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# What Makes a Workplace Investigation Defensible in Litigation

*What Outside Counsel Needs to See in the File Before Discovery Begins*

*A white paper by Natalie Holder, Esq. HRCI-SPHR | Employment Attorney and DEI Strategist*

When a harassment or discrimination complaint lands on your desk, the investigation that follows will either protect your client or expose them. The difference is rarely about what the investigator found. It is almost always about how the investigation was conducted and documented.

Here is what outside counsel needs to see in an investigation file to feel confident going into discovery.

## SECTION 1

### **An Investigator with No Stake in the Outcome**

Internal HR investigations are not inherently flawed, but they carry an inherent credibility problem. When the person conducting the investigation reports to the same leadership that is implicated in the complaint, opposing counsel will make that conflict the centerpiece of their argument.

An independent investigator removes that vulnerability before it becomes a liability. Independence is not just an ethical standard. It is a litigation strategy.

*The question is not whether HR is capable of conducting a fair investigation. The question is whether a fact-finder will believe it.*

## SECTION 2

### **A Documented Process from Day One**

Every decision made during the investigation should be recorded. Who was interviewed and in what order. Why certain witnesses were prioritized. What evidence was requested and received. What evidence was requested and not received, and why.

If a decision is not in the file, it did not happen as far as litigation is concerned. Documentation is not an administrative task. It is the foundation of a defensible record.

A thorough investigation will sometimes surface organizational conditions the client did not know were part of the problem. In one investigation I conducted, an employee raised concerns about a vendor brought in to deliver a workplace training who engaged in misogynistic stereotypes and racist tropes during the session. After

confirming that the conduct had occurred, the more consequential question became structural: how had a person engaged by the organization been permitted to behave that way in front of employees without any accountability? The investigation surfaced a gap in vendor policy. Contractors whose services fell below a certain procurement threshold were not required to complete the organization's code of conduct training before working with staff. That gap had gone unnoticed until an employee was harmed by it. Documenting that finding, and the corrective steps that followed, became as important to the defense posture as the original investigation itself.

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*Courts and investigators do not just evaluate what you found. They evaluate whether your process deserves to be believed.*

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### SECTION 3

## **Neutral, Precise Language in Every Written Record**

Investigation reports that use emotional language, draw legal conclusions, or editorialize about credibility create problems that are difficult to walk back. A defensible report describes what was said, what was observed, and what the evidence supports. It does not assign blame. It does not predict legal outcomes. It gives outside counsel something to work with, not something to explain away.

### **What to avoid in investigation language:**

Characterizing a witness as credible or not credible without grounding that assessment in specific, documented evidence. Describing conduct as clearly discriminatory or harassing before findings are complete. Using colloquial or emotional language that signals the investigator has formed a conclusion before the process is finished.

### SECTION 4

## **Findings That Are Proportionate to the Evidence**

One of the most common mistakes in workplace investigations is reaching conclusions that go further than the evidence supports. Findings that overreach give plaintiff's counsel exactly what they need to challenge the integrity of the entire process.

The standard is not whether something wrong happened. It is what the evidence actually establishes. An investigation that finds more than it can support is often more damaging to the employer than one that finds less.

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*Proportionate findings protect the employer. Overreaching findings create new exposure.*

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### SECTION 5

## **A Clear Chain of Custody for All Documentation**

Who had access to the investigation file. When it was completed. How it was stored. Who reviewed it and when. These details matter in discovery and they are often an afterthought until they are not. A defensible investigation

is not just what happened during the process. It is the provable record of everything that happened before, during, and after.

#### SECTION 6

## **What This Means for Management-Side Firms**

The time to think about defensibility is not after a lawsuit is filed. It is before the investigator conducts the first interview. Outside counsel who engages an independent investigator early, before the process is contaminated by internal politics or premature conclusions, gives their client the best possible foundation for whatever comes next.

I have conducted investigations spanning law enforcement, technology, higher education, hospitality, and finance. I work alongside outside counsel from the beginning so that the process and the documentation are built to withstand scrutiny before anyone asks for the file.

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*The organizations that protect themselves best are not the ones with the most aggressive legal teams. They are the ones that never give someone a reason to make the call in the first place.*

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#### ABOUT THE AUTHOR

Natalie Holder, Esq. HRCI-SPHR is an employment attorney, workplace investigator, and DEI strategist who partners with management-side law firms to conduct independent investigations and rebuild workplace cultures after misconduct. She has served as Chief Diversity Officer at institutions including the United States Capitol Police and Stanford University.

*If you represent employers and need an investigator who understands what defensible looks like from a legal standpoint, I would welcome a conversation. [natalie@questei.org](mailto:natalie@questei.org) | [questei.org](https://questei.org) | 240.283.5411*