

When and How to Use an Outside Investigator

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#1 – Can We Use an In-House Investigator?

In-House vs. Outside Investigator

- Pros
 - Familiar with agency and parties involved
 - Familiar with agency policies and procedures to be followed
 - Ability to commence right away
- Cons
 - Reporting relationships, biases and personal relationships must be examined
 - Must possess training and experience to investigate
 - Availability if the investigation will be extensive

#2 – Does the Situation Necessitate an Outside Investigator

Any of the Following Factors Present to Necessitate an Outside Investigation?

- Potential significant liability
- Political concerns
- Allegations against a high-level official
- Remove a conflict of interest or appearance of a conflict

#3 – Selecting an Outside Investigator

- Knowledge and Experience
- Personality and Demeanor
- Impartiality
- Excellent Writing Skills
- Strength as a Witness
- Availability
 - Must be Licensed
 - Bus. & Prof. Code §§ 7512-7573
 - Exception for attorney-investigators

#4 – What About Using Outside Attorney as Investigator?

Outside Attorney as an Investigator

- Pros
 - Attorney client privilege (limited)
 - Outside/Impartiality
 - Handle complex matters; understand employment laws
- Cons
 - Cost
 - Limited attorney client privilege
 - Prevents representation during discipline appeal/litigation

#5 – Define Scope of Investigation for Outside Investigator

- Outline issues to be investigated
 - Not “*free for all*” investigation. If new issues arise, investigator should contact City for direction
- Develop specific questions for the investigator based on the allegations in the complaint
- What factual issues will the investigator determine (ultimate facts vs. legal conclusion)?

#6 – The Outside Investigator Should Stick to Factual Findings

Factual Findings vs. Legal Conclusions

- The question posed to the investigator is not whether there a policy or law was violated (a legal conclusion) but rather to determine what actually took place
 - Example – Harassment Case: What actions did Accused Employee take towards Complainant? Did the actions involve a protected category status?
- Once an ultimate fact is determined, the City can make legal conclusions

#7 – Ensure Investigator Provided Authority to Investigate

Investigator Authority

- Provide Investigator with authority to question involved employees as if coming from Management
- Make sure affected employees understand the role of the Investigator and authority
- Provide Investigator access to information and witnesses relevant to underlying investigation

#8 – Ensure Affected Employees Are Provided Their Rights

Employee Rights in Interviews

- *Weingarten* Rights
 - Complainant
 - Witnesses
- *Lybarger* Admonition (if Necessary)
- POBR/FBOR Rights
- Validity of “Gag” Orders

#9 – Make Sure the Investigator Makes Credibility Determinations

Credibility Determinations Are Key to a Fact-Finding Investigation

- Sometimes “*he said, she said*” allegations and there is no “*smoking gun*” to point to
- Duty to thoroughly investigate
- Investigator must judge the credibility of each witness where there are inconsistent accounts

#10 – Balance Independent Investigation with City’s Need to Conduct Thorough and Complete Investigation

Investigator Independence vs. Ensuring Investigation Expectations Are Met

- Check in and status updates
- Review draft report
- Revisit scope of investigation
- Ensure confidence in investigation findings before finalizing

Questions?

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