



Navigating Internal Investigations at Nonprofit Organizations

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Written Standards of Conduct and Policies and Procedures

- **Written Standards of Conduct and Policies and Procedures**
 - Important to have a clear written policy that outlines compliance expectations
 - Code of conduct/code of ethics should be applicable to all employees, volunteers, board members
 - Policies should be approved by the organization's governing body and senior management
 - In order to be effective they need to be easily accessible to staff – need to be posted on website or a share drive that everyone can easily find.
- **Policy Development**
 - Standard format for all policies to avoid confusion – USER friendly
 - Statements should be short, declarative
 - Make sure policy does not conflict with another policy
 - Cross-reference policies – when appropriate
 - Define key terms

What Is the Standard of Proof the Law Requires?

- **Legal Standards**
 - Beyond a reasonable doubt – criminal cases
 - Clear and convincing evidence – fraud, equitable relief
 - Preponderance of the evidence
- **Investigation Standard**
 - Good faith investigation and reasonable conclusion
 - Your conclusion must be reasonable, not necessarily right



When Do You Need to Investigate?



- When there are disputed facts about something significant
- Every such complaint should be taken seriously
- Notice of misconduct may be actual or constructive
- A supervisor's knowledge of misconduct is knowledge of the employer

Who Should Investigate?

- The experience?
- The expertise?
- Conflicts of interest?



Planning an Internal Investigation

- Develop a Roadmap for the Investigation
 - Identify key players and management involved
 - Identify existence and location of evidence – meet with IT
 - Identify policies that may apply to the investigation process
 - e.g., collective bargaining agreement or sexual misconduct policy
 - Create list of witnesses to interview
 - Consider logistics – where and when interviews will take place
 - Review personnel files for individuals involved

Planning an Internal Investigation

- Send out Litigation Hold Notice to employees likely to have relevant information
 - The company has a duty to preserve once it “reasonably anticipates litigation”
 - When in doubt – assume the duty exists
 - Follow up to make sure that the Litigation Hold Notice is understood and that the information is being preserved
 - Issue periodic reminders

Identify and Preserve Electronically Stored Information

Sources of Potentially Relevant Information:

- E-mail servers
- Shared drives
- USB/Thumb drives
- Backup tapes
- External storage facilities
- Hosted archive systems
- Legacy systems
- Instant messaging
- Voicemail
- Text/Chat
- Call logs, calendars, contacts
- Mobile device, application data & pictures
- Employee devices, including smart phones/tablets, BlackBerries, laptops, etc., whether company-owned or personal
- CDs
- DVDs
- Social media
- GPS data
- Web browsing history

Planning an Internal Investigation

- Stop the underlying conduct
 - Interim measure must not be perceived as retaliation
 - Interim measures may include:
 - Suspension
 - Reassignment
 - Rearrange office locations
 - Change shifts
 - Consult lawyer for options



Preparing for Witness Interviews

- Review the relevant policy
 - If there is an investigation protocol – be sure to follow it
 - Review the elements of the alleged wrongdoing
- Review all relevant evidence – emails, text messages, voicemails, photos, video
- Review personnel files
- For each element of the alleged wrongdoing, draft interview questions you may want to ask witnesses to determine if the elements were met



How to Conduct Interviews

- Conduct interview in private/non-public place
- Explain who you are and why witness is being interviewed
- Begin interview with open-ended questions – get the witness to talk
- Make the witness comfortable and look him/her in the eye
- Ask specific follow-up questions, i.e., date, time, place, witnesses
- Be inquisitive, not accusatory
- Allow witness to explain things – don't rush him/her
- If witness offers to show you evidence, such as e-mail, texts, videos – do not refuse
- Ask the witness for documents/witnesses that may corroborate his/her story

Note-taking During Interviews

- At minimum, interviewer, interviewee, and note-taker should be present
- Contemporaneous creation of notes or immediately thereafter
- Arrange for interviewee to review and approve interview notes
- Written statement that interviewee is permitted to supplement or amend statement at any time



Assessing Credibility

Inherent plausibility

- Does the allegation make sense?
- Is the allegation believable at face value?
- Is the allegation reasonable, detailed, and consistent with known facts about the business?

Bias and motive

- Is the witness biased or impartial?
- Does the witness have a motive to lie or exaggerate?
- Does the witness have a special loyalty to or a grudge against anyone involved?

Demeanor

- How did witness act during the interview?
- Were any of the reactions unusual, based on their typical demeanor or behavior?
- Judging demeanor is difficult for even the most experienced investigators and should not be solely relied on in making a determination of credibility.

Assessing Credibility

Prior Incidents

- Has the complaining witness made unfounded complaints in the past?
- Has the accused individual ever been the subject of a complaint in the past?

Omissions/Contradictions

- Did any witness leave out important information?
- Did witness admit an important detail only after being confronted with it?
- Did witness contradict himself/herself during the interview?

Corroboration

- Did witness provide any evidence to corroborate the allegation?
- Does the evidence support the allegation?



Making a Determination

- Review all witness statements and evidence collected.
- Determine whom you believe and why.
- Decide what you think actually happened (or did not happen).



Making a Recommendation

Coordinate with management and discuss recommendations.

Communicate with management and the company lawyer to maintain privilege.



Documenting Your Investigation

The Final Investigatory Report should include the following:

- Consider verbal reports versus written reports
- The investigative steps – who you interviewed, evidence reviewed, policies reviewed
- Description of the Complaint, including a summary of witness accounts
- Credibility determinations
- Findings
- Recommendations regarding discipline



Internal and External Communications

Internal

- Telling employees who need to know
- Telling them what they need to know
 - “Jerry is no longer with us” versus “We fired Jerry for sexual harassment”

External

- The press
 - Does the press need to know?
 - Will the press learn about this anyway?
 - Framing bad facts or news in the best possible light
 - Preparing accurate statements
- Customers/Vendors/Other Third Parties



Maintaining Attorney-Client Privilege

Courts distinguish between communications that seek legal advice and communications regarding day-to-day business activities

Internal investigations of employee misconduct and other human resource functions are often considered day-to-day business activities.

Must ask : What is the primary purpose of the communication?

Maintaining Attorney-Client Privilege

Attorney communications subject to discovery in *Koumoulis*:

- Instructions regarding the types of questions to ask witnesses
- Recommendations regarding proposed disciplinary actions
- Draft scripts for anticipated conversations between human resource personnel and the complainant
- Advice regarding the types of facts that should be documented and the manner in which the documentation should occur

Assertion of *Farragher/Ellerth* defense may waive privilege for all documents or communications prepared, reviewed, or relied upon for the preparation of the investigative report and/or the ultimate decision

Maintaining Attorney-Client Privilege

Tips for protecting privilege:

- Segregate communications and documents regarding the factual investigation versus communications and documents regarding legal advice and ultimate decision-making.
- Where appropriate, reference statutes or relevant legal principles within communications.
- At the outset of the investigation, clearly define each participant's responsibilities.



Questions?

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June Luncheon: Save the Date!

Grassroots Mobilization: What Your Organization Needs to Know

June 23, 2022, 12p.m. – 1:30 p.m ET | Washington, DC (Webcast Option Available)



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