

INVESTIGATING ALLEGATIONS OF OFFICE MISCONDUCT

What triggers the duty to investigate? Who should do the investigation? How should the accused person be advised of the complaint? What should the investigator do and does he/she have a “plan” to conduct the investigation? How should witnesses be interviewed and who should be present? What do you, as the investigator, tell the witness? Where should the interview take place and should there be a court reporter present? Should the attorney of the accuser and/or the accused be present. Can the recording or notes taken during the interview be protected by an attorney-client privilege or the work product privilege? Who has the right to assert these privileges? Who is the client? Who signs the engagement letter and what does it say? To whom does the investigator submit his/her report? Does the accused have the right to see and or rebut the report? Does the employee, officer or other accused person have an employment agreement that requires their participation in the investigation? Does the Director have an agreement to participate in an investigation, even if that Director is the accused? Is there a stated policy, separately or in the governance guidelines or bylaws adopted by the employer, that addresses investigations and how they should be conducted?

Complaints made by rumor, in writing, or orally made to the human resource director, present a panoply of legal and reputational issues, that cannot be ignored. Unfortunately, once a complaint has been made, the leisure of time is not on the side of the employer. Usual instincts on how to handle the complaint are invariably wrong, which include: (1) hope the complaint will go away with time; (2) let the adults in the room (the accuser and the accused) work this out; (3) turn this over to the human resource director and let them handle it; (3) let in-house counsel take care of this; (4) let your friendly and long-time outside counsel take care of it; (5) doubt the validity of the accusation; (6) terminate the accuser and/or the accused, and issue a carefully crafted statement that the persons involved are “seeking other opportunities”. A majority of the time, all of the above are wrong and lead to either direct or vicarious liability.

Employers are well-advised to engage an independent outside counsel having little or no involvement with either the employer or the complainant to conduct a full and independent investigation, which is the only way that the final report and findings of the investigator will have creditability with the employer’s various stakeholders, including the non-involved employees of the company gathered around the water cooler.