AWI JOURNAL

VOLUME 12 | NUMBER 4 | DECEMBER 2021

ASSOCIATION OF WORKPLACE INVESTIGATORS®

THE OFFICIAL PUBLICATION OF THE ASSOCIATION OF WORKPLACE INVESTIGATORS

Getting Real about Critical Race Theory: What Workplace Investigators Need to Know

By Valyncia C. Raphael-Woodward

In 2020, former police officer Derek Chauvin's murder of George Floyd catalyzed discussions of anti-Blackness and systemic or institutional racism in U.S. workplaces. In fact, according to research by Race Forward, a research organization focusing on racial justice issues, the term "systemic racism" was used more times in the media after Floyd's murder than in the last 30 years combined.[1]

According to statistics recently compiled by the group, 88 Fortune 500 companies issued public statements touting antiracism.[2] However, data analysts found that many of these statements either stopped short of including actionable steps to end racism or failed to demonstrate critical self-reflection that would indict the companies' own "histories of racial inequity, entrenched whiteness, or need to massively overhaul its policies."[3]

Despite the well-intentioned efforts losing steam at this point, one trend is hard to ignore: The groundswell of political discourse for and against Critical Race Theory as a tool to address structural or systemic racism. While useful for and familiar to day-to-day diversity, equity, and inclusion practitioners, the debate surrounding Critical Race Theory strains workplace cultures and breeds conflict and worker complaints.

The political pendulum and social zeitgeist related to what versions of equity, diversity, and inclusion initiatives are lawful and popular are likely to remain in flux. But workplace investigators must be poised to assist employers in responding to complaints to exercise their commitment to their stated values, goals, and policies. This article helps equip investigators for this task by explaining Critical Race Theory, its critiques, and some practical implications given the diversity of political and ideological perspectives that may be at play.

The Roots of Criticism

The recent criticism of Critical Race Theory is rooted in an article by Christopher Rufo published in the *New York Post* in July 2020 describing the "diversity industrial complex." Framed as a scandal break, Rufo indicated that the training conducted at several federal agencies, "Difficult Conversations About Race in Troubling Times," focused on Critical Race Theory and that one consultant in particular made a name for himself as a diversity consultant at a taxpayer price tag of more than $5 million.[4] That piece, and Rufo's subsequent appearance on Tucker Carlson's Fox News television show a few weeks later, sparked two actions within the federal government.

One trend is hard to ignore: The groundswell of political discourse for and against Critical Race Theory as a tool to address structural or systemic racism.

First, Russell Vought, Director of the U.S. Office of Management and Budget, issued a memo at President Donald Trump's direction criticizing the trainings that Rufo referenced, and concluding: "The divisive, false, and demeaning propaganda of the Critical Race Theory movement is contrary to all we stand for as Americans and should have no place in the federal government."[5]

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THE AWI JOURNAL

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Published quarterly by the
Association of Workplace Investigators, Inc.
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The mission of the Association of Workplace Investigators is to promote and enhance the quality of impartial workplace investigations.

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

President's Message

While preparing to write this, my first President's Message, I did what every good investigator does. I looked at past examples—for templates, ideas, inspirations, and themes. I looked to the words of the wiser past presidents to see how they began their term on the pages of AWI's celebrated Journal.

Because most of these first messages immediately followed the Annual Conference, many begin with a brief congratulations to the Conference Committee for its success in delivering another great conference. Of course, for many years, we had the great fortune of taking an in-person conference for granted, relishing each fall the joy of gathering, sharing ideas, and learning from each other.

But as Peter Allen sang in *All that Jazz:* Everything old is new again. Maybe he was not talking about resuming in-person conferences, but he should have been. This year's Annual Conference was historic and wonderful. It felt new. New to be around people, gathered together in a large room. New to look people in the eyes, even if you could not see their broad smiles behind masks. New to see people speaking from a stage, rather than a Zoom window.

The conference was historic for two reasons. First, it was the first Annual Conference held outside of California, a nod to the incredible growth of AWI. The city of Denver was a wonderful host, even dusting us with a little snow. Second, of course, it was the first in-person Annual Conference after our world changed in March 2020.

In Karen Kramer's last President's Message, she reflected on the difficult decision the Conference Committee, ably led by Jennifer Doughty and Jeff Buebendorf, and the Board of Directors faced. They had to decide: One, whether to hold an in-person conference, and: Two, if yes to one, what safety protocols to impose. Karen cautioned that no decision could please everyone. We experienced in Denver that the decision to hold an in-person conference with safety protocols in place was the right one.

Though smaller than before, and with many of our in-house colleagues absent due to travel restrictions, the conference was a tremendous success. The Conference Committee worked tirelessly and produced an excellent program. Our steadfast association management team from Ewald Consulting handled the logistics, including new technology, seamlessly. And more than 150 brave attendees got on planes, in cars, and made their way to Denver to be present and to show that we can and we will come out of this pandemic fog.

At the board meeting before the conference, we joked with Karen about her "pandemic presidency." It was not the term she expected, or probably even wanted. But we could not have had a better leader for this period in history. Under Karen's careful, thoughtful leadership, in the face of repeated existential threats, AWI thrived. We owe Karen and all of the volunteers and staff who stepped up a debt of gratitude. AWI remains vibrant, active, and financially sound.

So, where do we go from here? While I hope that my term is not defined by the pandemic, we are still in its grasp. We have plans for in-person institutes, seminars, and conferences in 2022, but the specter of a resurgence that relegates us to virtual programming still lurks. However, we know that, whatever obstacles we face, we will adapt, and we will thrive.

I am honored to serve as AWI's board president, and I look forward to sharing with you the good work that so many of you do in furtherance of AWI's mission: "To promote and enhance the quality of impartial workplace investigations."

Eli Makus
President of the Board of Directors
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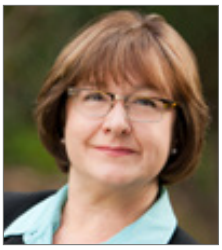

Letter From the Editor

Dear Friends and Colleagues,

Here we are on the cusp of a new season and once again, it's time for change. Only this time, I'm the one doing the changing. At the end of December, I'll be stepping aside as editor of the *Journal*. This is my last issue.

I have been honored to be part of creating this publication and delivering useful, thoughtful, and interesting information to workplace investigators around the world. Thank you all for trusting me with this role. I can't wait to see what comes next!

Speaking of what's next, Valyncia C. Raphael-Woodward takes a deep dive into the hot topic of Critical Race Theory. In her article, "Getting Real about Critical Race Theory: What Workplace Investigators Need to Know," Raphael-Woodward provides a down-to-earth explanation of what Critical Race Theory is—and what it is not. She brings deep academic understanding and years of practical experience to the issue, helping untangle rhetoric from reality and providing useful advice to investigators.

Among the issues that we at the *Journal* have been asked to publish on is the (dreaded) deposition of the workplace investigator. Julie Yanow and Michael Robbins have come to our aid with part one of their two-part series on the topic: "Being Deposed on Your Investigation: Strategies for Success." This installment "begins at the very beginning" by walking investigators through what we need to do long before the deposition is even a question. And the authors remind us that investigators always need to be prepared for the possibility of having a deposition taken on any investigation.

Being prepared is exactly what James Cawood helps us with in his article "Workplace Investigators and Threat Assessments: Good Partners, Different Focuses." Cawood clarifies the difference between a threat assessment and a workplace investigation. I appreciated that he gives sound advice on staying in our lane as investigators and helps us understand what it is exactly that folks like him do. I know I will refer to this article regularly in the future—especially for guidance on when investigators and threat assessors should work together.

Last, we welcome Jorge Colon, who has reviewed *Shooter v. Arizona*, a recent Ninth Circuit case addressing the sexual harassment investigation of Donald Shooter and his subsequent expulsion from the Arizona House of Representatives. As investigators, we hear claims about due process, or the perceived lack of it, in workplace investigations. Shooter made just such claims about his expulsion and the investigation that led to it. Colon deftly explains the finding of the court. (Hint: There are no elaborate procedural requirements to be found.) And he points out lessons for all investigators, wherever we roam.

This issue embodies one of the things I love best about AWI: the generosity of our members and volunteers. Because these authors have freely shared their expertise, we can learn from the best. I will miss reaching out to you all regularly, as I've had the privilege to do over the past several years. Thank you, again, for the honor.

Wishing you all health and peace,

Susan Woolley
Editor, *AWI Journal*
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Second, President Trump issued Executive Order 13950, "Combating Race and Sex Stereotyping," on September 22, 2020.[6] The order banned certain diversity training for federal contractors and aimed "to combat offensive and anti-American race and sex stereotyping and scapegoating."[7] Also, the U.S. Department of Labor's Office of Federal Contract Compliance Programs set up a reporting hotline and email address to manage reports of potential violations of that order.[8]

Thus, Rufo's piece disrupted the momentum of many workplaces—especially those of federal contractors. What he alleged about Critical Race Theory was formally called out as a political decoy by a contingent of 21 Democratic legislators opposing Executive Order 13950 and accusing the administration of "discouraging and needlessly politicizing critical efforts to end racial and sex-based discrimination."[9]

In addition, opposition and a plea to withdraw the order was voiced to President Trump directly in an open letter joined by more than 150 businesses, including the U.S. Chamber of Commerce.[10] The order's legality was also challenged in courts.[11]

To avoid having their contracts canceled, terminated, or suspended, however, many federal contractors paused their diversity training and other related initiatives, hopeful that a potential political change in presidential administration was forthcoming and the incumbent would revoke the executive order.

As expected, President Joseph Biden issued Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities through the Federal Government" on January 20, 2021, revoking Executive Order 13950.[12] Despite this, multiple pieces of state legislation and other local actions have barred Critical Race Theory in work and school settings, and also bar certain related training on bias mitigations and antiracism.

The original academic meaning and utility of Critical Race Theory has become warped and confused. Business leaders committed to combating racism, and systemic racism in particular, are likely to increasingly call upon workplace investigators when the underlying conversations go wrong—particularly if people will be banned from getting trained on how to have these conversations safely and mindfully.

Critical Race Theory Defined

Critical Race Theory generally explains that the inherently racist structure privileges white people and marginalizes people of color. More specifically, it is a theoretical framework providing insight about how race and racism affect U.S. jurisprudence. Education professors Jessica T. DeCuir-Gunby and Adrienne D. Dixson summarize the five main tenets of Critical Race Theory as:

- Counter-storytelling;
- Permanence of racism;
- Whiteness as property;
- Interest convergence; and
- Critique of liberalism.[13]

Each is described more fully in the accompanying table.

Tenets of Critical Race Theory	Description
Counter-storytelling	Activist research method that leverages personal stories to counter normalized racial stereotypes.
Permanence of racism	Considers and explicitly names racism a fixed and perpetual component of U.S. systems, such as politics, economics, and society more broadly which will perpetually maintain itself unless actively disrupted.
Whiteness as property	Leveraging the socially constructed white identity and the power that comes with it as if it is a property right, so that Black, indigenous, and other people of color are excluded.
Interest convergence	Concept that change only occurs when beneficial to the oppressed as well as the oppressor, or when the interests of both groups converge.
Critique of liberalism	Asserts ideologies of liberalism (colorblindness, assumptions of neutrality of the law, and incremental change) as problematic because they ignore white privilege, its effects, and how racism has been baked into the United States' founding principles.

The Rebranding in Practice

With this perspective in mind, the idea behind Executive Order 13950 was to prevent what Rufo and others called the "diversity apparatchiks" from enlisting "everyone in the federal government" to the work of "antiracism" that "diversity hustlers" peddle as an ideology in which minoritized people are "permanent victims and whites are forever tainted by racism."[14] This rebranding of Critical Race Theory, and the public debate it sparked, redefines the theory as a catchall term for antiracist approaches or initiatives that

include concepts of diversity, inclusion, equity, content regarding racist origins of U.S. history, and implicit or unconscious bias, and theories that grew out of it, such as intersectionality.

In this firestorm, one side has given Critical Race Theory various labels, from Anti-American or Un-American and evil to racist. Conversely, others deem it an historically honest approach to teaching and learning U.S. history and opine that resistance to it is a strategy to undermine efforts to foster equity, diversity, and inclusion in schools and workplaces.

All sides of the debate have distracted from and stalled the movement designed to address the root causes of inequity in U.S. schools and workplaces. This response seems to be a backlash to the unrest that followed George Floyd's murder and effectively challenges it at best and reverses it at worst.

Impact on Workplace Investigators

The debate about Critical Race Theory and its inappropriateness in the workplace and schools conjures the spirit of colorblindness. This approach asserts that, as an alternative to race-conscious strategies such as antiracism, it is preferable to ignore race and hope race-related problems go away. This is unsurprising, as this ideology is the dominant view within the law—perhaps because the arc of U.S. jurisprudence considers race in the education context and has evolved to consider affirmative action as a zero-sum endeavor to whites.

For example, in 2007, Chief Justice John Roberts, in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, concluded: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[15] This thinking pretends that power dynamics fueled by race—and wealth, and other social identities and inequities—do not exist. It does not account for modern understanding that racism is embedded and cannot be disentangled from systems without intentional and precise strategies.

In pointed contrast, in a dissent in the 1978 case of *Regents of the University of California v. Bakke*, which banned racial quotas in higher education admissions, Justice Thurgood Marshall articulated the ways the constitutional interpretations of equality were shapeshifted to thwart affirmative action. Marshall clarified that affirmative action was an attempt to redress centuries of discrimination, and anti-Black racism in particular.[16]

Given increased racial awareness globally, this tension may be reconciled; it is the difference between nondiscrimination and antidiscrimination work. Systems thinking is needed to challenge inequality and inequity at the systems level, versus the individual level. Systems thinking is the analytical strategy that takes a bird's-eye view of the structure of the whole to identify patterns, cycles, and trends as opposed to individual events or blips that occur within the system. In essence, it means seeing the forest, not the trees.

The debate has distracted from and stalled the movement designed to address the root causes of inequity in U.S. schools and workplaces.

This approach has several benefits because it puts investigators in the position to ascertain and perhaps diagnose the root causes of issues, not just observe their effects or symptoms. Without systems thinking, workplaces will struggle to comprehend how racism works because it is a systemic, not an individual, problem. Critical Race Theory provides this needed systems level approach, but given the current debate, mischaracterization, and confusion it has triggered, employers may be prevented from fully understanding and leveraging it.

Guidance for Investigators

Here are a few questions workplace investigators should ponder when engaged to review incidents potentially involving Critical Race Theory issues.

Am I current with evolving terminology?

The language defining second generation discrimination is constantly and quickly evolving. To ensure investigators are able to detect and assess issues and speak intelligently about them, their vocabulary must be current. Many glossaries are currently maintained and searchable online to help.[17]

Was the information authorized to be shared?

In situations in which training information is leaked, and the leakers appeal company efforts to hold them accountable, consider whether the information was authorized to be shared. As a corollary, also consider whether the training or the workplace set up expectations for keeping training materials private. If so, the person who shared the information may have violated policy or a professional code of conduct or a directive of the employer for sharing information.

Was the training mandatory?

Several studies show that diversity training does not reduce bias or positively impact behavior in the workplace if done in isolation, but can be effective if it is one of many approaches that engage managers in problem solving.[18] If the facts indicate that

the training is mandatory and the target of the investigation opted not to attend, the client may benefit from knowing the compulsory training may be having the opposite of the intended effect of creating an inclusive workplace that fosters belonging.

Was academic freedom or free speech infringed?

For colleges and universities, academic freedom and freedom of speech, especially at public institutions, are threatened or ultimately banned due to the Critical Race Theory debate. Eight states have currently signed a ban on Critical Race Theory-related teaching and five have a bill proposed or making its way through their legislative process. Another five have taken other state action and another two have pre-filed bills for the next legislative session.[19] One strategy to gain information would be to inquire about whether and how academic workplaces can engage in the difficult conversation about instructors' rights to academic freedom, every person's freedom to engage in protected speech, and institutional goals and commitments to diversity.

Is the complaint process being used as a weapon?

Educator and researcher Robin DiAngelo posits that due to lower racial stamina, white people tend to wilt when challenged to discuss race, then become so overcome with defensiveness they shut down conversation and cause others, particularly people of color, to avoid the topic in the future.[20] Psychology professor Jennifer Freyd calls this type of response DARVO, for "Deny, Attack, and Reverse Victim and Offender."[21] While both frameworks offer tools to describe and understand behavior, they may not be probative of whether policies were violated. Nonetheless, since most workplace policies note that only good faith complaints may advance, it may be instructive to assess whether a fragility or DARVO response prompted a complaint, permitting an investigation that is an extension of bias versus trying to stamp it out.

Valyncia C. Raphael-Woodward is a scholar-practitioner, higher education equity, diversity and inclusion strategist, and expert on addressing racism, sexual misconduct, and corrosive behaviors in the workplace. She has worked as a part-time instructor, and currently serves as Director of Employee Relations and Title IX Coordinator at Western University of Health Sciences, where she manages civil rights investigations for students and employees. She can be reached at vcraphael@gmail.com.

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

By Julie B. Yanow and Michael A. Robbins

Being deposed on your own investigation is a rite of passage that many investigators will face during their careers. This article, the first of a two-part series, provides strategies to ensure a successful deposition experience.

The time to start looking ahead to a potential deposition related to one of your investigations is at the outset of that investigation. Of course, most investigations will not end up in litigation, but approach every assignment as though it may. Consider that everything you do will create evidence and may be produced in litigation. This will induce in you a state of appropriate paranoia that will serve you well.

The Four Factors for Success

Four important factors will influence your deposition experience. They include:

- A retainer agreement;
- The investigation itself;
- The pre-deposition process; and
- Deposition preparation.

These factors will be explained in order, in this article and the next, to be published in the upcoming issue of the *AWI Journal*.

Success Factor 1: Your Retainer Agreement

If you are an external workplace investigator, you should have a retainer agreement between you and the employer. This article reviews the essential provisions that every external workplace investigator's retainer agreement should contain, with particular emphasis on those that may impact your deposition. In addition, consult legal authorities in your jurisdiction, AWI resources, and colleagues to determine the full complement of provisions to include.

If you are an internal investigator, don't go away. While you are unlikely to use a retainer agreement, you still need to be familiar with the concepts discussed here.

The essential elements of a retainer agreement include:

- A privilege provision;
- *City of Petaluma* language, or similar language from other jurisdictions;
- A litigation or right to retain counsel provision; and
- An indemnification provision.

The Privilege Provision

Whether you are an attorney or not, if you're conducting investigations, you will need to consider privilege issues, such as the attorney/client privilege.[1]

To simplify, the attorney/client privilege ensures that when an attorney conducts an investigation and there is a lawsuit, the investigation is protected from disclosure. It is the employer's call whether to produce or turn over the contents of the investigation.

Significance for attorney investigators and their employers. Suppose you are an attorney, external or in-house, and you look into a sexual harassment concern. After you complete the investigation, it is challenged. The claimant files a lawsuit charging that the allegations were not sustained due to your poor investigation. The employer will then have the option of using the investigation as either a "sword" or a "shield."

> The privilege provision provides the employer with an important choice it otherwise would not have in the event of litigation downstream.

If the employer is confident that you conducted a prompt, thorough, and impartial investigation, it "waives" the attorney/client privilege—that is, it turns over the investigation report, notes, and other materials relating to the investigation during the litigation to show it responded properly to the complaint. This action also means that you, the investigator, are obligated to testify in deposition and at trial, if called. In this way, the employer uses the investigation as a "sword."

On the other hand, the employer may decide to assert the attorney/client privilege and not turn over the investigation, using it instead as a "shield." One reason for doing so might be that your findings supported the complaining party's allegations. In such a case, the employer may not want the jury to see your conclusions and reach the same result. However, the employer cannot then claim that

it conducted an adequate investigation because it cannot use the investigation as both a shield and a sword.[2]

Including the privilege provision in the retainer agreement provides the employer with an important choice it otherwise would not have in the event of litigation downstream. Generally, it does not change the manner in which you conduct your investigation.

Significance for non-attorney investigators and their employers. If you are an external human resources professional or a private investigator, the privilege may still be available *if* you report to an attorney in conducting the investigation, *or* you are supervised by one.

For example, if you are a human resources professional, and the general counsel asks you to conduct an investigation, you will have the benefit of the privilege. In such a situation, because there will not likely be a retainer agreement, there should be documentation—an email, notes, a company policy, or something else—that memorializes the attorney's request to you for the investigation.

City of Petaluma or similar language

Language gleaned from the 2016 case *City of Petaluma*[3] and similar language from other jurisdictions concerning the attorney/client and work product privileges provide guidance about what can be included in the retainer agreement—and perhaps in your report as well—that will help establish an attorney/client privilege and thus give the employer the option of producing the investigation in case of litigation.

In *City of Petaluma*, the employer hired an external investigator, Amy Oppenheimer, AWI's founder and first president. After she completed the investigation, the plaintiff sued and asked for the investigation materials. The employer was faced with a decision: either turn over the entire investigation or turn over nothing, basing its position on the attorney/client privilege. In *City of Petaluma,* the employer declined to produce the investigation because Oppenheimer, an attorney, conducted the investigation.

However, the trial court determined that the attorney/client privilege did not apply and ordered the employer to turn over the investigation. The employer appealed that decision.

The appellate court looked at the retainer agreement, which stated that there was an "attorney/client relationship" and more significantly, stated that Oppenheimer was to use her "employment law and investigation experience to assist [the employer] in determining the issues to be investigated and conduct impartial fact-finding." Finally, every page of Oppenheimer's investigation report stated that it was "confidential and attorney/client privileged." Citing these facts, the court determined that the investigation was in fact privileged and the employer did not have to turn over the investigation.

Obviously, if you are an attorney, it is important to include language in your agreement similar to that cited in the *City of Petaluma* decision.

Litigation or right to retain counsel provision

As an outside investigator, adding a litigation provision as well as a right to retain counsel provision provides substantial protection for you.

For example, suppose you conduct an investigation. A year or so later, you learn there is litigation pending involving your investigation. The legal action is brought against the employer; you are not being personally sued. The litigation provision in your retainer agreement will specify that you will be compensated for all post-investigation time you work—including the rate at which the employer will compensate you and related details. With such a provision, for example, you will be compensated for all of the time you spend re-familiarizing yourself with the details of your investigation, preparing to be deposed, and, ultimately, for testifying in deposition and at trial. Without such a provision, the employer has no obligation to compensate you for any of this additional work.

In addition to providing for compensation in the event of post-investigation litigation, you can include a provision in your retainer agreement that entitles you to be represented by employer's counsel. Such a provision might even specify that you will select your own counsel, for which the employer will pay. Having counsel represent you at your deposition might provide you with protection. Also, it could insulate you from disagreements between the employer's counsel and the attorney representing the employee.

Indemnification provision

The litigation provision comes into play if an employer is sued, and you are involved as the investigator. The indemnification provision serves a different purpose.

Suppose you are directly sued because of the investigation you conducted. In this nightmare scenario, the indemnification provision will protect you personally. The provision imposes on the employer the duty to make good any loss, damage, or liability to you that arises from having conducted the investigation. This includes paying your attorneys' fees and any settlements. For example, if a jury were to impose damages on the employer and also on you, the employer would be responsible for both sets of damages; you would not be responsible for paying anything.

The exception to all of this, at least in California, is that an indemnification agreement such as that described here cannot be invoked in the case of a malpractice suit by the employer against the attorney/investigator. As with all these provisions, it is important to check applicable authorities in your jurisdiction.

Success Factor 2: Your Investigation

The key here is to remember that everything you do in every investigation may be subject to scrutiny in litigation later on. That is, a judge, jury, or arbitrator may be looking at exactly what you did during the investigation and why you found as you did. As you move though every investigation, remember that you are creating evidence.

Here are some tips to help you prepare for the best deposition process possible.

> As you move though every investigation, remember that you are creating evidence.

Maintain privileges

Remember that the employer, not the investigator, owns the privilege. You as the investigator cannot decide to waive it, unless perhaps you are in an in-house department such as human resources, compliance, or legal.

Stay in your investigator lane

You can do this by both appearing and being impartial. This includes not entertaining "off-the-record" comments, not giving your opinion when asked, not giving advice, and not discussing litigation or employment strategies with the employer. While these strategies are part of some investigators' practices, they are rarely a good idea. Note that this proscription does not preclude you from discussing your investigation strategy with the employer.

Similarly, talking to the press or public about your investigation and, particularly, about the conclusions you reached does nothing to aid the appearance of impartiality. In fact, such actions can be used as evidence that your investigation was not impartial. They can make your deposition much longer as deposing counsel explores the ways in which you made yourself part of the behind-the-scenes of the investigation. Your conduct during the investigation can undermine the essential integrity of your investigation.

Be savvy about the evidence you create

Remember that everything you do, say, and write is evidence and can be divulged in litigation. So is everything the employer says and writes to you. And as discussed above, everything will be turned over if the employer waives the privilege.

Continue to be appropriately paranoid

Once the investigation is over, practice appropriate file maintenance. Within a week after an investigation concludes, it is wise to review your file with an eye to keeping and discarding items appropriately. For example, do you want to retain multiple drafts of the report? (Hint: No). How about the raw typed interview notes or hand-written interview notes? (Hint: Yes). If you think about these issues close in time to the conclusion of the investigation, before the subpoena arrives, you will have choices about how to proceed.

Finally, once you have a file maintenance policy, follow it consistently. This will enable you to testify about your practice with confidence at your deposition or trial.

[The second article on this topic, to be published in the next issue of the* AWI Journal, *will discuss the pre-deposition process, preparing for the deposition, and the deposition itself.]

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[1] While not discussed in this article, note that similar issues exist with respect to the attorney work product privilege.

[2] *Wellpoint Health Networks, Inc., v. Superior Court*, 59 Cal. App. 4th 110 (1997); *See also, Payton v. N.J. Turnpike Auth., 148 N.J. 524 (N.J. 1997) (an employer may waive its attorney-client privilege by asserting the adequacy of its investigation); Peterson v. Wallace Computer Servs., Inc*., 984 F. Supp. 821 (D. Vt. 1997) (*the attorney-client privilege applies to the investigative notes and memoranda, but the employer waived the privilege by defending itself upon the adequacy of the investigation)*.

[3] *City of Petaluma v. Superior Court*, 248 Cal. App. 4th 1023 (2016).

Workplace Investigations and Threat Assessments: Good Partners, Different Focuses

By James S. Cawood

A good starting point in appreciating that workplace investigators and threat assessors make good partners is to understand the main difference between a standard workplace investigation and a threat assessment—which is the timeframe in which the processes are focused.

A standard workplace investigation is focused on allegations of inappropriate behavior that has already occurred. The investigator is being asked to determine whether behavior occurred more likely than not and, in some cases, whether it more likely than not violated a code of conduct, rule, regulation, or other agreed behavioral boundary. This could involve discrimination, harassment, fraud, or a host of other inappropriate or illegal behaviors.

A threat assessment and management process is a forward-looking procedure to determine the probability that a person will engage in an act of physical violence toward another person or entity in the future. The threat assessor or manager then uses the behavioral analysis and subsequent level of risk probability to prioritize available resources and develop and implement a response and intervention plan to reduce the risk for physical violence.

Simply put: Workplace investigations focus on alleged or likely past conduct, while threat assessment or management inquiries focus on the probability of future harmful conduct and lowering the probability of that outcome.

> Workplace investigations focus on past conduct, while threat assessment inquiries focus on the probability of future harmful conduct.

Analytical Differences

These stark differences in chronological focus and services delivered do not mean that the methodology used by both investigative and threat assessment professionals is altogether different. But the breadth of information routinely gathered and the analysis of that information does differ substantially.

In the case of threat assessment, it is routine to gather information concerning an individual from victim interviews, interviews with collateral witnesses, and in many cases, an interview directly with the person of concern. This is similar to the routine investigative strategies of workplace investigators. However, threat assessors will be gathering information about what was seen, heard, or experienced by the interviewees and their perceptions of each other and the circumstances surrounding these events.

Threat assessors are also obligated to seek information related to information the interviewees have about the person of concern, including that person's:

- Disclosed psychological history;
- Emotional reactions to events;
- Way of thinking;
- Health conditions disclosed or known, including any traumatic brain injuries;
- Prior criminal and civil court history;
- Ownership, interest in, or use of weapons and use of drugs—both prescription and non-prescription, and including alcohol and the behavior exhibited or commented about when they use drugs; and
- Suicidal or homicidal thoughts or plans.

Threat assessment investigations related to domestic violence cases may even require that additional questions be asked regarding the history of a relationship, including details of intimate behaviors.

In most standard workplace investigations, these topics would be off-limits to explore, as such probes would violate many privacy laws and boundaries regarding what can be asked. However, threat assessors who did not ask these questions might be considered to have conducted an inadequate assessment process.[1]

In a records search and review, it would be common for a workplace investigator to request:

- Copies of applicable policies and procedures;
- Reports of the incidents being investigated;

- Prior statements from witnesses, victims, and subjects;
- Copies of any other complaints or allegations made by or against the victim and subject of the investigation; and
- Copies of the victim's and subject's personal or academic files, if applicable.

A threat assessor would most likely ask for all these documents as well, but would also search for:

- Criminal and civil court records for the person of concern at the county, state, and federal levels;
- Records of police reports, contacts, or calls for law enforcement to respond to the person's known residences;
- Internet and social media sites of both potential or actual victims and the person of concern.

The purpose of these additional records searches would be to locate behavioral information that would provide further insight into the subject's stressors and behavioral choices, which would strengthen the assessment analysis.

The last significant difference between a standard workplace investigation and a threat assessment process is that once a workplace investigation has been completed and the results have been delivered, the investigation concludes and the workplace investigator moves on to the next case.

In a threat assessment, once the initial threat assessment has been conducted and reported, the clients will commonly decide what they want to do in response. A behaviorally-based response or intervention plan is then developed and implemented, and the case will remain open for a period of time, in anticipation of new behaviors that could require additional assessments. In other words, threat assessments are dynamic processes that often require reassessment and ongoing case management.[2]

Working Together: When to Begin

As a best practice, workplace investigators and threat assessors usually begin working together when an investigator is conducting a case intake or working on a case and the issue of safety or potential harm by one party is raised by the client representatives or others involved.

This might be a direct reference, such as: "I am very concerned that he might harm someone," to something vague or indirect such as: "When I think about this situation, I feel very uncomfortable." The key focus for the workplace investigator is to attempt to gain some insight into why that individual is concerned or uncomfortable. This usually involves probing into what the person has said, done, or presented that seems to be linked with that belief or reaction to the situation, or paying close attention to when any expressed thoughts or behaviors are linked to some warning signs or warning themes.

Concerns would also be raised if the investigator has a personal interaction with any of the people in the investigation that raises safety concerns—or a sense of the possibility of harm—involving these warning signs or warning themes. Warning signs or themes may involve either specific or similar thoughts or actions associated with an increased risk of physical violence.

Warning signs or themes may relate to a person who:

- Makes any direct or indirect threatening or intimidating statements;
- Writes notes that contain threatening or intimidating language;
- Is perceived to be unreasonably angry, defensive, or resentful;
- Is known to have acted in a violent or assaultive manner;
- Is known to have easy access to or familiarity with weapons or other dangerous devices, such as explosives, particularly when linked to one of the other warning signs or themes;
- Is known to express sympathy, fascination, or interest in publicized incidents involving violence;
- Has expressed or appeared to harbor resentment or anger toward the organization, managers, supervisors, co-workers, administration, fellow students, faculty, or staff;
- Demonstrates increasingly deteriorating work or school performance or attendance problems;
- Has had thoughts or displayed behaviors indicating extremely low self-esteem, severe depression, or suicidal tendencies; and
- Is believed or known to have new or increased significant stress that might soon precipitate a violent action, as opposed to some other time—including any significant life change such as medical, legal, financial, or other stressors.[3]

Warning signs or themes may involve either specific or similar thoughts or actions associated with an increased risk of physical violence.

If investigators sense a linkage between the thoughts, actions, or concerns and the warning signs or themes, that should trigger a discussion with the client regarding the possibility that a professional should be consulted to determine whether a threat assessment should be conducted to determine the level of possible risk posed by the individual of concern.

It is beyond the scope of this article to delve into the legal and regulatory requirements to provide a safe workplace for all employers. However, in many jurisdictions, there can be both significant civil liabilities and regulatory penalties for negligence in organizational safety and violence.

The wisest course of action, therefore, is: When in doubt, confer. This is true not only for reasons of professional and organizational liability arising from having had information that could have alerted someone to take action to forestall or minimize a tragic outcome—but also to avoid the psychological and emotional cost of knowing something that could have averted a tragic outcome without acting on it.

Vetting before Hiring

Like workplace investigators, threat assessment professionals operate at all levels of professional competence, and that is not easily discerned by their education and employment background alone.

Competent workplace investigators and threat assessment professionals begin their professional journeys on a wide variety of pathways. In the case of workplace investigators, that could mean starting out as a human resource or employee relations representative, as a lawyer, as a private investigator, or as a law enforcement investigator. This is similar to threat assessment professionals, who might start their careers as security professionals, private investigators, mental health professionals, victims' rights advocates, or law enforcement investigators. However, in both roles, substantial additional education and experience is required, beyond that of their initial competencies, to transition to trustworthy and effective workplace investigators or threat assessment professionals.

Therefore, it requires careful vetting to determine which professionals to trust in these important roles. In the case of threat assessment professionals, part of that vetting would be membership in a professional threat assessment association.

With members all over the world, the largest and oldest association of threat assessment professionals is the Association of Threat Assessment Professionals (ATAP). There are also closely affiliated threat assessment associations in the United States, Canada, Europe, Africa, South America, and the Asia-Pacific region. All the threat assessment associations provide ongoing training, but ATAP also has a Certified Threat Manager program, which requires ongoing documented and verified experience in threat assessment and management, and passing an examination based on an extensive body of professional knowledge actively curated by a diverse group of peer professionals. It also requires ongoing continuing education in the profession. Therefore, an additional vetting step might be to inquire whether a prospective threat assessment professional is a Certified Threat Manager (CTM).

Of course, taking these steps alone will not guarantee that a particular threat assessor is competent, but they can help provide an objective basis to make initial determinations regarding whether a particular person is qualified to do the work.

Structuring the Work Relationship

Once you have paired with a competent threat assessment professional, there is an effective flow of the work that seems best.

The first step is to recognize that because both professionals will deliver their own work product, using their own analysis and, as previously mentioned, their own range of information sources and interview questions, it is essential to plan for gathering shared information and interview strategies. This means coordinating the joint receipt of any documentation held by the client that would provide insight into the known facts of the case and relevant information about the thinking and behavior of the parties involved.

It is usually most beneficial if witnesses and the involved parties can be interviewed jointly. Such joint interviews are good from the client's perspective, as the process requires coordinating one rather than two interviews per person. And it is also beneficial for the professionals involved. Each will have a witness to what was said and done in the interview to help protect them both from misinterpretations or later false claims, while also guarding against interviewees having time to adjust their narratives based on the questions from the first interviewer.

It is usually most beneficial if witnesses and the involved parties can be interviewed jointly.

Attention should also be paid to the order of the professionals conducting the interview, given the difference in the nature of the analysis and product being produced, but also the more extensive nature of the information being sought by the threat assessors in these interviews. It is often most effective to have the workplace investigator open the interview by providing the necessary admonitions—including confidentiality, cooperation, Lybarger/Spielbauer warning, and retaliation—and then have the threat assessment professional conduct the first part of the interview.

After the threat assessment professional has completed initial questioning, then the workplace investigator can follow up with any additional questions to gather the remaining information—including any clarifications needed from the initial part of the interview.

This process follows best practices in that a competent threat assessment professional will normally conduct the interview with an enhanced cognitive interviewing style, allowing for a great deal of "free report," rather than using a tight "question/answer" approach. This naturally leads to more specific fact-centered questions and clarifications, which are often needed by the workplace investigator for analysis.

If it is not possible to coordinate interviews that include both the threat assessment professional and workplace investigator, consider having one professional provide the other with a list of necessary questions to cover to enhance the probability that the interviews can be completed in one session, for the reasons mentioned above.

Finally, once the information gathering and interviews are completed, each professional will produce individual reports for the client. However, as previously described, best practice would mean that the threat assessment professional would remain available to help clients implement the employment or other related action they decide to take. Threat assessors can help the client by utilizing the behavioral insight gained for the parties involved and understanding how to implement those actions in ways that will best reduce the risk that any action taken will trigger an escalation in behavior leading to an increased risk for physical harm.

The manner in which any disciplinary, corrective, or other adverse action is communicated or implemented can have the unintended consequence of stimulating such an escalation and the process should account for, and address, those possibilities.[4]

Confer and Collaborate

In conclusion, workplace investigators and threat assessment professionals will be presented with cases in which they can work together to provide a high-quality investigation, while coordinating a process that will lead to an increase in safety from physical violence. This can be done effectively and efficiently, if both professionals work together and understand their similarities and differences in focus, scope, and the resources required.

When in doubt, confer—and collaborate.

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[1] Association of Threat Assessment Professionals, *Risk Assessment Guideline Elements for Violence: Considerations for Assessing the Risk of Future Violent Behavior* (Sept. 4, 2006).
[2] *International Handbook of Threat Assessment*, J. Reis Meloy & Jens Hoffman, eds., Oxford University Press (2d ed. 2021).
[3] *Violence Assessment and Intervention: The Practitioner's Handbook*, James S. Cawood & Michael H. Corcoran, Routledge (3d ed. 2019).
[4] *Threat and Violence Interventions: The Effective Application of Influence*, James S. Cawood, Academic Press (2020); *Threat Assessment and Management Strategies: Identifying the Howlers and Hunters*, Frederick S. Calhoun & Stephen W. Weston, CRC Press (2d ed. 2016).

CASE NOTE: *Shooter v. State of Arizona*

The Need for 'Notice' and 'Opportunity' in Workplace Investigations

By Jorge Colon

In January 2018, Representative Donald Shooter was expelled from the Arizona House of Representatives by a 56–3 vote after an investigation into allegations concluded that Shooter had created a hostile work environment.

The saga began in November 2017, when Representative Michelle Ugenti-Rita accused Shooter of sexual harassment. Shooter maintained that the accusation was part of a political plot by the governor's Chief of Staff Kirk Adams and Speaker of the House Javan Mesnard to scuttle his probe into corrupt practices by the governor's office concerning "no bid contracts."

Shooter called for a complete probe of the matter, including an investigation into Ugenti-Rita for malfeasance and sexual misconduct. Shooter expected Arizona's House Ethics Committee to conduct the investigation. However, Speaker Mesnard appointed his own staff to oversee the investigation, instead—and the staff hired the law firm of Sherman & Howard to conduct it.

The Investigation

Sherman & Howard interviewed more than 40 people, including Shooter, over 10 weeks and drafted a detailed 75-page report, publicly released in January 2018. The report concluded that Shooter had created a hostile work environment by engaging in a pattern of unwelcome and hostile conduct. It found credible evidence that Shooter:

- "made unwelcome sexualized comments to and about Rep. Ugenti-Rita, including about her breasts;"
- "grabbed and shook his crotch" in front of a female officer from the Arizona Supreme Court; embraced a female intern in a "prolonged, uncomfortable, and inappropriate manner;"
- made "sexualized comments" about the appearance of a female lobbyist; and
- made a sexual joke to a newspaper publisher and attorney.[1]

The report concluded that there was "no credible evidence" that Ugenti-Rita had violated the harassment policy.

Shooter alleged that he had been assured he was entitled to five days to provide a written response to the report. However, the House voted to expel him four days after the report was released.

Shooter's Lawsuit

On January 29, 2019, Shooter filed suit in state court against Adams, Mesnard, and the state of Arizona, alleging that his expulsion was the "product of conspiracy" to suppress his anticorruption investigation. Shooter brought his claims pursuant to 42 U.S.C. §1983, alleging equal protection and due process violations, as well as three state law claims: defamation, false light invasion of privacy, and wrongful termination.

On March 11, 2019, Adams and Mesnard removed the case to federal court. The district court dismissed Shooter's §1983 claim and remanded the state law claims. Shooter appealed. The Ninth Circuit affirmed the district court's dismissal.

Equal Protection Claim

In its opinion on appeal, the Ninth Circuit addressed Shooter's equal protection claim, stating that though Shooter invoked discrimination on the basis of his sex, he failed to plead sufficient facts to raise the inference that Adams and Mesnard had acted with discriminatory intent based on his sex. The court relied on Shooter's complaint, which alleged that his differential treatment was due to Adams's and Mesnard's desire to end his corruption probe.

Due Process Claim

The court also dismissed Shooter's due process claims on qualified immunity grounds because he failed to meet the two-pronged test, requiring both that the state or federal official violated a statutory or constitutional right, and that the right was "clearly established" when the challenged conduct occurred.[2]

Shooter argued that Sherman & Howard's investigation deprived him of his right to "notice" and "an opportunity to be heard" prior to being expelled. He contended he had the right to access the evidence against him, and to cross-examine witnesses at an Ethics Committee hearing, citing *Monserrate v. New York State Senate*.[3]

In *Monserrate*, the New York State Senate formed a committee to investigate Senator Hiram Monserrate after his conviction for committing misdemeanor reckless assault on his girlfriend. The committee held six hearings, but Monserrate did not participate, though he was given the opportunity to do so. The committee issued a report recommending censure or expulsion; the Senate voted to expel. Monserrate filed an injunction in federal court, which was denied. The Second Circuit affirmed.

The Second Circuit found that Monserrate had been notified of the parameters of the investigation and was aware that "expulsion was a possible recommendation." The court additionally found that Monserrate had "received sufficient opportunity to be heard,"[4] and did not need to be given access to all of the materials on which the committee relied, nor an opportunity to cross-examine witnesses. The court stated that Monserrate "nevertheless received a sufficient opportunity to clear his name—and that is all the Constitution requires."[5]

To the Ninth Circuit, *Monserrate* seemed to support the conclusion that Shooter's claims lacked merit. The court cited the specificity of Sherman & Howard's investigation report. It noted that for each specific allegation, "the report summarizes the evidence on which its conclusions are based, as well as counsel's description of Shooter's response to each of those allegations." The court continued that Shooter did not deny that he was given an opportunity to present his side of the matter and had acknowledged that the report absolved him of more than half of the claims of sexual harassment.[6]

The court distinguished Shooter's case from *McCarley v. Sanders,*[7] in which a three-judge district court held the Alabama Senate violated the procedural due process rights of Senator William McCarley when it established an investigative committee on the same day that McCarley was implicated in a bribery scandal. The committee held closed hearings the next day. McCarley did not participate. Eighteen witnesses testified, but no transcript was prepared before the Senate's expulsion vote. The Senate relied on "a brief five-page report released by the committee shortly after midnight on the day McCarley was expelled."[8] Citing the "lack of evidentiary record" and "denial of any meaningful opportunity for McCarley to defend himself," the court concluded that the expulsion proceedings failed to accord "even the barest rudiments of due process."[9]

The court also noted Shooter's citation of *Sweeney v. Tucker*,[10] but distinguished it. In *Sweeney*, the appellant had been convicted after a jury trial in which he received his full due process protections.

Shooter additionally argued that his due process rights were violated when Speaker Mesnard unilaterally drafted a retroactive, zero-tolerance sexual harassment policy on which the investigators relied. The court dismissed on the grounds of qualified immunity, but granting the assumption that Shooter's claim had merit, it found that Shooter failed to raise "a plausible inference" that the prior policy allowed for his conduct.[11]

Lessons Learned

Employers and workplace investigators should note that "notice" and "an opportunity to be heard" is the legal standard that will be applied in an ensuing court action. The *Shooter* court reiterated the holding in *Monserrate* that "a sufficient opportunity to clear his name" is all that is constitutionally required.

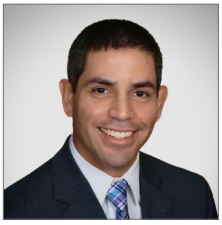
A sufficient opportunity requires that subjects of investigations should be given:

1. notice of the parameters of an investigation; and
2. an opportunity to present their side of the matter.

Investigators should note that 'notice' and 'an opportunity to be heard' is the legal standard applied in an ensuing court action.

The subject need not have access to all documentation on which the investigation relies nor the ability to cross-examine witnesses. However, *Shooter* does reinforce the need for detailed investigation reports that address each of the allegations, and the need to summarize the evidence used to make determinations, including the subject's responses.

Though the court did not review the merits of Shooter's claim that the retroactive, zero-tolerance sexual harassment policy violated his due process rights, it clarified that the claimant has to "raise a plausible inference" that his conduct would have been allowed under a prior existing policy. Employers and workplace investigators should also take stock of this when drafting new policies or clarifications to existing policies.



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[1] *Shooter v. Arizona,* No. 19–16248, slip op. at 7-8 (9th Cir. July 22, 2021).
[2] *Ashcroft v. al-Kidd,* 563 U.S. 731, 735 (2011).
[3] *Monserrate v. New York State Senate,* 599 F.3d 148 (2d Cir. 2010).
[4] *Id.* at 158-59.
[5] *Id.* at 159-60.
[6] *Shooter v. Arizona,* No. 19–16248, slip op. at 18-19 (9th Cir. July 22, 2021).
[7] *McCarley v. Sanders,* 309 F. Supp. 8 (M.D. Ala. 1970).
[8] *Id.* at 10-12.
[9] *Id.* at 11-12.
[10] *Sweeney v. Tucker,* 375 A.2d 698 (Pa. 1977).
[11] *Shooter v. Arizona,* No. 19–16248, slip op. at 23 (9th Cir. July 22, 2021).

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Almost to a person, AWIers agree that what they value most about membership is the richness of exchanging ideas, strategies, and practice tips with other investigators.

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- Writing an article or Letter to the Editor to be published in the *AWI Journal*, the association's quarterly, peer-reviewed publication. Contact us at awijournal@awi.org.

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