawsuit may include claims such as wrongful termination, discrimination, defamation, and intentional infliction of emotional distress. If the investigation does not substantiate the claimant's allegations, the claimant may sue the employer. The lawsuit may include claims for actions including retaliation, the employer's failure to prevent and remedy any wrongdoing alleged, and tort claims. Individual employees, including supervisors and co-employees, may be named as defendants as well, depending on the nature of the matter.

Once a lawsuit is filed, the parties engage in the discovery process. This is the time, prior to trial, when both sides request and exchange relevant information. Increasingly, the quality of the employer's investigation is challenged in litigation. As a result, in lawsuits alleging harassment, discrimination, retaliation, and other misconduct, the quality of the investigation conducted may well be the subject of discovery.

Considerations for in-house investigators

If you are an internal investigator, your employer will contact you concerning investigation information that another party to the litigation requests in discovery. This will usually be done through the employer's in-house attorneys. However, you may work instead with the outside counsel—that is, the attorneys who are handling the litigation for the employer. In such cases, at outside counsel's direction, you will produce the information that counsel deems responsive, relevant, and non-privileged.

During the discovery process, plaintiff's counsel is likely to request your deposition to ask you detailed questions about how you conducted your investigation. Most commonly, plaintiff's counsel will serve a "notice" of the date and time of your deposition, and may also request documents for you to bring with you to the deposition. Once more, you will work with the employer's attorneys—both regarding the date of the deposition and what, if anything, you will produce on the day of deposition.

Considerations for external investigators

For external investigators, the situation is a bit different. It is possible that you will first learn about discovery requests through the employer's counsel. Most likely, however, your first notice that documents have been requested will come when you are served with a subpoena.

Initially, the subpoena may request simply that you produce documents relating to the investigation. Generally, that would include your report, notes, exhibits, and communications with the employer, recordings of interviews, transcripts of recordings, as well as anything else that is in your investigation file. But the subpoena may request more than documents. It may also request that you appear at a specified place and time for a deposition.

Either way, if your investigation was conducted pursuant to the attorney-client privilege, you should contact employer's counsel before complying with any subpoena requests. This is because the employer "owns" the privilege. As a result, it is up to the employer, not you, to determine whether to assert the attorney-client privilege. If the employer asserts the privilege, you will not comply with the subpoena; if the employer elects not to assert the attorney-client privilege, then you must comply.

In some cases, the employer opts to waive the privilege only with respect to specific requested items. For example, you may be required to produce your report, notes, and exhibits, but other matters—such as your communications with the employer—may be considered privileged. It is a good idea to request that the employer communicate decisions regarding production to you in writing. If this is not possible, be sure to take and retain notes about what the employer tells you. Alternatively, before you produce any documents, send the client a communication memorializing your understanding of its instructions, and stating what you will and will not produce.

Although you may not produce items covered by the privilege, you cannot simply refuse to comply with the subpoena. Instead, someone will need to file an official objection to the requests based on the privilege.

Normally, the employer's counsel would file such a document. Occasionally, however, the employer will require you to file the objections. If you are not an attorney, it is usually wise to hire an attorney to file the document. If you are an attorney, you can file it yourself, but the better practice is to hire an attorney to represent you with respect to the filing. Depending upon how you have drafted your retainer agreement, the employer may be responsible for paying your attorney.

Success Factor 4: Deposition Preparation

It is likely that, as part of the discovery process, your deposition will be taken. This may occur after plaintiff's counsel has requested documents. Or, it may be that documents are requested to be produced for the first time at your deposition.

Either way, it is not a good practice for you to appear at your deposition without significant preparation. Your goal is to demonstrate that you conducted a thorough and professional investigation. As a result, you will need to be very familiar with exactly what you did, what you determined, and why. In addition, it may be that the investigation about which you are testifying was conducted many years ago. Unless you prepare, by going over your notes and files in the matter, you might not remember essential specifics about the investigation.

You should not only be familiar with your investigation, but also with the employer's relevant policies. For example, these may include the employer's policies regarding harassment, discrimination, retaliation, or other workplace conduct. And, of course, you should be familiar with the employer's investigation policies and the ways in which you complied with them.

Familiarity with standard practice for conducting workplace investigations is important as well. Examples of this include AWI's Guiding Principles for Conducting Workplace Investigations, the *California Department of Fair Employment and Housing Harassment Prevention Guide*, the *Equal Employment Opportunity Commission Guidance* (1999), and other similar materials. Be prepared to show how you followed standard practices.

Considerations for in-house investigators

The employer's attorney likely will work with you to prepare you for the deposition. That means you will discuss with the attorney what you will review. The attorney can also prepare you for the process and for expected questions.

An alternative approach—though one that is not recommended—is to essentially do no preparation for your deposition. Following this approach, it is likely you will remember much less than if you prepared and even less if the investigation took place long ago. As a result, you might need to answer "I do not recall" to many of the questions plaintiff's counsel asks you. While it is true that doing so will allow you to provide plaintiff's counsel with very little information, you also may look unprepared or as though you are not being forthcoming.

Certainly, after the deposition, but in advance of your trial testimony, you could review your materials. That way, you would be prepared to answer questions in a substantive manner at trial. But the jury or other finder-of-fact, such as a judge, may see your earlier deposition testimony. They might draw their own negative conclusions about your motive—and your credibility as an investigator, concluding that you deliberately attempted to thwart the discovery process. Though some attorneys follow this approach, it is not the best practice, because plaintiff's counsel is not your opponent; you are a neutral.

Considerations for external investigators

As in the case of the in-house investigator, it is important that you prepare in advance to show that you did a thorough, professional job.

However, you should consider *how* you will prepare for the deposition. One possibility is to prepare on your own, without the help of counsel. This provides the greatest degree of independence for the investigator. Another approach is for the employer's counsel to work with you to prepare for your deposition. A third possibility is that you retain an attorney for deposition preparation and to represent you during the deposition, as discussed in more detail in the next section.

The Deposition Process

The actual deposition process is likely to be somewhat different, depending on whether you are an in-house or external investigator.

Considerations for in-house investigators

At the deposition, it is likely that the employer's attorney will represent you. After all, as an employee of the organization, it would be natural for the organization's attorney to do so. It may be the same person who helped you prepare for the deposition.

Considerations for external investigators

As mentioned, there are various approaches to consider—each with advantages and disadvantages.

Similar to preparing on your own, defending your own deposition helps preserve the appearance of neutrality. It reinforces that you conducted an independent investigation without any interference by the employer. Representing yourself during the deposition continues to demonstrate your independence from the employer. In addition, it helps you control your own responses, and avoids creating the appearance that you need an attorney's protection during the deposition. Defending your own deposition saves costs

as well; either the employer's cost, or the cost of hiring your own attorney.

There are also disadvantages to defending your own deposition, however. For example, if you are not an attorney, or not a litigator, you may not understand the nuances of the discovery process. You may not know exactly when to make objections or what they should be, or when it is appropriate to answer questions and when it is not.

> You should not only be familiar with your investigation, but also with the employer's policies—including investigation policies, and the ways in which you complied with them.

Another disadvantage of self-defending is that it is hard to multitask. Concentrating on answering questions about your investigation and managing the discovery and deposition process at the same time can be difficult. Also, if you decide to object to certain questions, you may appear to be—or be painted as—an advocate rather than a neutral. As a related point, if deposing counsel is abusive, there will be no buffer between you and that attorney.

Being represented by the employer's attorney solves many of these problems. However, if the employer's counsel represents you, you may appear less neutral. If the jury or factfinder sees your defended testimony, it may regard you less favorably. Additionally, there may be times when your interests as the investigator diverge from the employer's. In such a situation, having employer's counsel represent you could be a problem. Moreover, it is unclear whether your preparation-related communications with the employer's counsel would be privileged. If not, then the plaintiff's attorney could ask you questions about your preparation discussions.

Many of the downsides of having employer's counsel represent you are solved by retaining a separate counsel—both to prepare you for a deposition and to defend your deposition. Overall, this may be the safest choice. You as the investigator can remain and appear completely independent and have protection during the deposition. Because the attorney is there to represent you, your pre-deposition communications would be privileged. On the other hand, retaining separate counsel can be costly. If your retainer agreement does not provide for the employer to pay for such counsel, you would bear the costs. And, even if you have drafted your retainer agreement so the employer pays for separate counsel, this means additional expenses for the client.

During the Deposition

Whether you are an in-house or external investigator, consider your attire and accessories in advance of the deposition. The point is to look professional and to impress upon deposing counsel that you will also make a good impression on the jury. Further, if your testimony is videotaped, the jury may see the deposition testimony itself.

In addition to attire, you should present yourself in a way that shows you are knowledgeable and professional. Be sure that you are fully familiar with your investigation. Answer questions honestly. Do not volunteer information that is not requested. Do not be evasive.

If counsel points out something that could have been done differently, consider whether that would have made a difference and why you chose not to proceed that way. Do not get defensive or argue. Instead, explain why you did not take the additional step. Explain that you used your professional judgment and took the steps that you felt were adequate in the circumstances, and that allowed you to reach reasonable conclusions. Demonstrate that is exactly what you did.

Julie B. Yanow is a workplace investigator, trainer, and expert witness. Before launching EquiLaw in 2003, she was employed by Warner Bros., where she co-founded the Employment Law Department and served as vice president and senior employment counsel. Immediate past chair of the Labor and Employment Law Section of the Los Angeles County Bar Association, past president of the Society of Independent Workplace Investigators (SIWI), and a sustaining member and former director of AWI, she can be reached at jyanow@equilaw.com.

Michael A. Robbins is president of EXTTI Incorporated—a company he founded 23 years ago, after practicing as a labor and employment attorney for 20 years. He has conducted or supervised more than 600 workplace investigations and has served as an expert witness in nearly 700 employment cases—primarily on workplace investigation issues. A past president of AWI and a past chair of the Los Angeles County Bar Association's Labor and Employment Law Section, he can be reached at MRobbins@extti.com.

Bridging the Gap: How Workplace Investigators Can Collaborate with Employers

By Megan Amanda Miller and Christina Dixon

External investigators often have their own ideas about what constitutes a prompt, thorough, and impartial investigation. At the same time, investigations are conducted on behalf of employers with their own practices, methods, and expectations concerning the investigative process. And, unlike the investigators, who can leave the investigation and its wake in their rearview mirrors, employers must also handle the consequences. These differences in expectations and practices can create problems in an investigation—ranging from the merely irritating to the downright detrimental.

This article summarizes tips from a panel of internal HR experts and in-house counsel—working in the public and private sectors, educational institutions, and domestic and multinational organizations—that can help guide external investigators in conducting more effective investigations.

Understand the Client's Goals

Too often, external investigators launch into a full-scale investigation and fail to consider or ask whether that approach would best serve the client's goals. Many of the experts emphasized the need to clarify the goals of the investigation and "triage" the situation at the outset. This need is particularly strong when the client lacks an internal HR or group leader to crystalize the company's needs into clear directives that can be passed on to the investigator. In situations like these, it is critical to gain clarity on what the client needs or hopes to achieve with the investigation. Is a full-scale investigation with a formal report the desired output? Or would the client be better served by an Executive Summary that highlights the investigator's findings and summarizes the evidence supporting the conclusion?

Even when the client is sophisticated, large, and employs a team of HR professionals who manage the various aspects of their employee relationships, asking in advance for clear direction on the desired output, work product, and expectations remains high on the wish list for the experts polled here. Several pointed out that because they have internal HR teams, some extensive and cross-jurisdictional, they only hire externals when the matter is highly complex or sensitive. As such, the written work product by external investigators might be an "Attorney's Eyes Only" report or only reviewed by senior leadership. Once again, they emphasized the desire for reports that speak specifically to those audiences: high-level, findings-driven reports written for executives.

Connect the Dots—and Beyond

The panel of experts overwhelmingly lauded the importance of writing a good analysis—one that connects the dots so the reader can understand the reasoning behind conclusions.

For example, don't simply rehash the evidence summary in the analysis and then conclude. Instead, interpret the evidence. Was there evidence supporting both sides—and if so, which had more weight? Why was that so? If credibility is an important factor, as it so often is, conduct that analysis. Why did you find the complainant more or less credible than the respondent? What credibility factors did you consider and how did each come out?

On a related practical note, organize the analysis and findings so they are easy to locate. Don't force the reader to sift through disorganized data to locate your conclusions.

While a good analysis will connect the dots, an excellent one will also include information that helps an employer diagnose and prevent future problems, even if there were no policy violations. For example, did tension arise between the parties because of some ineffective workplace practice, poor communication, or overwork? Was information shared that might be helpful for understanding the parties' reasons for engaging in any sustained conduct? This information will be helpful for the employer, not only in determining whether a policy was violated, but in taking steps to change workplace culture and prevent future conflicts. While such contextual information may prove helpful, a prudent investigator will ask clients whether and how they want to receive that information. For example, they may appreciate that information verbally as opposed to a written report. While investigators would not generally make findings about such issues, they might frame this information as "additional observations" gathered during the investigative process.

The panel also emphasized the importance of consulting with internal experts when needed. For example, an external investigator who is tasked with writing policy findings but is not familiar with how the employer's policies have been implemented in the past may be wise to consult with someone who knows that history. Failing to do so means shooting in the relative dark and risking findings that conflict with the employer's past interpretation of its own policies.

But beware. As a side note, many external investigators resist making policy findings for exactly this reason. If the employer asks for this, it may be prudent to discuss how to avoid the potential pitfall of inconsistent policy interpretation and ask whether a suitable, unbiased expert is available to discuss how the policy has been applied. Explore with that expert what fact patterns or hypotheticals would or would not violate the applicable policy. Then, use that information to help guide your policy analysis.

Consider the Audience

While writing a clear analysis is good advice for any investigator, the experts interviewed here also emphasized that externals should keep in mind both the reader and the purpose of the report. In general, reports should include only relevant, non-extraneous information. The reader is often an executive or HR generalist who may not need or want to get into the weeds. In essence, less is more. Take the time you need to reflect and condense the report to an appropriate length.

On the other hand, although many experts emphasized the need for brevity in report writing, some contexts may warrant greater detail. For example, if litigation is anticipated, a client who plans to use your report to show that an adequate investigation was conducted may want a detailed, thorough analysis to demonstrate that point.

In considering how to balance thoroughness and brevity, think of the analysis as a landscape that can be viewed from different altitudes. For example, a busy executive may want the analysis from the 30,000-foot level. What features still show at that altitude? Be prepared to get into detail if asked, but you may not need to spell all of that out in the report. Ask clients early on about their needs and preferences concerning how much detail to include.

Be Prepared

The experts expressed a desire for externals to minimize the stress of the interview on witnesses, who are often anxious about and unfamiliar with the process. They encouraged reducing the need for follow-up interviews so that witnesses can put the experience behind them as soon as possible.

But getting the information needed requires preparing thoroughly in advance of each interview. For example, review the witness's job description, reporting relationships, and length of time in the position prior to the interview, to understand what that witness might be able to speak to in advance. Review all relevant documents you believe the witness might be able to clarify or explain, and bring those documents with you to the interview.

And consider whether there are any questions you might be able to ask the witness initially that would prevent the need for a later follow-up. If the information you are trying to gather from a follow-up interview would not likely change the findings, it may not be worth putting the witness through another interview, or charging the client for that additional expense. However, this is a delicate balance. In some situations, it may be better to do that extra interview for the sake of thoroughness and to help ensure that any undetected confirmation bias does not cause you to overlook or undervalue possible evidence.

On a related note, consider that witnesses may be concerned about anonymity, and such concerns can cause significant stress. Most investigators have heard the question: "Who else will know that I talked to you?" Or: "Will anyone get to see what I told you?" While it is fine to redirect the witness to an appropriate client contact, it is also good for you to know the answer to the witness's question in advance. Ask clients upfront about confidentiality and its limits under their applicable procedures. Will the report be a public record? Does the respondent have a right to question the complainant, directly or indirectly? Must witnesses be made anonymous, or should they be? And ask clients whether they would like you to share that information with concerned witnesses or direct the witness to the client to answer such questions.

Knowing this in advance will not only help the investigator comply with the employer's internal policies, it will also help the investigator respond confidently and appropriately to a witness's inevitable concerns and questions about confidentiality. While having a ready and accurate response may not eliminate witnesses' concerns, the investigator's preparation may inspire confidence in the overall process and may communicate that the investigator cares about and has considered the impact of the interview process on the witness.

Beware of Demeanor

The experts also emphasized that one surprising source of witness stress involved externals' demeanor with witnesses. Several offered anecdotes in which an external investigator engaged in a combative style of questioning during the administrative interview, *Law and Order* style. One obvious drawback is that it undermines the investigator's perceived impartiality. Even if the investigator were to treat all witnesses and parties combatively, each participant could easily perceive the investigator as being "against" them and, by extension, "for" someone else. Such an investigation would surely not be perceived as impartial.

A combative approach could also reflect actual bias by the investigator because a truly impartial investigator does not need to argue. It is the neutral investigator's role to remain open to each witnesses' perspective, not to win an imagined fight with the witness. This is not a deposition. Nor is it an "interrogation," even though that word is used to describe the interview process in some statutory contexts.

Another disadvantage of the combative approach is that it increases the participants' stress and dissatisfaction with the investigative process. Employers conduct investigations not only to resolve an issue at hand but to establish that the employer takes complaints seriously and will fairly and impartially evaluate the complaint. When witnesses feel interrogated, they will likely become defensive and be less forthcoming about their experiences and perspectives. This can also cause them to feel they have not been heard.

Clarify Expectations

Experts advised externals to balance the need for timely communication with not overwhelming clients with check-ins. Remember: They outsourced for a reason. There is likely an elevated need for both actual and perceived independence for this particular investigation. And HR or outside counsel are also likely busy with other matters.

On the other hand, investigators should keep the principles of constructive notice in mind. If they are told about a workplace concern, the employer is also on notice, by extension, of that concern. And the employer may need to take separate action about that concern or wish to fold that concern into the investigation's existing scope.

Ask employers upfront about their preferences on how the investigator should communicate status updates. And identify a point person with whom the investigator can touch base about issues or concerns that arise during the investigation, including possible scope expansions. Similarly, determine in advance who the investigator will coordinate with regarding document requests and interviews. Having a plan upfront will go a long way toward reducing the need for procedural questions during the investigative process. Similarly, investigators should stay proactive in communicating about timing and delays to any estimated deliverables. Don't wait until the day before the report deadline to tell the client that it will take another week. And finally, don't wait until the budget is almost blown to notify the client that the investigation is getting close. Keep an eye on the costs and be transparent and proactive in communicating about costs with clients—especially those for which an estimated budget has been discussed.

Communicating more frequently with the client may seem counter-intuitive to some external investigators because of the need to maintain both actual and perceived independence. However, this approach may backfire on all fronts. There are many appropriate reasons to communicate with the client during the investigation. Not only is communication with the client appropriate, it can also improve the client's experience, improve the participants' experience—and lead to a more prompt, thorough, and impartial investigation overall.

A few words on the dreaded "scope creep:" It happens. The clients understand it. The experts' advice on the topic is constant communication. Confirming the scope in the engagement letter might be your standard practice, but what is your standard operating procedure when it comes to scope creep and work product? Our experts implored externals to check in when scope creep happens to discuss how the client wants to handle it in the written report. Whether you include the additional issues in the report depends, in large part, on how the client plans to use the report. Addressing these issues before incorporating them into the report was pinpointed as a key concern.

Think Globally

Some experts emphasized the importance of considering the diversity of the overall workforce in both demographics and jurisdiction. For example, a multinational corporation may have complaints involving parties in different countries, who may have different cultural and societal expectations regarding appropriate workplace conduct. And they may also have or be subjected to different stereotypes based on race, gender, disability, or other protected status. Such differences may be important to include in a report to help provide context for the employer and explain possible causes for any sustained or perceived misconduct, such as differences in communication norms or expectations.

Regarding choice of law, it may be wise in cases that may involve multiple jurisdictions to clarify with the client which laws apply and what, if any, impact that may have on the investigation. For example, the complainant may work in one jurisdiction and the respondent in another. And the employer may be incorporated in yet another jurisdiction. While investigators do not make legal findings, they should consider the legal backdrop in making factual findings to facilitate the rendering of legal advice by an employer's counsel. In multi-jurisdictional cases, it is important to consider whether this context affects how the investigation should be framed and what kinds of information may need to be gathered to help the employer's counsel evaluate potential legal issues.

Megan Amanda Miller is a Bay Area-based attorney and investigator in private practice and the co-chair of AWI's Membership and Marketing Committee. She conducts investigations throughout California for public and private sector employers—including public safety officer and Title IX investigations. She holds a Master of Arts in Counseling Psychology and is trained in Trauma-Informed Forensic Interviewing. She can be reached at Megan@MeganAmandaMiller.com.

Christina Dixon, managing shareholder at Aecus Law, is an external workplace investigator and the founding attorney at the firm. She serves as VP of Corporate Partners for the National Association of Women Business Owners-Sacramento chapter, active in the supplier diversity space. She also serves on the Leadership Committee of the American Bar Association's GP/Solo Section and the Labor and Employment, Employee Rights and Responsibilities Committee. She can be reached at Christina@aecuslaw.com.

When Investigations May Not Be the Answer

By Michal Longfelder

Most workplace investigators have witnessed complaints that were based upon misunderstandings or misinterpretations. And the observant will note that, when they drilled down, a good number of those complaints were preceded by interpersonal conflicts between the parties. Over time, a perceived slight here and an off-comment there evolve into a more serious complaint that is escalated to human resources or a manager to address. Naturally, the default response is to conduct an investigation.

Therein lies the rub.

When the goal of an investigation is purely on reaching factual findings, any opportunity to resolve the issues between the parties who have the conflict is lost. The very manner in which workplace investigators operate almost always exacerbates the underlying conflicts; because the parties in an investigation are kept entirely separate, they have very little, if any, insight into one another's perspective. In the end, one party often emerges feeling vindicated—although usually outraged about having to through the process. The other party is livid and feels betrayed by the organization. Furthermore, the parties are told not to discuss the investigation with each other; the gate was slammed down at the start and it stays closed. If there was animosity between the parties before an investigation, it is unlikely to magically disappear following it.

What many employers and attorneys often fail to realize is that the end of the investigation is not the end of the problem. While an investigation may meet legal obligations, it usually does not address the underlying conflict. Furthermore, when the subject of the investigation isn't fired, an angry complainant is more likely to claim retaliation for any future incidents involving the subject.

Because investigations do not focus, nor should they, on enhancing the working relationship between the complainant and the subject, the parties never have the opportunity to sit down and talk to one another about their personal experiences, how they viewed certain interactions, and the impact of those interactions.

This article explores how a facilitated dialogue can achieve what an investigation cannot: an increased awareness of what initially set the stage for the complaint. By tackling the root cause of the issues that led to the complaint, parties are able to devise strategies to avoid future conflicts. In addition, concurrent with a growing appreciation for the value of facilitated dialogues, a number of investigators have added conducting such sessions to their wheelhouses. For investigators considering expanding into this arena, it is worthwhile to examine some of the key issues involved in transitioning to the role of a facilitator.

Differences and Similarities

While an investigator's background in workplace issues and interviewing skill set is a tremendous asset, there are distinctions. Proficiency at facilitating comes with a significant investment in mediation trainings combined with ample practical experience. Fortunately, there are countless mediation trainings available—from those offered by community-based organizations to local colleges to the Harvard Program on Negotiation. Community-based organizations are often an excellent starting point for training and hands-on experience, as most community board models encourage understanding and resolving interpersonal conflicts rather than taking on legal claims.

The ability to gain the parties' trust is another parallel with investigations. Related to the challenges internal investigators may face regarding the parties' wariness of their neutrality, it is imperative to carefully consider who will be selected as the facilitator. Even an internal staff person who meets the criteria may be wise to step aside and bring in an external resource.

Finally, and perhaps the biggest challenge for most investigators, is letting go of any perceived or preconceived solution to the conflict. The parties' solution is theirs alone.

When to Consider a Facilitated Dialogue

While the idea of a facilitated dialogue may dawn on an employer, it is usually counsel, HR, or an investigator who will present it as an option. Investigators can be helpful in recognizing that an issue may be more appropriate for a conflict resolution process, as well as calling out issues that the investigation did not resolve. The HR professional or attorney who is left to deal with lingering anger and hostility between the parties often quickly realizes that no one is "going back to normal," and some sort of intervention is necessary.

First and foremost, counsel should be consulted in advance of proposing the possibility of a facilitated dialogue to the parties. If counsel raises serious concerns, having to withdraw the opportunity after the parties have embraced it will muddy the waters even further.

It is especially important to consult with counsel if considering a

facilitated dialogue in lieu of an investigation, especially if the issue could result in legal liability. Even the complaining party's stated preference is to work with the respondent to resolve their dispute rather than proceed with an investigation, that does not absolve the employer of the obligation to investigate. Complainants may change their minds or another person could subsequently allege that the employer did not adequately address the allegations—a risk the employer needs to consider. If proceeding, both parties should memorialize in writing that they chose the option of a facilitated dialogue.

More customary is when the parties are amenable to engage in "repair work" following an investigation. Conducting a facilitated dialogue after an investigation is by far where most of the work lies. Regardless of when the facilitated dialogue occurs, the employer must be careful to present this as an option, which either or both can refuse without any consequences.

Another issue to consider is whether the person who conducted the investigation should also proceed as the facilitator in a particular matter. On one hand, the investigator will have gained good insights about the parties; on the other, the fact that the investigator reached findings is often interpreted as signaling agreement with one of the parties. As with investigations, it is worthwhile for all concerned to reflect on potential perceptions.

Differences from Mediation

Poles apart from a traditional employment mediation, a facilitated dialogue is not about obtaining a settlement agreement to prevent litigation. The premise of most workplace mediations is almost always that the parties will be going their separate ways, and not maintaining a working relationship. In a facilitated dialogue, the goal is on rebuilding trust and repairing the working relationship. The focus is for each party to understand, from the other's perspective, what went wrong and when. While both parties are encouraged to share how they experienced a given interaction, it often leads to a real awakening when one person actually listens to how the other felt about it.

To achieve this, the logistics of a facilitated dialogue are the opposite of when the plaintiff and defendant sit in separate rooms for the entirety of the mediation. Here, as the parties spend their time in joint sessions, the seeds of resolving conflicts together are planted. The simple act of sitting across from an adversary is often the first step to repairing a working relationship.

For example, assume that Ahmed complained that his manager, Tom, was treating him differently than his co-workers by excessively scrutinizing his work. What if Ahmed learned that while he works best when he has a great deal of autonomy, Tom's working style is primarily driven by a strong need for accuracy, which translates into his tendency to check Ahmed's work? Learning this, Ahmed may come to the realization that it is actually not that Tom doesn't trust him, but rather that's just how he is hardwired. For his part, Tom may realize that, looking back, Ahmed's work has always been highly proficient and that extending more trust will result in a more productive and engaged employee. They will then both have the opportunity to appreciate different working styles—and, importantly, how to resolve a conflict themselves, rather than escalating it.

Signposts of Facilitated Dialogues

In addition to how a facilitated dialogue differs substantively from a traditional employment mediation or an investigation, the practical and logistical aspects of the process are also vastly different. Some of these will require the facilitator to be aware of and educate the employer about the process, guidelines, and best practices.

Confidentiality

Facilitators should discuss with the employer what information will be shared with HR, management, and other sources. This can range from minimal ("Tom and Mike were successful/not successful in reaching an agreement on how they will address disputes in the future") to extensive (specific terms of the agreement between the parties, behaviors, statements or beliefs that are harbingers of potential problems, and the facilitator's observations and recommendations to support the parties).

Facilitators must also balance the employer's desire for full transparency with the parties' desire for a safe space. When the parties know that "What happened in Vegas, stays in Vegas," the chance for an honest dialogue increases exponentially. This, in turn, boosts the likelihood of a higher level of understanding and trust, along with the ability to reach a sustainable agreement. Whatever is agreed with the employer, it is crucial that the parties are informed in advance about what will be shared.

The focus is for each party to understand, from the other's perspective, what went wrong and when.

Voluntary participation

A coerced participant is a failure waiting to happen. Facilitators should talk with employers about how they will pose this opportunity to ensure neither party feels pressured. For example, in situations in which the complainant reports to respondent in the workplace, the complainant may feel pressured to participate because of that relationship. Respondents may suspect management has lost faith in their capabilities as managers and may feel similarly compelled or risk losing their jobs if they don't agree.

One possibility is for facilitators to ask the employer to identify someone both parties trust to broach the subject. That person needs to demonstrate empathy about how challenging the investigation has been, carefully listen and respond to any concerns, and talk about why the organization is suggesting—not directing—that they participate. No one likes being miserable, so emphasizing that the heart of having a facilitated dialogue is a path to moving forward will set the stage for the parties to conclude this is meant to benefit both of them.

Employer observations

Having a good sense of the organizational culture and of the specific employees involved may help facilitators anticipate how the parties are likely to behave. How is conflict perceived, and is expressing dissenting views encouraged? In addition, can someone provide insights to how these specific employees' view conflict? Do they tend to be resistant or open to other points of view? Gathering this kind of intel will provide valuable insights for facilitators.

It is also important for facilitators to verify whether one or either employee is being considered for a transfer, lay-off, or other change in their current positions. Employees who voluntarily participate in a facilitated dialogue and subsequently lose their jobs will feel misled and betrayed, giving them perfect grounds to call a lawyer.

The Look and Feel of the Process

Often the first step facilitators take is to interview the parties for an overall description of the working relationship, when the conflicts arose, and their perception of what the conflict is about. It can also be helpful to use working and conflict style assessments to be shared in joint sessions.

If the facilitated dialogue is being conducted post-investigation, it must also be conveyed that is not the forum to challenge the investigation or raise new allegations. However, it is inevitable that incidents at issue in the investigation will surface. This is likely the first time the parties will hear the other side's story. It is not unusual to hear "I never knew that's how you saw it" or "Now I see why you were so upset."

With some exceptions, the facilitator's approach is much more hands-off than that of a workplace investigator. Ideally, in a facilitated dialogue, the parties talk to one another with as little intervention as possible. Instead of getting a precise accounting of "what happened when," the underlying incidents are examples. The facilitator encourages the parties to lead much of the discussion, listens for emotions, steps in to neutralize inflammatory statements if needed, and observes when there are points of agreement. The primary role is to help move the parties away from their anger and self-absorption and toward understanding.

Another effective tool for facilitators, quite different from investigators or mediators, is offering observations about one party's obstructionist tactics or, to the contrary, their tendency to accept all the blame without raising their own concerns. Sometimes the parties try to rush too quickly toward resolution, and the facilitator's role is to ensure that they are not leaving unresolved issues on the table.

Facilitators must be prepared to suspend the process at any time if anger derails the discussion; time-outs are a useful tool. Similarly, the session must end if either party references an incident that creates legal liability for the company and needs to be addressed separately.

Finally, focusing on workable solutions to preventing and resolving future disputes is at the heart of the entire process of a facilitated dialogue. Walking away with a clear roadmap will support the parties as they navigate a new working relationship.

The Value Added

The facilitated dialogue process is not a simple one. It is also not a linear process, as a party may often suddenly return to re-emphasize a point that was made hours before. A facilitator's role is somewhat like herding cats.

The process takes commitment and hard work for everyone—including the facilitator. But the payoff can be remarkable. The parties will be able to move past the complaint or investigation, leaving their anger and resentment behind. Each will have a better appreciation of the impact of their own actions and a sense of having contributed to a healthier future working relationship.

The employer will also realize enormous benefits. First and foremost, when parties work together to understand one another, agree to change, and actually do so, they are far less likely bring a claim of unfair treatment in the future. Going the extra mile by engaging in a facilitated dialogue will help alleviate the underlying conflict, restore a well-functioning workplace, and, if litigation or an agency charge occurs, demonstrates the company's commitment to both employees.

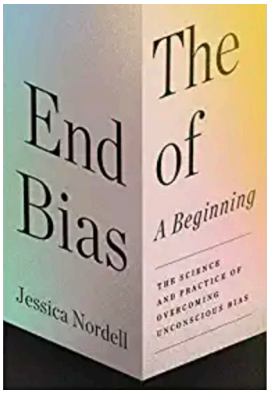
Michal Longfelder is the principal of Employment Matters, an employment law practice focusing on workplace investigations, internal mediations, executive coaching, and expert witness services. She served as a mediator for the EEOC, and as adjunct faculty at the Golden Gate School of Law and the University of San Francisco teaching employment discrimination, business law, negotiation and conflict resolution skills, and human resources. She can be reached at michal@employmentmatters-ml.com.

BOOK REVIEW

The End of Bias: A Beginning by Jessica Nordell

(Metropolitan Books, 2021)

Reviewed by Miles Grillo



Workplace investigators know firsthand the impacts that implicit bias and unexamined stereotyping can have on the work environment—from discriminatory practices and policies, to the toll they take on individuals and organizations as a while. In *The End of Bias: A Beginning,* a fitting name for author and journalist Jessica Nordell's book, she provides context for the history of bias and explores some ways to go forward.

Nordell acknowledges that with bias, "the stakes are high, the repercussions are serious," and that eliminating bias does not have a quick and easy solution. It takes dedication, by both individuals and organizations. The author sets out to convince readers that bias is a problem that can be solved, and does so by interspersing interesting and poignant anecdotes with extensive research; the book contains hundreds of citations to studies and other resources.

In her exploration of bias, Nordell examines a number of workplace settings—including legal, medical, academic, and software tech, and describes how bias reveals itself in each of them. Nordell discusses two relevant legal cases: a 2015 suit brought by venture capitalist Ellen Pao against her company and a 2011 class action suit brought on behalf of female employees at Walmart, and how the understandings of bias affected the results. These examples illustrate that bias can operate in workplaces as a complex system, which can make it difficult for anyone—including investigators—to identify, and challenging for organizations to hold individual actors responsible.

The book is split into three parts: How Bias Works, Changing Minds, and Making It Last.

In the first section, Nordell discusses the origins of bias and illustrates that individual bias results in systematic and measurable differences in how marginalized groups are treated. Examples from this section include the effects of priming on racial bias and the impact highlighting gendered categories has on children's stereotypes of one another.

The second section, Changing Minds, reports strategies that have shown promising results in reducing individual bias. Nordell starts with the failings of diversity training within organizations and suggests a different approach: treating bias as a habit to be broken. Here, there's a focus on a workshop for students put on by Patricia Devine and Will Cox at the University of Wisconsin-Madison, focusing on strategies for noticing stereotypes and replacing them mentally, spending time with people from different backgrounds, and envisioning others' perspectives. Follow-up studies of undergraduate students who participated showed changed habits: Two years later, these students were more likely to speak up against bias. The section also discusses ways that police forces in Hillsboro, Oregon and Watts, California worked to combat bias using mindfulness and community building.

The book's last section discusses systematic efforts to lessen the effects of bias, such as including more diverse viewpoints in decision-making roles, eliminating subjective criteria in hiring, and revising representation in the media. Making some of these systematic changes, Nordell posits, can change result in long-term changes in cultural perceptions—and in workplaces.

Because the issue of bias comes up often for investigators, their goals may differ from the average reader of *The End of Bias: A Beginning.* While some readers may have a personal goal of focusing on understanding and eliminating bias, an investigator needs to be vigilant for other reasons. Allowing biased decision-making can lead to serious consequences, professional and legal, for both clients and for individual investigators.

While Nordell's research may not feel surprising to many investigators, the book can be one of many tools in an investigator's toolkit. *The End of Bias: A Beginning* is engaging and jam-packed with information, both historical and current, and can serve as a reminder to an investigator of what we are up against. Our roles in bias cases, whether fact-finding regarding specific bias allegations or consulting with firms about potentially biased policies, require a nuanced understanding. Investigators need to consider ways that bias manifests on macro and micro levels, on top of working to identify and overcome our own individual biases. When Nordell describes the phenomenon of homophily (love of the same), she points to how it leads to hiring practices that create more homogeneous workplaces. Investigators are reminded to also consider how homophily impacts our own perspectives: Did we assign more credibility to a witness who came from our hometown or went to the same school?

Nordell concludes with the question: "Can we overcome biases that are unconscious, unintentional, or unexamined?" Her answer is yes—with some willingness and dedicated and concerted efforts on individual and institutional levels.

Miles Grillo has been an investigator for five years with Public Interest Investigations in Los Angeles, California. He is an AWI Certificate Holder and has attended a number of investigation-related trainings. He has worked on a variety of cases, including death penalty cases, Title IX complaints, and various workplace investigations. An avid reader and lover of books, he can be reached at mgrillo@piila.com.

MAILING PANEL

2022 Training Institutes

Philadelphia Training Institute for Workplace Investigators
April 4–8, 2022

Niagara Training Institute for Workplace Investigators
June 13–17, 2022

Park City, Utah Training Institute for Workplace Investigators
August 22–26, 2022

Virtual Training Institute for Workplace Investigators
October 31–November 11, 2022

REGISTRATION AND DETAILS FOUND AT WWW.AWI.ORG

THANK YOU TO OUR 2021 AWI CONFERENCE SPONSORS

OPPENHEIMER INVESTIGATIONS GROUP LLP

VAN DERMYDEN MAKUS
Investigations Law Firm

Levenfeld Winter LLP
Investigations and Training for the Workplace and Campus

LAW OFFICE OF CAROLINE SCHUYLER

TRIBU PARTNERS

Flynn Investigations Group
EMPLOYMENT MATTERS

INVESTIGATIONS LAW GROUP

Ogletree Deakins

DaVita

Public Interest Investigations, Inc.®

convercent by OneTrust

ELLIS INVESTIGATIONS
LAW CORPORATION

KRAMER
WORKPLACE INVESTIGATIONS