


ASSOCIATION OF
WORKPLACE INVESTIGATORS


Promoting and enhancing the quality of
impartial workplace investigations.™

Investigative Pitfalls

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 November 9, 2021


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Learning Objectives

- Today we will examine 4 issues that may challenge you when you are conducting an investigation as an internal or external investigator.
 - Losing control of the scope of the investigation
 - Your contact overshares information and opinions
 - Managing time and client demands
 - Managing multiple issues and reports


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Some Key Differences

<ul style="list-style-type: none"> • Internal investigator <ul style="list-style-type: none"> – Knows the employer and culture very well – Likely knows many of the witnesses – Likely communicates with legal, HR, operations, compliance 	<ul style="list-style-type: none"> • External investigator <ul style="list-style-type: none"> – Usually does not know the employer or witnesses. – Is hired by an attorney for the employer and communicates primarily with that attorney.
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HELP! I'M LOSING CONTROL OF THE SCOPE OF THE INVESTIGATION





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Hypothetical- Taylor’s Troubles


- Taylor submits a written complaint to HR, stating he was discharged because of sexual favoritism and retaliation for complaining about the favoritism. Taylor alleges his co-worker and sister Violet is having an affair with the CEO, and Taylor was not able to meet production requirements because he had to do most of Violet’s work.
 - What is the scope? How is the scope determined?


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Hypothetical- Taylor’s Troubles

- When you interview Violet, she tells you she is the victim of retaliation because the CFO helped Taylor write the complaint accusing Violet of having an affair with the CEO and accusing her of being a slacker. Violet provides emails from the CFO to Taylor showing the CFO suggested revisions to the written complaint Taylor eventually submitted to HR.
 - Does this alter the scope? How? What do you do?


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Hypothetical- Taylor's Troubles

- You interview a total of 7 witnesses identified by Taylor, Violet, the CEO and the CFO.
 - Each of the 7 witnesses tell you everything they feel is wrong with the workplace, and everything they don't like about Taylor, Violet, the CEO, and the CFO.
 - Information provided by the witnesses include allegations of substance abuse, missed meal and rest periods, unpaid overtime, being forced to work off the clock, disparate treatment based on age, and a sexual affair between 2 other employees.



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Hypothetical- Taylor's Troubles

- Does this additional information affect the scope?
- Do you address all of this in a report? How?



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External Perspective

- It's your duty to keep the scope under control.
- Who is your client? Usually the attorney for Taylor's employer.
 - Need good, clear, communication with the client from the outset and each time an issue comes up that is outside the original scope.




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External Perspective


- Client will direct the scope.
- Practical issue- how do you organize an investigation that has an expanded scope?
 - Taylor’s sexual favoritism and retaliation claim;
 - Violet’s retaliation claim;
 - CFO “colluding” with Taylor to complain about Violet;
 - Wage & hour violations;
 - Age discrimination;
 - Sexual affair between 2 co-workers.

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External Perspective


- How does scope creep effect on your ability to complete the investigation timely?
 - Manage expectations of the client and witnesses.
- Impact on report(s)
 - Always keep litigation potential in mind.

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Internal Perspective


- As an Internal Investigator or HR Professional you don’t always have the luxury to limit scope.
- You care about all HR issues in the workplace.
- What do you do?

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Internal Perspective

- Triage the case? Can it be handled at the same time?
- Divide it up into separate cases and investigate based on priority?
- Enlist support from others to handle matters.
- Don't lose your focus on the question you are charged with answering.
- However you decided to handle it, best to write separate reports.




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Help! My Contact Spills Their Guts and Overshares Their Opinions






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Hypothetical – Laurie’s Loose Lips

- Laurie contacts you to investigate an allegation of disability discrimination. Laurie received an email from Eli alleging he was denied a promotion because of his disability.



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Hypothetical – Laurie’s Loose Lips

- Laurie tells you:
 - Eli is “always complaining,” is “weak” and a “crybaby.”
 - The company has provided Eli 6 medical leaves in his 14 years with the company, so “what is he complaining about?”
 - “Nobody likes Eli” because they have to do his work when he is absent and they think he’s “faking it.” Plus, Eli makes more money than his co-workers and he thinks he is better than everyone else.



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Hypothetical – Laurie’s Loose Lips

- ❖ External perspective:
 - Communicate role of investigator at the outset.
 - AWI guiding principle 5- You should avoid communicating outside the interview process with anyone who is or may be directly involved in the matters being investigated, or with anyone who is or may be interviewed on substantive matters.
 - Consider privilege issues- is Laurie your client?
 - Litigation potential.



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Hypothetical – Laurie’s Loose Lips

- ❖ Internal perspective:
 - Do you have your own preconceived notions about the complainant?
 - Constant complainer?
 - Personal experience?
 - Are you a witness to behavior?
 - If yes, what do you do?



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Hypothetical – Laurie’s Loose Lips

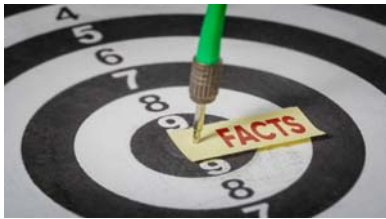
- ❖ Internal Perspective- continued:
- Can someone else handle the investigation?
- If not:
 - Be aware of your biases
 - Do a reality check
 - Illicit other opinions (without revealing confidential information)
 - Sometimes personal knowledge can inform credibility



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Reality Check- There are Only 24 Hours in a Day



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External Perspective

- Deciding to take the investigation- be realistic.
- Managing expectations:
 - Estimating completion dates- adjust if scope or complexity of investigation occurs.
- Strategies for efficiency in investigating:
 - Keep a timeline.
 - Prepare interview summaries promptly.
 - Keep running list of issues raised/facts to be pinned down as investigation continues.



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External Perspective

– Will interim measures be taken to lessen the impact of the investigation ?

– Make findings.

– If time is of the essence and your analysis is complete, consider communicating findings prior to finalizing your written report.



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Internal Perspective

– Prioritize legal violations, potential harm to others, serious policy violations.


– Can other work wait? Manage priorities with supervisor and clients.

– Team of one? Set expectations with clients, delegate other work if possible.

– Interview complainant as soon as possible and look for temporary solutions – Shift changes? Suspension? Transfer?

– Document timeline and delays.

– What if you have to make employment decisions during the investigation, or before the report is complete?



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Internal Perspective

– Complete investigation as soon as possible without compromising quality.

– Report out findings so that managers are not waiting to make employment decisions.

– Reporting out can buy time to complete a written report.



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There is No One Size Fits All



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Internal Perspective

- Always write a report or at minimum document the interviews.
- Accessibility of documents:
 - If you win the lottery and retire will anyone else be able to find the documentation? Shared drive, database?

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Internal Perspective

- Are all reports created equal?
 - Perfect is the enemy of good.
 - Take care with matters that are a potential legal violation and could lead to litigation.
 - Run of the mill case, maybe summarize in a couple of paragraphs.

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Internal Perspective


– Always draft reports with an eye towards litigation.

• Will the EEOC investigator be reading your report?

• A jury?

• Might you be deposed?

– More than one issue in an investigation, consider separate reports – don’t want to muddy a report with separate issues (i.e. sexual harassment and wage hour violation)



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Internal Perspective

• Don’t be afraid to assess credibility! If not you, who?

• Make a determination – concluding that the matter was a he said/she said is not a determination – 51% more likely than not.

• Analyze facts to support conclusion – this step is often missed!



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External Perspective

• Most of the points Rachel made also apply to an external investigator.

• You need to keep an open mind and be creative because no 2 investigations are going to be the same.

– Although there are some processes you can standardize, the pitfalls, facts, and analyses will differ each time.




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External Perspective

- Don't forget:
 - An employer can make an employment decision based on the facts presented at the time of the investigation as long as the investigation was prompt, thorough, and unbiased.
 - If six months later you find out someone lied or withheld information that may have changed your findings, that's okay as long as you did a thorough investigation at the time and made findings based on the evidence gathered and careful analysis of the facts.

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Questions?



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