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MCLE SELF-STUDY:

ATTORNEY WORKPLACE INVESTIGATIONS: NEITHER IMPARTIAL NOR INDEPENDENT

A counterpoint to our September 2022 article on workplace investigations by Lindsay Harris and Amy Oppenheimer

Attorneys Conducting Impartial Workplace Investigations: Reclaiming the Independent Lawyer Role,[1] written by our friends and colleagues Lindsay Harris and Amy Oppenheimer,[2] certainly has a ring of "truthiness."[3] But, desiring something to be true does not make it so. Indeed, while Harris and Oppenheimer argue that attorney-client-privileged investigations can be impartial and that attorney workplace investigators can be independent from their clients (the defendant employers who retain them), we posit the exact opposite.

While acknowledging that "impartiality 'resists easy definition,'"[4] Harris and Oppenheimer proceed to restrict their view of that term to mean simply that the investigator is "free from bias."[5] Contrary to the narrow manner in which Harris and Oppenheimer view the term "impartial investigation," however, a truly "impartial"

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investigation would be one in which the investigator is not only free from bias *but also* treats all parties equally and is not influenced or controlled in any way by the complainant's employer.[6] Indeed, applying the Harris/Oppenheimer view of "impartial" to the world of baseball, they would conclude that a baseball game was fair even if the umpire hired by the Dodgers to officiate a Dodgers/Yankees game agreed to abide by the Dodgers' rules of the game, such that the umpire could only call strikes when the Dodgers were pitching and could only call balls when the Dodgers were batting, so long as the umpire was "free from bias."

For at least three reasons, we posit that attorney-client privileged workplace investigations are not impartial and that investigators conducting such investigations are not independent.

First, when an attorney conducts an attorney-client privileged investigation, the attorney is constrained not only by the attorney-client privilege but also other ethical considerations. As explained in detail below, attorney-client-privileged investigations are inherently structured to benefit the investigators' client employers from start to finish.

Second, the well documented "repeat player bias" prevents attorney investigators from being impartial. Indeed, because investigators know that "their clients may rely on the investigation to defend against claims made in subsequent litigation,"[7] the investigators have a strong financial incentive to structure the investigation and its outcome so as to bolster their clients' defenses (i.e., repeat business from not only their employer clients but also their clients' employment law defense firms).[8] Additionally, given that many investigators require, as part of their standard retainers/engagement agreements, that their clients indemnify and defend them from claims that may arise from the investigation,[9] these investigators are even further financially dependent upon their clients.

Third, in the real world, attorney workplace investigators are routinely complicit in and/or take no steps to stop defendant employers from weaponizing attorney-client-privileged investigations against the complainant. Indeed, most of the authorities cited by Harris and Oppenheimer specifically recognize that attorney-client-privileged investigations must be structured in ways designed to advantage the employer. For example, one of these authorities states that the "existence or threatened existence of" civil litigation "necessarily affects how the company and outside counsel conduct and document" the investigation. The authority also cautions that the investigator should provide interim oral (*not* written) reports to the employer, and that "[c]areful consideration should be given to the extent to which written reports should be rendered, if at all, during or at the conclusion of the investigation."[10] It further recommends that the corporate defendant work with its attorney investigator to determine whether or not to waive the attorney-client privilege.[11] Another article cited by Harris and Oppenheimer "outlines eight steps that can . . . limit legal exposure" for employers.[12] It also recommends that employers "make decisions about the investigation . . . including the type of investigator needed, the appropriate scope of the investigation, and the type of investigation report preferred" based on "the privilege standards as to investigative materials in their applicable jurisdictions."[13] Yet another article cited by Harris and Oppenheimer specifically cautions workplace investigators to structure their engagements in ways to ensure that the investigation is covered by the attorney-client privilege.[14] Even the Association of Workplace Investigator's *Guiding Principles For Conducting Workplace Investigations*[15] explicitly provides that workplace investigators should defer to their client's wishes regarding not just the scope of the investigation, but also the form of the investigatory report (*e.g.*, oral versus written). The *Guiding Principles* further recommends that workplace investigators "discuss[ ] the merits of potential report formats with the employer."[16]

Finally, as discussed in more detail below, if attorneys conducting workplace investigations really desire to reclaim the "independent lawyer" role, they need to take to heart Supreme Court Justice Louis D. Brandeis' famous saying, "sunlight is said to be the best of disinfectants."[17]

ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS ARE INHERENTLY STRUCTURED TO BENEFIT EMPLOYERS AND CANNOT THEREFORE BE IMPARTIAL

Attorneys conducting attorney-client-privileged workplace investigations can never be independent. The attorney-client-privileged nature of the investigation is fundamentally structured such that the investigator cannot treat the employee and the employer equally with respect to either the investigation or the investigatory report.[18]

AN ATTORNEY-CLIENT-PRIVILEGED INVESTIGATION ALLOWS THE EMPLOYER TO USE THE INVESTIGATION AS A SWORD WHEN THE INVESTIGATION FAVORS IT, AND AS A SHIELD WHEN IT DOES NOT

In *Wellpoint Health Networks, Inc. v. Superior Court*,[19] the plaintiff employee sought discovery of the workplace investigator's investigation, initially arguing that, because "an attorney retained to investigate employee claims of discrimination is not acting as an attorney but as a fact finder, the attorney-client privilege and work product doctrine therefore do not have any applicability."[20] The court rejected this argument, holding that the attorney-client privilege and work product doctrine do, in fact, apply to attorney workplace investigations. The

court then explained that the employer was free to waive the attorney-client privilege if it wanted to attempt to "prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation."[21] If the investigator were to inform the employer that the investigation favors it, the employer would then instruct the investigator to thoroughly document the investigation in a comprehensive written report, which the employer could then use to defend against the employee's claims.

Even in those situations where the employer elected to rely on the investigation, it could still argue that some aspects of the investigation should remain privileged (i.e., the communications between the employer and/or its employment defense counsel and the investigator about the investigation).[22] So, for example, the employer could ask its outside defense counsel to communicate with the investigator in an effort to influence the investigator against the complainant or toward an outcome optimal to the employer. Under this arrangement, the employer could argue that it should be able to rely on the investigation. At the same time, the employer could use the attorney-client privilege to preclude the complainant from seeing these incriminating communications.[23] Similarly, some courts have actually allowed defendant employers to rely on the adequacy of an investigation, even while producing only a redacted version of the investigation report.[24]

Should an investigation corroborate the plaintiff employee's claims, the employer is free to claim attorney-client privilege and completely shield the investigation from the complainant/jury[25]—an information deficit that necessarily prejudices the complainant.

ATTORNEY INVESTIGATORS CONDUCTING PRIVILEGED INVESTIGATIONS ARE ETHICALLY REQUIRED TO ALERT THEIR EMPLOYER CLIENTS AS TO ALL INFORMATION UNCOVERED DURING THE INVESTIGATION–CONVERSELY, INVESTIGATORS ARE ETHICALLY PROHIBITED FROM ALERTING THE COMPLAINANT WITH INFORMATION THAT WOULD HELP THE COMPLAINANT

As Ms. Harris has correctly recognized in a prior law review article on this subject, "[a]n attorney conducting a facts-only investigation may also be required to alert the client to reasonably foreseeable legal issues that become apparent during the investigation, even if these issues fall outside the scope of the agreed upon representation."[26] This ethical obligation means that so-called "impartial" attorney investigators are required to provide employers with information unrelated to the investigation, which would allow employers to defend against complainants' claims. This necessarily favors the employer.

For example, an employer retains an attorney investigator to investigate a female Muslim employee's complaint that she was treated poorly and was then fired because of her gender. During the course of the investigation, the investigator uncovers facts demonstrating that, while there was no gender discrimination or harassment: (a) the employee's supervisor authored communications demonstrating that the supervisor harbored animus toward the employee's Muslim religion, and took adverse employment actions against the employee specifically because of that animus; and (b) unbeknownst to the employer, the employee embezzled money from the employer. In this situation, the attorney investigator would be ethically bound to disclose these facts to the employer.

Conversely, using this same example, the attorney investigator would be ethically precluded from sharing any of these facts with the employee. That is, because of attorney-client privilege, the investigator would be unable to disclose a finding to the employee that her supervisor had harbored anti-Muslim animus against her and fired her because of that animus.

In such a situation, the attorney investigator would not be acting in an impartial manner. Worse, if instructed by the employer client, the attorney investigator would be ethically obligated to prepare a written report debunking the complainant's allegations of gender discrimination (without disclosing the religious discrimination found) and finding that the employee had embezzled money from the employer.

THE "REPEAT PLAYER" BIAS PREVENTS ATTORNEY-CLIENT-PRIVILEGED INVESTIGATIONS FROM BEING IMPARTIAL

Studied at length in the arbitration-context,[27] the "repeat player" effect is also alive and well in workplace investigations. The "repeat player" effect in this context refers to an investigator's (conscious or unconscious) propensity to bias the outcome of an investigation in an employer's favor in the hopes of securing additional work.[28] This phenomenon can undermine the impartiality/independence of workplace investigations.[29]

Further, according to Harris and Oppenheimer, "[t]he investigator should see herself as an independent professional retained to render her candid and neutral assessment to the client, rather than retained to protect management, or to whitewash organizational wrongdoing."[30] This is simply not possible given that investigators stand to profit from: (1) the investigation; (2) *other* investigations for the client and the client's employment law defense firm(s); and (3) expert witness in other cases for the client and the client's employment

law defense firm(s).[31] Additionally, workplace investigators know that the employment defense bar is small. They can easily be blackballed and put out of business if they develop a reputation for putting "impartiality" above their clients' interests in defending against employment claims.

> As the United States Supreme Court has emphasized:
>
> [V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome.[32]

So too does that exist when the income stream of the attorney investigator would end if a negative report prohibited future rehire. With the forces of the "repeat player" and "pecuniary interest" biases working hand in glove, attorney workplace investigations are arguably a rigged system favoring the employer.

IN THE REAL WORLD, EMPLOYERS WEAPONIZE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS

Far from the sanitized realm imagined in the Harris/Oppenheimer article is the real world, where corporations weaponize attorney-client privileged investigations in their own perceived monetary self-interest to the detriment of employee complainants. An illustration of how employers can misuse the investigative process can be seen in the sexual harassment workplace investigation at the Washington Commanders by Wilkinson Walsh. According to a recently released report from the U. S. House of Representatives,[33] the Washington Commanders retained Wilkinson to conduct an attorney-client-privileged workplace investigation into allegations of a pattern and practice of gender harassment and bullying within the Commanders' organization. Thereafter, the owner of the Commanders, Daniel Snyder, began to improperly control and influence the outcome of the investigation by launching a shadow investigation into former employees.[34] Snyder used and attempted to use non-disclosure agreements and hush money to silence witnesses.[35] This included: having his attorneys offer an accuser a monetary sum "in the seven figures" to not speak with anyone about her allegations;[36] sending private investigators to the homes of former employees;[37] making, along with his attorneys, at least seven presentations to Wilkinson during the investigation (presumably in an effort to influence the outcome of the investigation);[38] attempting to prevent an accuser from sharing information with Wilkinson;[39] using a proxy to block Wilkinson's access to information that could implicate him personally in sexual misconduct;[40] using a defamation lawsuit to target former employees and influence the Wilkinson Investigation;[41] and publicly announcing, in collaboration with the NFL, a summary of the Wilkinson Investigation that, by stating that all of those involved in the misconduct were no longer employed by the Commanders, falsely suggested that the Wilkinson Investigation had exonerated him,[42] while at the same time using the attorney-client privilege to preclude the release of the Wilkinson Investigation.[43]

EMPLOYERS USE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS TO PRE-CONDITION THE INVESTIGATOR IN THEIR FAVOR

The notion of preconditioning or confirmation bias is "the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."[44] At the same time, damning evidence is either ignored or interpreted in ways that do not undermine the pretextual conclusion.[45] For this reason, social scientists have strongly recommended that workplace investigators strictly limit their contact with their clients not just at the beginning of the investigation but throughout the investigation precisely to avoid preconditioning or confirmation bias.[46] Yet, it has been the authors' experience that the vast majority of workplace investigators do not limit such contact or communications with their clients and that their clients (and their clients' outside employment defense counsel) use that access to pre-condition and bias the investigator in the employer's favor.[47] In one particularly egregious case, before the investigation even began, the in-house investigator was informed that there would be a finding against the alleged harasser "over [the employer's] dead body" and that "the complaint was meritless."[48]

In the attorney-client privileged investigation setting, because these preconditioning and bias inducing communications are usually buried in attorney-client privileged communications, the employee never learns about these threats.

EMPLOYERS USE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS TO STRUCTURE, SHAPE, AND CONTROL THE INVESTIGATION

In the real world, employers use the attorney-client privilege to structure, shape, and control the investigation—an intentional attempt to exert undue influence and avoid discovery of or hide the truth that the employer-client has legal exposure for workplace misconduct. Too often, attorney workplace investigators allow it.

For instance, attorney workplace investigators frequently do not interview employees whom they deem to have relevant information that may corroborate claims of

misconduct if their client does not want those witnesses interviewed.[49] When allegations emerged that Fox News' Roger Ailes had a long and sordid history of workplace sexual harassment, parent company 21st Century Fox turned to "independent" workplace investigator Paul, Weiss, Rifkind, Wharton & Garrison LLP (a firm known for its defense-side employment practice). This supposedly "neutral" law firm/investigator refused to interview female employees who were known to have been harassed by Ailes, one of whom took the affirmative step of reporting to Paul Weiss that she was one of Ailes' victims.[50]

In yet another case, CBS hired Covington & Burling and Debevoise & Plimpton in 2018 to conduct an "independent" investigation into sexual harassment allegations against CBS Chairman and CEO Leslie Moonves.[51] However, the investigation was overseen by none other than two "acolytes of Moonves" and a partner in the law firm representing the majority voting shareholder of ViacomCBS (the parent company of CBS).[52] It defies credulity that an "external" investigation which is overseen by the harasser's closest allies and the company's attorney would be free from "bias."

EMPLOYERS USE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS TO "DIG UP DIRT" ABOUT THE COMPLAINANT

Not only do employers use attorney-client privileged investigations to shape and control the investigations, they also routinely use such investigations to "dig up dirt" in an effort to discredit the complainant.

Discrediting harassment victims is an all too familiar tactic to mitigate fall out from a misconduct complaint.[53] Unfortunately, these tactics are not limited to "private investigators" or allies of the accused. Instead, too often, the authors have found their employee-clients to be on the receiving end of these smear campaigns. "Well respected," "independent" attorney investigators are free to ask the complainant and witnesses highly personal and intrusive questions (questions often prepared by defense counsel) that would not be allowed in a court proceeding.

EMPLOYERS USE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS TO SETTLE MERITORIOUS CASE FOR FAR LESS THAN THEY ARE WORTH

An employer's effort to pull the wool over the employee's eyes allows the employer to settle a meritorious case for far less than it is worth. They conceal not only the "privileged" communications between the investigator and the employer, but also the fruits of the investigation (*e.g.*, witness statements and the investigation report).

It is an oft recognized tenet of employment law that the employer is "in possession of the vast majority of evidence that would be relevant to employment-related claims against it . . . [which] work[s] to curtail the employee's ability to substantiate any claim against the employer."[54] The employer's sole access to the investigation materials exacerbates this information disparity. In the authors' experience, investigations are never fully shared with an employee and her counsel unless compelled by a court or arbitrator to do so or if the investigation materials exonerate the employer.[55] For example, employers may learn from the investigation that "other victim" evidence exists, that witnesses will corroborate the complainant's allegations of wrongdoing, or that "smoking gun" documents showing retaliatory animus exist. In such a case, the employer will engage in settlement discussions in an effort to resolve the matter before the complainant learns of the evidence.

Critically, Harris and Oppenheimer concede that "having full access to an employer's investigation might help plaintiff's attorneys better value their cases."[56] Given this admission alone, it is difficult to understand how attorney workplace investigators can contend that attorney-client-privileged investigations are "impartial" when employers and complainants are not on an equal footing.

EMPLOYERS SOMETIMES USE ATTORNEYS NOT ONLY AS OUTSIDE WORKPLACE INVESTIGATORS, BUT ALSO SIMULTANEOUSLY (OR SUBSEQUENTLY) AS DEFENSE COUNSEL

In the real world, employers also weaponize their "neutral" attorney-client-privileged investigations against employees them to craft the employer's litigation strategy. After the investigation concludes, the "neutral" investigator becomes an advocate for the very clients for whom they previously professed neutrality. Unfortunately, in California, courts have allowed it.[57]

Indeed, in one matter, the authors of this article were contacted by an attorney claiming to be a "neutral" workplace investigator. In their very first telephone conversation, the authors were informed that the investigator had reviewed their draft complaint for damages, which had been provided to the employer during confidential settlement negotiations. According to the "neutral" workplace investigator, she had already rendered a legal opinion to the employer about which causes of action were vulnerable to demurrer.

Other times, purportedly neutral investigators allow future litigation counsel to submit interview questions of the complainant. For example, such questions include: whether the complainant has retained counsel; whether the

complainant has seen a mental healthcare professional, and, if so, who and how many times; and the amount of damages sought by the complainant.

Worse, the authors of this article have experienced some employment defense attorneys who have orchestrated matters to allow the employer three bites at the apple. First bite, the employment defense attorney supervises an internal human resources representative who interviews the complainant and witnesses. Second bite, the employment defense attorney supervises (and sometimes participates in the investigation by)[58] an outside workplace investigator who interviews the complainant and witnesses. Third bite, the employment defense attorney gets to depose the complainant.

This gamesmanship has no place in workplace investigations when so much is at stake. The authors believe that California should follow federal courts that have held "a defendant may waive the attorney-client privilege if it fuses the roles of internal investigator and legal advisor," as "the plaintiffs must be permitted to probe the substance of [the defendant's] alleged investigation to determine its sufficiency."[59]

WORKPLACE INVESTIGATORS ARE NOT IMPARTIAL, BECAUSE THEY OFTEN DO NOT ALLOW THE ELECTRONIC RECORDING OF WITNESS INTERVIEWS AND BECAUSE THEIR CLIENTS DO NOT WANT AN OBJECTIVE ACCOUNT OF THE INVESTIGATION PRESERVED

The authors of this article have collectively represented clients (as complainants and third-party witnesses) in hundreds of workplace investigations. In virtually every single case, the workplace investigators have not only refused to electronically record their interviews, but they have also insisted that none of the interviewees record their own interviews.[60] Why? Investigators often offer a raft of absurd reasons,[61] but the real reason was acknowledged in an Association of Workplace Investigators Journal article. "One consideration generally trumps all the issues we discuss below: *what the client wants*."[62] The mere fact that attorney investigators defer to their clients and ignore the wishes of some complainants (and third-party witnesses) to electronically record interviews demonstrates that attorney investigators are not impartial. Moreover, this deference to the client's wishes demonstrates that, contrary to the opinion of Harris and Oppenheimer, attorney workplace investigators do not "remain[ ] uninfluenced by her relationship with the company or counsel who retain her."[63] Rather, attorney investigators allow their clients to call the shots.

Putting impartiality aside, recorded interviews offer significant advantages over non-recorded interviews. For example, recorded interviews:

- Allow the investigator to "maintain uninterrupted eye contact with the witness, focusing on the questions and answers while maintaining rapport with the witness."[64]
- Accurately capture what the witnesses say and thereby preclude the "he said/she said" disputes that often arise when the interviews are not electronically recorded.[65]
- Shed light on whether the investigator unduly focuses on facts that accord with the investigator's own biases or preordained theory of the case.[66]
- Do a nearly perfect job of capturing a witness's shifting story in all its elastic quality.[67]
- Capture things like pauses, the "hem haw" response, tone of voice, and changes in testimony.[68]
- Accurately capture what is asked by the investigator and thereby reveal whether the investigator was leading the witness in one direction or another and/or missed any important areas of inquiry.
- Offer insights into whether the investigator has any biases (consciously or unconsciously).[69]
- Allow the complainant or a judge, jury or arbitrator to be able to make their own credibility determinations of the complainant, the accused, and the third-party witnesses.
- Serve as direct evidence, which makes them a fantastic tool if a witness disappears and a great asset for witness impeachment.[70]

Given all of the advantages of recorded interviews, why would the clients of attorney investigators *not* want recorded interviews? The answer is simple–employers do not want the investigation preserved such that the jury, judge, and/or arbitrator can view the evidence themselves. Rather, the employer wants the jury, judge, and/or arbitrator to only see the evidence as filtered through the lens of *its* attorney workplace investigator.

IF ATTORNEY INVESTIGATORS WISH TO "RECLAIM THE INDEPENDENT LAWYER ROLE," THEY NEED TO STRICTLY ADHERE TO A CODE OF CONDUCT REQUIRING THEM TO BE TRULY IMPARTIAL

If attorney workplace investigators truly wish to "reclaim the independent lawyer role," they must ensure that they are "impartial" in the broadest sense of that word.

They must show that they are not only free from bias, but also that they treat all parties equally and are not influenced or controlled in any way whatsoever by their clients. This means, at a minimum, that the very outset of every investigation, the investigator must secure their clients' irrevocable written: (1) waiver of the attorney client privilege; (2) agreement to include the complainant's counsel in *all* communications with not only their clients but also their clients' employment defense counsel;[71] (3) agreement to videotape all interviews; (4) agreement to prepare a written report; and (5) agreement that the investigator will, at the end of the investigation, contemporaneously provide their client and counsel for the complainant with the written investigative report, all interviews, all notes, and all documents generated by or provided to the investigator.

The foregoing steps would be a good first start for those attorneys conducting impartial workplace investigations who truly desire to reclaim the independent lawyer role and would go a long way towards letting in the "sunlight."

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1. Lindsay Harris & Amy Oppenheimer, *Attorneys Conducting Impartial Workplace Investigations: Reclaiming the Independent Lawyer Role*, 36 Cal. Lab. & Emp. L. Rev. 5 (Sept. 2022).

2. One of the authors of this article retained Oppenheimer as an expert testifying on behalf of the plaintiff employee about how an employer's workplace investigation fell short of the standard of care.

3. "Truthiness" means "the quality of seeming to be true according to one's intuition, opinion, or perception without regard to logic, factual evidence, or the like." *See* Dictionary.com, available at https://www.dictionary.com/browse/truthiness (last visited Jan. 17, 2023).

4. Lindsay Harris & Amy Oppenheimer, *supra* note 1, at 6, n. 5.

5. *Id.*

6. "Impartial" means "treating or affecting all equally." *See* Merriam-Webster, available at https://www.merriam-webster.com/dictionary/impartial (last visited Jan. 17, 2023); *see also* Britannica ("treating all people and groups equally"), available at https://www.britannica.com/dictionary/impartial (last visited Jan. 17, 2023); Cambridge Dictionary ("not supporting any of the sides involved in an argument"), available at https://dictionary.cambridge.org/us/dictionary/english/impartial (last visited Jan. 17, 2023); Lexico ("Treating all rivals or disputants equally"), available at https://www.lexico.com/en/definition/impartial (last visited Jan. 17, 2023).

7. Leslie Ellis & Lisa Buehler, *Documenting and Preserving Workplace Investigations: What to Keep and How Long to Keep It*, 5 AWI J. 4, 1 (Oct. 2014) ("Experienced workplace investigators understand that their clients may rely on the investigation to defend against claims made in subsequent litigation"), available at https://cdn.ymaws.com/www.awi.org/resource/collection/B3103F98-2511-4D7E-B8A8-31E3B02583DF/Module%206%20-%20Documenting%20and%20Preserving%20Workplac.pdf (last visited Jan. 17, 2023).

8. *Id*. at 4 (recommending that when determining how to document and preserve workplace investigations, "[i]nvestigators should consider how the client will use the investigation—to substantiate employment decisions and defend against subsequent claims—and how it will be attacked in litigation.").

9. *See* Kirsten Branigan, Carole Nowicki, Lori Buza, & Jessica Allen, *Conducting Effective Independent Workplace Investigations in a Post-#MeToo Era*, 74 Disp. Resolution J. 85, 92 (2019); Douglas R. Richmond, *Navigating the Lawyering Minefield of Internal Investigations*, 63 Vill. L. Rev. 617, 687 (2018), available at https://digitalcommons.law.villanova.edu/vlr/vol63/iss4/2 (last visited Jan. 17, 2023).

10. Amer. College of Trial Lawyers Fed. Criminal Proc. Co., *2020 Update: Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, at 3 & 11 (2020), available at https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/2020—-recommended-practices-for-conducting-internal-investigations.pdf?sfvrsn=2473e169_2 (last visited Jan. 17, 2023) ("The goal at the outset should be frequent updating by oral reporting. Careful consideration should be given to the extent to which written reports should be rendered, if at all, during or at the conclusion of the investigation. There is typically limited utility and great risk in creating interim written reports of investigation.").

11. *Id*. at 11.

12. *See* Branigan *et al*., *supra* n. 9, at 85.

13. *Id*.

14. Lindsay Harris & Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, 25 Cal. Lab. & Emp. L. Rev. 4 (July 2011).

15. *Guiding Principles for Conducting Workplace Investigations*, Ass'n of Workplace Investigators, available at https://cdn.ymaws.com/www.awi.org/resource/resmgr/files/publications/AWI-Guiding-Principles-Broch.pdf (last visited Jan. 17, 2023).

16. *Id*.

17. Louis D Brandeis & Norman Hapgood, Other People's Money and How the Bankers Use It, *Chapter V: What Publicity Can Do* (2009), available at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v (last visited Jan. 17, 2023.)

18. *See*, *e.g*., Douglas R. Richmond, *supra* note 9, at 622 ("It is, after all, the client who determines the purpose and scope of the investigation . . . It is the client to whom the lawyers owe ethical duties of competence, communication, confidentiality, diligence, and loyalty, and who controls the attorney-client privilege with respect to the lawyers' communications.").

19. 59 Cal. App. 4th 110, 121 (1997) (*Wellpoint*).

20. *Id*.

21. *Id*. at 128.

22. *See Kaiser Foundation Hosp. v. Super. Court*, 66 Cal. App. 4th 1217, 1219, 1226 (1998) (allowing "employer [to] assert the protection of the attorney-client privilege and the attorney work product doctrine as to documents contained in its investigation files [even] where the employer pleads the adequacy of its prelitigation investigation into the claimed misconduct as a defense in the action"). *See also Wellpoint*, *supra* n. 19, at 122 (cautioning that there should not be a "blanket" nullification of the attorney client privilege and that the plaintiff should not have "carte blanche access" to the investigative file even where the defendant employer puts the adequacy of the investigation directly at issue).

23. *See*, *e.g*., *Gordon v. Nexstar Broadcasting, Inc*., 2019 WL 2177656, at *7 (E.D. Cal. 2019) (denying motion to compel production of communications between employment defense attorney and attorney workplace investigator even though defendant employer put the adequacy of the investigation directly at issue).

24. *See*, *e.g*., *Christensen v. Goodman Distribution Inc*., 2020 WL 4042938, at *3 (E.D. Cal. 2020).

25. *See*, *e.g*., Ramit Mizrahi, *Workplace Investigations In FEHA Cases–Making Them Work For You*, Advocate (June 2015) ("A plaintiff's attorney can ask the employer to make a *Wellpoint* election as a condition of the employee's participation. . . But, by refusing to make that election in advance, the employer is essentially saying, 'If the results are favorable to me, I will waive the privilege to get the information before the jury. If they are unfavorable, I will block the employee from getting corroborating information and block the jury from hearing the truth.'"), available at https://www.advocatemagazine.com/article/2015-june/workplace-investigations-in-feha-cases-making-them-work-for-you (last visited Jan. 17, 2023).

26. Lindsay Harris & Mark L. Tuft, *supra* n. 14; *see also Nichols v. Keller*, 15 Cal. App. 4th 1672, 1684 (1993) ("[E]ven when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention."); Timothy J. Pierce, *Limited Scope Representation: Some Considerations*, 2 (same), available at https://inns.innsofcourt.org/media/69501/30172_november_2012_limitedscoperepresentationsomeconsiderations.pdf (last visited Jan. 17, 2023).

27. *Armendariz v. Found. Health Psychcare Servs., Inc*., 24 Cal. 4th 83, 111 (2000); Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rights & Emp. Policy J. 189 (1997).

28. As Oppenheimer has previously recognized: "Many investigators believe they are too sophisticated to be

unwittingly swayed by the attitudes and opinions of others, but these influences are, by their very nature, unconscious. Research has shown that people are influenced and primed much more than they realize." *See* Amy Oppenheimer, *The Psychology of Bias: Understanding and Eliminating Bias in Investigations*, Ass'n of Workplace Investigators (2012), available at https://cdn.ymaws.com/www.awi.org/resource/collection/8AC6116E-0B82-4DA0-9FDB-14F840457195/Module%202%20-%20The%20Psychology%20of%20Bias.pdf (last visited Jan. 17, 2023) (discussing the impact unconscious biases can have on investigators).

29. *See*, *e.g.*, Mark Berger, *Can Employment Law Arbitration Work?* 61 U. Mo.—Kan. City L. Rev. 693, 714 (1993); Julius G. Getmant, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 936 (same); Block & Barasch, Proc. of N.Y.U. 44th Ann. Nat'l Conf. on Lab., at 298.

30. Lindsay Harris & Amy Oppenheimer, *supra* n. 1, at 5.

31. Ashley Lattal, *The Hidden World of Unconscious Bias and Its Impact on the "Neutral" Workplace Investigator*, 24 J.L. & Pol'y 411, 464 (2016), available at https://core.ac.uk/download/pdf/228608351.pdf (last visited Jan. 17, 2023) ("[I]f an organization repeatedly uses one or two investigators, these 'externals' may face the same biases as internal investigators—knowledge of the inner workings of the organization, dependence upon the organization, and ongoing relationships with those who may impact their livelihood.").

32. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.").

33. *See Conduct Detrimental: How the NFL and the Washington Commanders Covered Up Decades of Sexual Misconduct*, Committee on Oversight and Reform of the U.S. House of Representatives (December 8, 2022), available at https://www.documentcloud.org/documents/23396116-2022-12-08-nfl-report_final?responsive=1&title=0 (last visited Jan. 17, 2023).

34. *Id*. at 13.

35. *Id*. at 23 & 39.

36. *Id*. at 39.

37. *Id*. at 7, 23 & 30.

38. *Id*. at 27.

39. *Id*. at 34.

40. *Id*.

41. *Id*. at 23–24.

42. *Id*. at 11–12 & 64–65.

43. *Id*. at 13.

44. R.S. Nickerson, *Confirmation bias: A ubiquitous phenomenon in many guises*, 2 Rev. of Gen. Psych. 2, 175–220, 175 (June 1988), available at https://doi.org/10.1037/1089-2680.2.2.175 (last visited Jan. 17, 2023).

45. *Id*.

46. Ashley Lattal, *supra* n. 31, at 459.

47. *Id*. ("A client will often have a particular belief in the 'correct' outcome for an investigation, which they may communicate to the workplace investigator when he or she is retained. This can create an 'initial hypothesis' in the workplace investigator's mind and lead him or her down the dangerous road of confirmation bias."). *See also* Amy Oppenheimer, *supra* n. 28 (citing from the educational setting, a study that "showed that if teachers were randomly told that some students were superstars and others were not going to make it, the influence of those characterizations on the teacher's attitude toward the students impacted how the students performed.").

48. *See Doe v. U. of So. Cal.*, Case No. 2:20-cv-06098 (C.D. Cal. July 8, 2020).

49. Sometimes this failure to interview material witnesses occurs because the investigators' clients (defendant employers) specifically instruct the investigator to not interview particular witnesses or classes of witnesses (*e.g.*, former employees) and, other times, investigators make this decision on their own for fear of antagonizing their clients.

50. Pam Martens & Russ Martens, *Was Paul Weiss an Appropriate Law Firm to Investigate Sex Charges Against Roger Ailes?* Wall St. on Parade (August 24, 2016), available at https://wallstreetonparade.com/2016/08/was-paul-weiss-an-appropriate-law-firm-to-investigate-sex-charges-against-roger-ailes/ (last visited Jan. 17, 2023); Lloyd Grove, *Laurie Dhue's Lawyer Slams Fox's Probe Into Roger Ailes Harassment Claims*, Daily Beast (April 13, 2017) available at https://www.thedailybeast.com/laurie-dhues-lawyer-slams-foxs-probe-into-roger-ailes-harassment-claims (last visited Jan. 17, 2023).

51. Brian Steinberg, *CBS Hires Two Law Firms to Investigate Leslie Moonves Allegations*, Variety (August 1, 2018), available at https://variety.com/2018/tv/news/cbs-leslie-moonves-law-firms-allegations-1202893125/ (last visited Jan. 17, 2023).

52. Sumner Redstone, Wikipedia, available at https://en.wikipedia.org/wiki/Sumner_Redstone (last visited Jan. 17, 2023).

53. Susan Fowler, *I Spoke Out Against Sexual Harassment at Uber. The Aftermath Was More Terrifying Than Anything I Faced Before*, Time (February 17, 2020), available at https://time.com/5784464/susan-fowler-book-uber-sexual-harassment/ (last visited Jan. 17, 2023); Lisa Rein, *VA chief Wilkie sought to dig up dirt on woman who complained of sexual assault, agency insiders say*, The Washington Post

(Feb. 8, 2020), available at https://www.washingtonpost.com/politics/va-chief-wilkie-sought-to-dig-up-dirt-on-woman-who-complained-of-sexual-assault-agency-insiders-say/2020/02/08/c5823e44-49e1-11ea-9164-d3154ad8a5cd_story.html (last visited Jan. 17, 2023); Matthew Sheffield, *New York mayoral candidate Bo Dietl admits Fox News wanted him to spy on women alleging sexual harassment*, Salon (May 5, 2017), available at https://www.salon.com/2017/05/05/new-york-mayoral-candidate-bo-dietl-admits-fox-news-wanted-him-to-spy-on-women-alleging-sexual-harassment/ (last visited Jan. 17, 2023); *Sharpe v. Utica Mut. Ins. Co.*, 756 F.Supp.2d 230, 245 (N.D.N.Y. 2010); Jenny Vrentas, *Panel Finds Daniel Snyder Interfered With Sexual Harassment Investigation*, N.Y. Times (June 22, 2022), available at https://www.nytimes.com/2022/06/22/sports/football/dan-snyder-harassment-news-congress.html (last visited Jan. 17, 2023).

54. *Kinney v. United HealthCare Servs., Inc.*, 70 Cal. App. 4th 1322, 1332 (1999).

55. Pam Martens & Russ Martens, *supra* n. 50.

56. Lindsay Harris & Amy Oppenheimer, *supra* n. 1, at 5.

57. *Wellpoint*, *supra* n. 19.

58. Pam Martens and Russ Martens, *supra*, n. 50. (When Paul, Weiss, Rifkind, Wharton & Garrison LLP was hired to "investigate" sexual abuse allegations by the Board of Trustees of Syracuse University, Paul, Weiss "failed to produce the underlying notes and files . . . [about] what was discussed in its interviews which were done with litigation counsel present.").

59. *Barton v. Zimmer Inc.*, 2008 WL 80647, at *9 (N.D. Ind. Jan. 7, 2008); *Harding v. Dana Trans., Inc.*, 914 F.Supp. 1084, 1090-1100 (D.N.J. 1996) (finding in a sexual discrimination case that defendant had waived the attorney-client privilege where defendant's attorney "acted as [it]s attorney as well as its investigator.").

60. Indeed, many of the authorities cited by Harris and Oppenheimer specifically recommend that investigators ensure that the interviewees do not record their own interviews. *See* Kirsten Branigan, *et al.*, *supra* n. 9, at 96.

61. Investigators say that they do not electronically record witness interviews because doing so will have a "chilling effect" causing the interviewee to be less forthcoming and preventing them from "opening up truthfully," or it will somehow interfere with the investigator's ability to build a rapport with the witness, or it will make "witnesses nervous." *See* Keith Rohman & Elizabeth Rita, *Capturing the Witness Statement*, 4 AWI J. 3, 8-9 (July 2013), available at https://cdn.ymaws.com/www.awi.org/resource/collection/8AC6116E-0B82-4DA0-9FDB-14F840457195/Module%204%20-%20Capturing%20the%20Witness%20Statement%20-%20A.pdf (last visited Jan. 17, 2023).

62. *Id.* at 2.

63. Lindsay Harris & Amy Oppenheimer, *supra* n. 1, at 2.

64. *Id.* at 7.

65. *See*, *e.g.*, Ramit Mizrahi, *supra* n.25 ("Ask that all interviews be recorded. If they are, and a *Wellpoint* election is made, those recordings can make your case. This author had a case in which the investigator's summary of what a key witness said (and the findings in the report) differed drastically from the witness's taped statements. This called into question the integrity of the entire investigation. Similarly, recordings capture nuances such as tone of voice, give you accurate records of what was said, prevent bullying and intimidation, and allow you to determine the propriety of the interviewer's techniques."). Both of the authors of this article have also represented clients being interviewed by attorney workplace investigators who have not only attributed to the clients' statements they did not make but have also failed to note critically important statements that the clients *did* make.

66. *Id.* at 5.

67. *Id.* at 7.

68. *Id.*

69. *See Is Your Investigator More Biased Than You Think? Part I: How Unconscious Bias Can Disrupt Your Workplace Investigations*, Ogletree Deakins (July 17, 2017), available at https://ogletree.com/insights/is-your-investigator-more-biased-than-you-think-part-i-how-unconscious-bias-can-disrupt-your-workplace-investigations/ (last visited Jan. 17, 2023) (acknowledging that "[t]here are three relevant ways in which unconscious bias may manifest itself during workplace investigations: (1) confirmation bias; (2) "like me" (or not like me) bias; and (3) priming.").

70. *Id.*

71. Because substantive pre-investigation discussions between the attorney investigator and his or her client (the defendant employer) can prime the investigator to become (consciously or subconsciously) biased against the complainant and otherwise rig the investigation in favor of the employer, it is extremely important to ensure that the complainant's counsel is included in all communications between the investigator and his or her client and the client's employment defense counsel. *See*, *e.g.*, Ashley Lattal, *supra* n. 31, at 416-17. ("There is much room for bias to seep into the investigation process, including during initial discussions with the client [] about the case, preinterview document review, interviews regarding the line of questioning and the phrasing of questions, when deciding which witnesses to interview and what additional evidence to review, and when deciding which evidence to reference and which to ignore in reports").