NEW JERSEY LAWYER

December 2023

No. 345

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TIMOTHY F. MCGOUGHRAN

Access to Justice Remains at the Forefront of the NJSBA's Mission

The third tenet of the New Jersey State Bar Association's mission statement pledges this:

"To promote access to the justice system, fairness in its administration, and the independence and integrity of the judicial branch."

In the decades since the NJSBA first adopted this statement, access to justice remains a guiding goal of the Association's service to the greater legal system in New Jersey. No one, least of all attorneys, wants a two-tier justice system, where large swaths of the population are denied quality legal representation. Everyone deserves their day in court, represented by someone who is bound by strict ethical rules.

I am proud to continue the efforts that my predecessors initiated to meet the ongoing need to provide high-quality, affordable legal services to the public, especially for low- and middle-income New Jersey residents who face difficulty retaining counsel for common matters like debt-collection cases, landlord-tenant lawsuits, and mortgage foreclosures. I believe the best and most efficient way to narrow the justice gap for this population is to match them with lawyers willing to work *pro bono* or at a reduced rate.

As we head into the holiday season, when many of us reflect on the year and how we have made contributions to our families and communities, I'm happy to report that the Association continues to expand its access to justice initiatives on multiple fronts.

Legal Edge, the NJSBA's proprietary software that helps match unrepresented clients with attorneys willing to work at a reduced rate, just celebrated its fifth year of operation in the Morris/Sussex County vicinage. Soon after the anniversary, the program passed a key milestone of assisting more than 500 people—who otherwise would have likely represented themselves in court—by matching them with counsel.

The NJSBA developed Legal Edge's online portal with the goal of alleviating the pressure the courts face in handling an unprecedented number of *pro se* litigants who are just above the threshold to qualify for free legal services. The result has been a boon to all parties in the Morris and Sussex counties justice system, including litigants, attorneys and the courts.

Given the software's success, I'm also excited to announce that larger vicinages like Essex, Bergen and Somerset are on their way to establishing separate reduced-fee platforms after taking cues from the Morris/Sussex model. It's our goal to expand Legal Edge to every county in the state. Doing so would address the access to justice gap, increase attorney caseloads and stave off the encroachment of online legal services in the profession. I urge local bar leaders throughout the state to inquire about Legal Edge to establish a reduced-fee program in their county or even bolster an existing one.

This year, the Association also published the *Access to Justice Guide,* a free online resource for the public who may need help navigating the complex justice system. The guide—soon to be released in Spanish—offers information on how to find and afford an attorney, participate in hearings, contact legal service organizations for help and more.

More than a dozen esteemed attorneys produced the comprehensive guide in partnership with Seton Hall Law School for state residents who are unable to afford counsel or lack knowledge of the law. It provides a list of legal assistance organizations that handle criminal, domestic violence and immigration matters, among other cases.

For people interested in representing themselves in court, the guide includes a section on general guidance for legal-related proceedings and instructions to submit forms for various court filings. I encourage you to view the full guide at njsba.com and circulate it among those who might benefit.

As a former municipal court judge and prosecutor for 23 years, I have personally seen the access to justice gap and the incredibly high threshold to obtain a public defender. The NJSBA, through our Artificial Intelligence Task Force created this year, is also looking at possible areas that AI can help bridge this access to justice gap. If you have any ideas or thoughts on this issue, please feel free to email me at tmcgoughran@mcgoughranlaw.com or give me a call at 732-660-7115. ■

NEW JERSEY LAWYER

December 2023 No. 345

New Jersey Lawyer (ISSN-0195-0983) is published six times per year. Permit number 380-680. • Subscription is included in dues to members of the New Jersey State Bar Association ($10.50); those ineligible for NJSBA membership may subscribe at $60 per year. There is a charge of $2.50 per copy for providing copies of individual articles • Published by the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Periodicals postage paid at New Brunswick, New Jersey 08901 and at additional mailing offices. POSTMASTER: Send address changes to New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Printed in U.S.A. • Official Headquarters: New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. 732-249-5000 • Advertising Display 732-565-7560.

FROM THE SPECIAL EDITOR

Navigating the Nuances of Investigations

By Susan L. Nardone

Nearly every organization has, at one time or another, been faced with the need to conduct, participate in, or respond to an investigation. Employee complaints trigger an investigation. Law enforcement action triggers an investigation. Inquiries from regulators trigger an investigation. The reasons for and the manner in which an investigation is conducted can vary widely. As in most things, context matters.

In this edition, we explore both recent developments in the world of investigations and some truisms that transcend all investigations. Our first article, written by Kirsten Scheurer Branigan, Carole Lynn Nowicki and Beth P. Zoller, focuses on several recent developments affecting employment-related investigations, including the Equal Opportunity Commission's proposed "Enforcement Guidance on Harassment in the Workplace," the National Labor Relations Board's *Stericyle* decision concerning investigation confidentiality, and the New Jersey Division on Civil Rights' new investigation "best practices." Each provides guidance to employers on the path toward a prompt, thorough, and effective workplace investigation. While some of their pronouncements merely reinforce existing habits, there are some things to be learned, and perfected.

SUSAN L. NARDONE *is the director of the Employment and Labor Law practice at Gibbons P.C. in Newark. She offers guidance to regional and national employers on how to proactively ensure compliance with applicable employment laws and obligations. She provides strategic and preventive advice and counseling for employers, including employee hiring, discipline and termination, and accommodation and leave. Susan conducts employee training and workplace investigations, as well as cultural assessments to help companies gain an understanding of the qualities that define their workplace cultures.*

The next article tackles the important topic of avoiding bias in investigations. The investigation "gold standard" requires fact-based, objective conclusions that are devoid of conscious or unconscious bias. Authors Christina Silva and Kea S. Noyan explore the types of unconscious bias that can sometimes enter the investigation process. They also address selection of the investigator and perceptions about the investigator, justified or not, that can lead to an attack on even the most thorough and seemingly objective investigation. Silva and Noyan offer multiple tips for reducing bias in investigations.

Our third article takes us back to the basics and offers five tips on conducting an effective workplace investigation in any context. These reminders from authors Ricardo Solano and Ryan Goodwin are worth playing on repeat. For example, an investigation without a clear definition of the issue to be investigated can get easily derailed, leading to confusion, a lack of confidence in the outcome, and increased cost. Investigation planning is also key, though it is important to be nimble and adjust the plan as the matter develops.

The fourth article provides insight from an experienced practitioner who represents employees in employment-related matters. Author Ayesha Hamilton theorizes that counsel for the employee can and often does guide the employee through a company investigation, sometimes in the background and sometimes as a participant in the process. Oftentimes the investigation is being conducted because of a complaint made by the employee, and Hamilton offers tips on preparing the employee for an investigation interview. She recommends that the employee ask the investigator how to prepare for the interview, including whether the employee should download company documents and share them with the investigator.

Our fifth article focuses on note-taking during an investigation and, when the investigator is an attorney, whether the notes are protected by the attorney-client privilege or attorney work product doctrine. Authors John D. Haggerty and Anne M. Collart distinguish between notes reflecting facts gathered during the investigation and those that reflect the attorney's mental impressions. That distinction is not always clear. Among other things, Haggerty and Collart recommend limiting the number of people who take notes during the investigation and designating the notes as containing the attorney's mental impressions.

The final article, written by Peter Frattarelli and Simone Adkins, takes a deeper dive into attorney-client privilege and work product in internal investigations, starting with the New Jersey Supreme Court's 1997 decision in *Payton v. New Jersey Turnpike Authority*, a case that is often cited for its pronouncements on what is discoverable when a company conducts an investigation into allegations of sexual harassment. New Jersey law offers an affirmative defense in sexual harassment cases where the employer takes prompt and effective remedial action in response to a complaint. However, the affirmative defense is not available in other types of discrimination cases. Some companies opt to use their outside counsel to conduct a privileged investigation into a complaint for purposes of securing legal advice. In this case, privilege and work product protection are typically afforded to the attorney's work and advice.

I hope you find the information shared by this very talented group of authors interesting and informative. I certainly did. ■

WORKING WELL

Declutter Your Spaces— Declutter Your Mind!

By Lori A. Buza
NJSBA Well-Being Committee Chair
KSBranigan Law

Decluttering one's living and work spaces as well as decluttering one's mind are important aspects to overall well-being and efficient work practices andproduction.

Physical Spaces (work and home): Having an organized, uncluttered, and clean environment facilitates creativity, clear thinking, and an overall sense of peace. Some tips to declutter one's physical environment are:

1. Take stock of items and accumulated "stuff" (e.g., papers, tchotchkes) in the office and at home to formulate a plan as to what area(s) to tackle first.
2. Start organizing small spaces (i.e., your desk, a drawer) before moving to the larger areas. Clear counters. Create empty areas.
3. For each unit to address, sort into piles the items: create a "keep pile," a "trash pile," a "recycle pile," and a "donate pile." Release what does not have purpose or meaning to you. Follow through with distributing the trash, recycle and donate piles. Organize the keep pile as follows:
4. Get drawer organizers, containers, shelf risers and Lazy Susans to store papers and items. Sort "like" items together in containers to make things easier to find. Label containers and position in easy-to-see locations. A label maker is a quick and neat way to identify your items.
5. Sort physical mail into piles of importance. Address the most important first. Throw out junk mail, opened envelopes and anything unneeded. Use trays for your mail to be housed.
6. Organize and pay bills and create an excel sheet of payees. If possible, set up auto-payment which will reduce the amount of mail and papers as well as missed deadlines.
7. Prepare several meals in advance so they are easy to grab and go; and this way clean-up is infrequent. Purchase new Tupperware or Pyrex for proper organization; discard those with missing lids, etc. Check your refrigerator and pantry and discard expired food. Donate unexpired food items for which you do not expect to use to your local food pantry.
8. Periodically review and toss old manuals, handouts, dated law books, duplicates, etc. Paper references you do not use anymore can be purged. Shred paperwork which is not needed and if in compliance with firm policy.

9. Going forward, be sure to only buy what has a purpose and a specific place in your space. Have a location in mind for each item and know where it will be stored so that you may find it easily.
10. Create a sanctuary space to retreat to. This space should be completely devoid of any work or technology. Add a plant and/or items (e.g., photos, an instrument) that bring you calm and joy.

Mental space: Clutter is not just the physical "things" that take up space, it's the stress, worry and distraction that consumes space in your mind. Some tips to declutter your mind are:

1. Answer emails in order of priority. Address those emails you've been ignoring. Delete those you no longer need and unsubscribe to any unwanted senders.
2. Write down your tasks so that you may release them from consuming your thoughts.
3. Prioritize your tasks onto "To Do" lists. Have various lists such as: "Home-To Do," "Work-To Do," "Shopping-To Do," etc. Keep them all together and review them each morning to decide what you will accomplish that day. Mentally shelve the other items for a different day knowing that because they are written down, they cannot be forgotten.
4. Create a bucket list of short-term goals and long-term goals. It can be very satisfying to cross off items from the list as you achieve them. Revisit and revise the list as goals are accomplished or change.

5. Limit your screen time including time on your smart phone. Put your phone down and away from reach for planned out "tech-stop" periods.
6. Schedule rest or breaks throughout the day. This can include quick stretching or breathing exercises. Schedule enough sleep per day and follow through with it. Do not look at the phone during sleep hours and when possible, set the phone to "do not disturb."
7. Write your creative ideas down in one location that you can revisit when you have time to expand upon them or see them to fruition. You may want to keep a notebook next to your bed for creative thoughts that often reveal themselves during restful times.
8. Keep a journal and write in it reasons you are grateful each day. Read it frequently for perspective.
9. Participate in a physical activity (e.g., walking) each day and expose yourself to nature when possible.
10. Meditate each morning and/or night to clear your head; in so doing, develop the strength to push negative thoughts away while releasing the build-up of clutter in your mind.

WRITERS CORNER

Use the Active Voice; Avoid the Passive Voice

By Judge Nelson Johnson

Vigor in your prose is essential. If you want your reader to keep reading, you must speak with an assertive voice. You achieve that through active verbs. Verbs make things happen. They build muscle. They generate energy. If your sentences seem to sag or lack dynamism, blame the verbs *or* the lack thereof. If your sentences zing home your message with meaning, credit the verbs. "Nurture the verb as though the life of your sentence depended upon it." Effective writers must develop the mindset to prefer the active voice. It is more plainspoken and its meaning is clearer. It infuses your writing with more authority and directness to your readers. "Just as English tends to move straight ahead from subject to verb to object, it also works best when it goes straight to the point." Avoid the passive voice like a deadly virus.

You can recognize passive-voice expressions because the verb phrase usually includes a form of be, such as *am, is, was, were, are* or *been***.** In a passive sentence, the person or thing doing the action (the actor) is usually preceded by the word "by." Active sentences generally are in the form of "A did B." Passive sentences, however, are in the form of "B was done to A." Accordingly, active sentences are easier to read. The passive voice "robs sentences of energy, adds unnecessary words, seeds a slew of wretched participles and prepositions, and leaves questions unanswered.... Vigorous, clear, and concise writing demands sentences with muscle, strong active verbs cast in the active voice."

Following are some examples:

Original: What would have been a disaster, was averted by the quick thinking of defendant.

Edited: Defendant's quick thinking prevented a disaster.

Original: The injuries sustained by plaintiff were not a result of anyone's negligence.

Edited: Plaintiff's injuries were free of negligence.

Judge Nelson Johnson (Ret.), the former state Superior Court judge who penned the book that inspired the HBO series Boardwalk Empire*, has a new book published by the NJSBA to help attorneys write and argue better. His latest work,* Style & Persuasion: A Handbook for Lawyers*, lists the most common writing and arguing mistakes lawyers make and includes practical tips for improvement. This is an excerpt from the book, which can be purchased at njsba.com.*

TECHNOLOGY

Tips for an Engaging Podcast to Market Your Business

By Melissa Acosta

Melissa Acosta Freelance Paralegal Services

Over the last 20 years, many attorneys and law firms have used different tools to market and network their business and services. These services may have included everything from newspaper ads, postcards, fliers, websites, business networking events, and sponsorships. Within the last decade, things such as social media (Facebook, Instagram, Twitter) and podcasts have soared astronomically as a way to reach more potential clients and market your business.

Is podcasting the new way to market our law firms and paralegal businesses in 2023 and beyond? There is a certain investment of time and effort involved, but the benefits could be very well worth it, and as business owners we must always look to expand and try new things to reach new audiences and potential clients.

The first tip to having a podcast to market your legal business is to have great memorable guests that will yield a big audience. When I started my "Paralegal Tea Time" podcast, it was important for me to have great attorneys as guest speakers who specialized in various areas of law so that my audience could learn about these areas. Additionally, potential clients who listened to the episodes and need assistance in these areas could reach out to the attorney with any questions. Specifically, I had guests discuss topics such as the importance of having a last will and testament, divorce and women in law.

One of the most memorable episodes was with Dorothy Secol, one of the pioneer freelance paralegals who was a petitioner in a case to validate that there is no distinguishable difference between an in-house and freelance paralegal working under the direct supervision of an attorney. Each episode you record must have interesting and knowledgeable content to keep your audience size growing.

The second tip is to make sure your podcast is available on as many forums as possible, such as Apple Podcasts and Spotify to name a few.

The third tip would be to create a name for your podcast that is not already taken and that would complement your law firm or legal business. Additionally, create a matching logo that will be uploaded as your Spotify and Apple Podcasts image of your podcast. This is what all listeners will see when they look up your podcast each time. It should be a great image that represents your company well.

An equally important tip is to have the proper equipment when you are starting your podcast such as an efficient computer, a microphone, and access to the internet. For more experienced podcasters, there are podcast recording studios available for a fee with all of the high-end equipment included. You can conduct your research as to which studios offer the better rate if you prefer to record your podcast outside of your home office.

Your editing options are also important to research. Depending on your budget, you can hire an editing engineer to do your editing, or you can use editing software such as Descript and Riverside to name a few.

It is also important to create an Instagram page for your podcast so that you can continue to market your show and your business. You will get a lot of interest and a lot of phone calls from potential clients and referrals.

VIEW FROM THE BENCH

Tips, Applicable Rules for Motion Practice

By Judge Ronald J. Hedges

Former U.S. Magistrate Judge (D.N.J.)

Motions are a common feature of civil actions in the United States district courts, and motion practice requires familiarity with the:

- Federal Rules of Civil Practice
- Local rules of district courts, and
- Chambers' practices of judges

The Federal Rules of Civil Procedure are replete with references to motion practice. For example, a whole host of rules apply to non-dispositive motions. Rule 11 governs any "pleading, written motion, and other paper." Fed. R. Civ. P. 11. Among other things, Rule 11(a) requires an attorney of record or pro se party to sign any of such documents. Rule 11(b) provides that, "[b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the

person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
2. the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
3. the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
4. the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information." Fed. R. Civ. P. 11(b). Rule 11(c)(2) addresses motions for sanctions for violations of 11(b). Fed. R. Civ. P. 11(c)(2). Rule 26(g)(1) mirrors 11(b) in the context of discovery and requires a signature which incorporates this certification:
   A. with respect to a disclosure, it is complete and correct as of the time it is made; and
   B. with respect to a discovery request, response, or objection, it is:
      i. consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
      ii. not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
      iii. neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. Fed. R. Civ. P. 26(g)(1). Rule 26(g)(3) provides that, if a certification violates (g)(1), "the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Fed. R. Civ. P. 26(g)(3). Rule 26(c) allows a party or any person from whom discovery is sought "to move for a protective order." Fed. R. Civ. P .26(c). Rule 37 addresses, among other things, motions to compel disclosure or discovery, motions for failure to comply with orders, and motions for sanctions for failure to preserve electronically stored information. Fed. R. Civ. P. 37. You should also be aware of Rule 78, providing that attorneys may request oral argument on a motion, while Rule 78(b) provides for submission on the papers: "By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings." Fed. R. Civ. P. 78.

Duty to Confer

The Federal Rules are generally silent as to what a motion should "look like." However, note the following requirements:

- Rule 26(c)(1) requires a party, when moving for a protective order, to certify that "the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."
- Rule 37(a)(1) requires a party, when moving to compel disclosure or discovery, to make the same certification as above.

Fed. R. Civ. P. 26(c)(1); Fed. R. Civ. P. 37(a)(1). This obligation on the part of a moving party is not taken lightly by courts. Parties are not obligated "to continue negotiations that seemingly have no end." *Fleisher v. Electronically Filed Phoenix Life Ins. Co.,* 2012 U.S. Dist. LEXIS 182698, at *8 (S.D.N.Y. 2012). However, "[t]wo-way communication" is required to satisfy the duty to confer. See, e.g., *Easley v. Lennar Corp.*, 2012 U.S. Dist. LEXIS 83197, at *8 (D. Nev. June 15, 2012). Moreover, a "[w]oefully inadequate" effort to confer can result in the denial of a motion to compel discovery. See, e.g., *U-Haul Co. of Nev., Inc. v. Gregory J. Kamer, Ltd.,* 2013 U.S. Dist. LEXIS 132795, at *7 (D. Nev. Sept. 17, 2013).

The duty to confer is central to civil litigation in the U.S. courts and should be understood as an overarching principle, as reflected in the Committee Note to the 2015 amendment to Rule 1:

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure. Fed. R. Civ. P. 1 advisory committee notes (2015 amendments). Bottom line: judges expect cooperation and communication by attorneys in matters before them, including motion practice.

This is the first of a two-part series on Motion Practice. This article from Practice Guidance, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis. Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.

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The MCLE deadline is quickly approaching - do you have enough credits?

A spotlight on some 2024 programs...

2024 Family Law Symposium

Friday Night Program: Divorce in the Digital Age
Fri., Jan. 26 | 6 – 8 p.m.
Hyatt Regency, New Brunswick
Earn up to 2.4 credits!

Saturday Program: 2024 Family Law Symposium
Sat., Jan. 27 | 9 a.m. – 4:30 p.m.
Hyatt Regency, New Brunswick

On January 27th and 28th, hundreds of family law attorneys, judges, paralegals and other related professionals attended New Jersey's premier family law event, the 2023 Family Law Symposium! Purchase today to hear thought-provoking and insightful presentations from many of the state's leading lawyers and judges, and to network with colleagues and other family law professionals.

Don't miss out on New Jersey's top Family Law event featuring compelling and timely discussions!

Civil Case Law Update

Sat., Jan. 27 | 9 a.m. – 1 p.m.
Olde Mill Inn, Basking Ridge
Earn up to 4.5 credits!

Sat., Feb. 10 | 9 a.m. – 1 p.m.
New Jersey Law Center, New Brunswick
Earn up to 4.5 credits!

Sat., March 16 | 9 a.m. – 1 p.m.
DoubleTree Suites, Mount Laurel
Earn up to 4.5 credits!

Our 35th Annual Presentation

New Jersey's top-rated Civil Case Law Update is back to provide you with the key updates you need to know. Register today to pick up a full year's worth of strategy and the latest developments you can arm yourself with. Our panel of New Jersey Appellate and Superior Court judges will present a summary and analysis of the key cases you need to know about fro m the past year. You'll walk away with a 360-degree understanding of the current civil trial climate, as well as an arsenal of new strategies you can put to work right away in the cases you handle.

2024 School Law Conference

Wed., Feb. 7 | 9 a.m. – 3:30 p.m.
Pines Manor, Edison
Earn up to 6.3 credits, including 1.0 in ethics.

Presented in cooperation with the NJSBA School Law Special Committee

This comprehensive program features a case law and legislative update, a roundtable discussion on the Supreme Court's impact on public schools, a session
dedicated to curriculum, another on the ethical issues that school law practitioners need to be aware of, and entirely new workshops focusing on educating the non-verbal student, compensatory education, transgender student privacy and parental rights, and the new Sick Leave statute.

NELA Conference 2024

Fri., Feb. 23 | 9 a.m. – 4 p.m.
New Jersey Law Center, New Brunswick
Earn up to 6.7 credits.

Presented in cooperation with the New Jersey Chapter of the National Employment Lawyers Association

This annual conference reviews the most recent hot button issues in employment law and explores where we are trending. Our distinguished faculty discusses significant case law developments and will provide strategies and techniques you can use to resolve your cases in your client's favor. Register today to hear advice from some of New Jersey's best labor and employment lawyers!

2024 Solo and Small-Firm Conference

Sat., Feb. 24 | 9 a.m. – 4 p.m.
Crowne Plaza, Edison
Earn CLE credits.

The day kicks off with a round table of judges who were formerly solo and small-firm lawyers, with tips and ideas for how to set goals high and achieve them. Then, choose programs in one of three tracks – Hanging Your Shingle, Honing Your Skills or Scale and Grow – with basic, intermediate and advanced topics that will meet your needs. The day ends with a segment on cultural sensitivity for both inside and outside the office and, of course, a cocktail reception that celebrates solo and small firm attorneys. Register today to stay on track for excellence in 2024!

Visit NJICLE.com to register today.

Updated Government Guidelines Cover Confidentiality and Ensuring Prompt, Thorough and Impartial Workplace Investigations

By Kirsten Scheurer Branigan, Carole Lynn Nowicki and Beth P. Zoller

There are three key pillars underlying effective investigations. Investigations must be (1) prompt, (2) thorough, and (3) conducted impartially. Organizations should ensure that their investigators are well-trained regarding proper investigation standards. Failure to implement consistent and compliant investigation protocols increases the likelihood of exposure.

If an investigation lacks any of the key pillars, challenges will undoubtedly result, leading to additional claims of liability, damages (including punitive damages), and the loss of affirmative "safe haven" defenses. The organization will then need to defend its possible failure to properly investigate and remediate the matter in addition to the underlying alleged harassment, discrimination, retaliation, or other misconduct. Aside from the legal risks, the employer is often left with a fractured and divisive

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work environment with diminished productivity.

There are several developments about which organizations and investigators should be aware to update their policies, procedures, and/or practices. On Sept. 29, the Equal Employment Opportunity Commission (EEOC) issued its long-awaited Proposed Enforcement Guidance on Harassment in the Workplace (Proposed EEOC Guidance).[1] On Aug. 2, the National Labor Relations Board (NLRB and/or the Board) issued a major decision, *Stericycle*, which impacts investigation confidentiality rules and instructions.[2] In 2020, the New Jersey Division on Civil Rights (DCR) issued New Jersey's first-ever written investigation "Best Practices" in its report entitled "Preventing and Eliminating Sexual Harassment in New Jersey" (DCR Harassment Report).[3]

The EEOC Proposed Guidance, and its technical assistance documents, mandate that organizations act to protect confidentiality and maintain privacy in the complaint process and resulting investigation. Conversely, through its *Stericycle* decision, the NLRB restricts employers' ability to enforce confidentiality in connection with investigations. Organizations must navigate these conflicting agency positions and endeavor to both protect employees' confidentiality while simultaneously not chilling their rights.

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2023 Proposed EEOC Guidance

The Proposed EEOC Guidance was published in the Federal Register on Oct. 2, and allowed for public comment until Nov. 1. If finalized, the Proposed EEOC Guidance will replace the previous EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors that was released in 1999 (1999 EEOC Guidance).[4]

The EEOC previously attempted to update the 1999 EEOC Guidance in 2016. Following a Task Force Report, the EEOC released a draft of its Proposed Enforcement Guidance (2016 Proposed EEOC Guidance).[5] Although the 2016 Proposed EEOC Guidance was never finalized, the EEOC issued a technical assistance document in 2017 entitled "Promising Practices for Preventing Harassment" (Promising Practices) and four "Checklists for Employers" on the following topics: Leadership and Accountability; An Anti-Harassment Policy; A Harassment Reporting System and Investigations; and Compliance Training (EEOC Checklists).[6]

The recently issued Proposed EEOC Guidance is consistent with the EEOC's Enforcement Priorities in the EEOC's Strategic Enforcement Plan Fiscal Years 2024–2028, which includes preventing and remedying systemic harassment and protecting vulnerable workers and individuals from underserved communities from harassment.[7]

The Proposed EEOC Guidance requires

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The EEOC provides that adequate investigations must also be thorough enough to "arrive at a reasonably fair estimate of truth." While investigations do not require "a trial-type investigation," they should be "conducted by an impartial party and seek information about the conduct from all parties involved."

effective complaint processes and requires, at a minimum, prompt and effective investigations and corrective action as well as adequate confidentiality and anti-retaliation protections.[8] It advises that "an investigation is prompt if it is conducted reasonably soon after the complaint is filed or the employer otherwise has notice of possible harassment," illustrating that a two-month delay in instituting an investigation is not prompt in comparison to an investigation opened one day after a complaint was filed, which is clearly prompt.[9] What is considered to be "reasonably soon" is fact-sensitive and depends on considerations like the nature and severity of the alleged harassment and the reasons for delay.[10]

The EEOC provides that adequate investigations must also be thorough enough to "arrive at a reasonably fair estimate of truth."[11] While investigations do not require "a trial-type investigation," they should be "conducted by an impartial party and seek information about the conduct from all parties involved."[12] The EEOC highlights that investigators should be "well-trained in the skills required for interviewing witnesses and evaluating credibility."[13] It expressly instructs that, if there are conflicting versions of relevant events, it may be necessary for the investigator to make credibility assessments so the employer can determine whether the alleged harassment in fact occurred.[14] The EEOC also highlights that it is not a remedy for the employer to do nothing simply because there is a denial that the harassment occurred and that an employer may take remedial action even where a complaint is uncorroborated.[15]

As per the EEOC, an employer may need to consider intermediate and interim steps to address the situation based on the nature and seriousness of the complaint, including "making scheduling changes to avoid contact between the parties; temporarily transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation."[16] The EEOC instructs employers to "make every reasonable effort to minimize the burden or negative consequences to an employee who complains of harassment, pending the employer's investigation."[17] Further, "corrective action that leaves the complainant worse off also could constitute unlawful retaliation if motivated by retaliatory bias."[18]

The EEOC indicates that, after the investigation has been completed, the employer should inform the complainant and alleged harasser of its determination and corrective action being taken, subject to applicable privacy laws.[19] It stresses that recordkeeping is an important part of the investigation process and that "employers should retain records of all harassment complaints and investigations" as this may "help employers identify patterns of harassment, which can be useful for improving preventive measures, including training," and may also "be relevant to credibility assessments and disciplinary measures."[20]

Employers should implement measures to minimize the risk of retaliation, such as reminding individuals about the prohibition against retaliation and closely evaluating "employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives."[21]

As per the EEOC Proposed Guidance, employer anti-harassment policies, training, and complaint procedures are expected to contain confidentiality protections.[22] While employers are expected to make clear to employees that they will protect the confidentiality of harassment allegations to the extent possible, the EEOC also acknowledges that employers cannot guarantee complete confidentiality since they cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses.[23] However, it also urges that information about allegations should only be shared with those who need to know and that records relating to harassment complaints be kept confidential.[24]

The EEOC's Checklists and Promising Practices documents also reference employers' confidentiality and privacy obligations in handling harassment complaints and investigations. Employment policies should include statements that the employer will keep the identities of complainants, witnesses, or those accused of harassment, and the information gathered during an investigation, confidential to the extent possible and consistent with a thorough and impartial investigation.[25] The EEOC provides that employees responsible for receiving, investigating, and resolving complaints or otherwise implementing the harassment complaint system, should among other things, "understand and maintain the confidentiality associated with the complaint process."[26] Further, the EEOC cites that one of the factors

underlying effective harassment complaint systems is protecting the privacy of individuals who file reports or provide information during the investigation, and the persons(s) alleged to have engaged in the harassment, to the greatest extent possible.[27]

NLRB's New Standard for Workplace Confidentiality Instructions and Rules

While the EEOC prioritizes confidentiality, the NLRB cautions that too much confidentiality can chill protected conduct. Such was articulated by the NLRB in its recent *Stericycle* decision, where the Board overhauled the standard to assess the legality of various workplace rules and policies and adopted a new approach for evaluating facially neutral employer rules that do not expressly restrict employees from engaging in protected concerted activity in furtherance of "mutual aid or protection" under Section 7 of the National Labor Relations Act (NLRA).[28] In *Stericycle*, the NLRB specifically overruled its holding in *Apogee Retail LLC d/b/a Unique Thrift Store* (which held that, absent very few exceptions, employer rules/instructions that required confidentiality for the duration of the investigation were presumptively lawful without a case-by-case balancing of interests).[29]

Now, under *Stericycle,* a workplace rule or confidentiality instruction will be deemed presumptively unlawful if it can be demonstrated that a challenged rule has a "reasonable tendency to chill employees from exercising their Section 7 rights."[30] It would then be incumbent upon the employer to rebut this presumption by establishing that "the rule advances a legitimate and substantial business interest" that cannot be achieved by a more narrowly tailored rule.[31] Thus, this new standard requires a particularized analysis of the specific rule or instruction, its language, the workplace industry and context, and the employer's interests in justifying the rule. Investigators and organizations should review and update confidentiality rules/instructions in light of *Stericycle*.

NJ DCR Investigation Best Practices

In February 2020, following a series of public hearings, the DCR Harassment Report was issued.[32] Such specified four "Best Practices" for conducting "prompt, thorough and impartial investigations."[33] These best practices, itemized below, are the first-ever written investigation standards articulated by a government agency in New Jersey.

First, employers should "allocate sufficient resources and authority to those responsible for investigating complaints" and "ensure that those conducting investigations are impartial, objective, and well-trained."[34] The DCR highlighted that this could include employers engaging third parties trained in conducting "impartial, independent investigations."[35]

Second, policies should set forth the stages and procedures for conducting investigations.[36] For example, an employer should have clear protocols for what triggers an investigation, how an investigation will be conducted (including policies on witness interviews), how an investigation will be concluded (including the issuance of a final report and retention policies on documents, notes, and evidence), communicating the results to the impacted parties, and appropriate post-investigation monitoring mechanisms.[37]

Third, employers should "consistently enforce prohibitions on retaliation throughout the investigation process and maintain the confidentiality of the complainant to the fullest extent possible to prevent retaliation."[38] Those conducting investigations should treat all parties involved, including complainants, witnesses, and alleged harassers, with respect and compassion.[39]

Fourth, employers should empower their investigators to "reach meaningful conclusions" and then follow up those conclusions with corrective action.[40] Guidance should be provided to those conducting investigations on how to appropriately assess credibility, weigh evidence, make findings, and reach a conclusion.[41]

The DCR also cited the appropriate investigation burden of proof as "more likely than not" (a preponderance of the evidence standard). Specifically, if the investigator finds that the conduct is "more likely than not" to have occurred, employers should "impose appropriate consequences, up to and including termination" of the accused wrongdoer.[42]

Credibility Assessments

As highlighted in both the Proposed EEOC Guidance and the DCR Report's Best Practices, credibility determinations are critical components of effective investigations. An investigator's failure

An investigator's failure to appropriately make credibility determinations will be under scrutiny in litigation. Investigators should evaluate the credibility of those interviewed, including closely examining the information provided to determine believability and truthfulness.

Using Trauma-Informed Interviewing Techniques

In situations dealing with sensitive matters in which the complainant or witnesses may have experienced some sort of trauma, investigators should use trauma-informed interviewing techniques. Trauma-informed interviewing is a method of asking questions in a manner that minimizes harm to the interviewee while improving the reliability of the information being provided.[50] Critical components of trauma-informed interviews include the tone, manner of phrasing questions, and commitment to listening without interruption.[51]

One helpful way to achieve a trauma-informed tone is through genuine curiosity about what the interviewee has to say.[52] The investigator should aim to build a rapport with the interviewee by asking questions in a non-judgmental tone.[53] Instead of asking "why" or "what" questions, the investigator should say to the interviewee, "Help me understand...."[54]

Another aspect of trauma-informed interviewing is focusing on the details themselves and asking interviewees open-ended questions, such as "what else happened," rather than forcing interviewees into chronological timelines.[55] Using open-ended questions without interruption permits the interviewee to tell the story without the pressure to convey information in a manner in which the interviewee is not comfortable.[56] Trauma-informed interviewers should engage in active listening and allow interviewees to tell their own narrative, in their own way, ensuring that the interviewee feels respected and heard. After the interviewee relays the narrative, the investigator can then ask follow-up questions to ascertain more details and the sequence of events.

to appropriately make credibility determinations will be under scrutiny in litigation. Investigators should evaluate the credibility of those interviewed, including closely examining the information provided to determine believability and truthfulness. Assessing credibility can be a challenging area if the investigator is not educated on how to approach the assessment.

All too often, investigators will bypass this critical step and simply determine the allegations were "unsubstantiated" when there are conflicting versions of events. This is particularly common when there are no eyewitnesses to alleged conduct. By essentially making a non-decision, the investigator is in effect disbelieving the complainant. It is critical for investigators to understand that there are other ways to assess credibility when there are no eyewitness accounts. Simply because another person did not see the conduct does not mean that it did not occur. In fact, both the existing EEOC Guidance and the Proposed EEOC Guidance specifically reference that credibility assessments may be necessary to determine whether conduct occurred when there are conflicting versions of relevant events.[43]

Both the EEOC and courts have highlighted the important premise that facts can be believed even when the conduct was not witnessed.[44] For example, in *Knabe v. Boury Corp.,* the court cited that it was an "incorrect premise" for the investigator to conclude that a finding of harassment could not be made absent a corroborating witness.[45] Even when conduct is not witnessed, investigators can corroborate the allegations through other methods. If an investigator fails to do so and does not appropriately assess credibility, the investigation can be deemed ineffective.[46] As such, investigators who do not make credibility assessments should prepare to have their investigations challenged.

One example of a challenge to an investigator's failure to assess credibility was demonstrated in *Lightbody v. Walmart Stores,* which was noted in the Proposed EEOC Guidance.[47] There, the plaintiff submitted a written complaint that her manager engaged in inappropriate behavior. The human resources manager interviewed the plaintiff, the manager, and two employees identified by her. The manager denied many of the accusations. One of the employees identified a number of other female employees who cited inappropriate behavior by the manager, but the human resources manager did not interview them because the plaintiff was not aware of the allegations. The plaintiff argued that the investigation was deficient because the investigator failed to interview all relevant witnesses. The court found that a reasonable jury could conclude that the employer's investigation was deficient, and a thorough investigation would have required the employer to follow leads that bore on the manager's credibility.[48]

Another example of a deficiency as to credibility assessments was in *Vandegrift v. City of Philadelphia,* in which the court found that a genuine issue of fact existed as to whether the city had properly responded to the plaintiff's harassment allegations when, among other things, the investigator failed to judge the credibility of the plaintiff, the witnesses, and the alleged harassers.[49]

Conclusion

For investigations to withstand scrutiny, they must be prompt, thorough, and conducted in an impartial manner. Both organizations and investigators should keep apprised of current investigation

resources and standards. It is critical for organizations to provide training to investigators and maintain clear investigation protocols to ensure consistent and reliable results. ■

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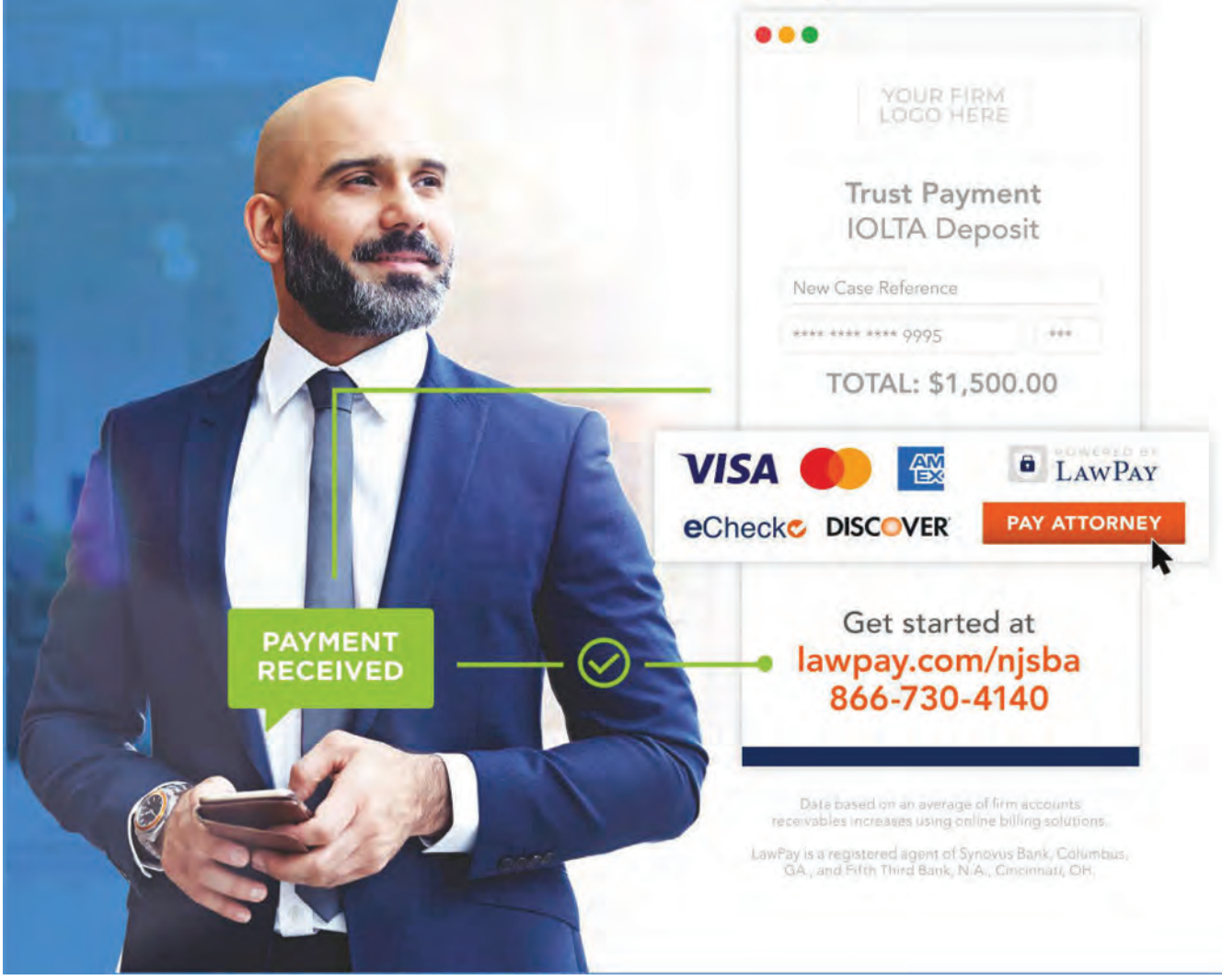

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Recognizing and Avoiding Bias in Workplace Investigations

By Christina Silva and Kea S. Noyan

Investigations into allegations of employee misconduct require investigator neutrality to obtain facts that are objective, fair, complete, and accurate, and to facilitate fact-based decisions by an employer. If bias or the appearance of bias governs the investigation, decisions will not be a result of objective case deliberation but rather a result of unconscious information processing. Confronting the issue of biases (both conscious and unconscious) can increase awareness and understanding of its effect on investigator neutrality, reduce biases, and preserve the integrity of the investigative process.

How Biases Can Affect the Workplace Investigation Process

Once a workplace investigation is initiated, an employer engages an investigator (either internal or external) to determine whether workplace misconduct has occurred. A workplace investigation generally entails interviewing the complainant(s), respondent(s), and relevant witnesses, and reviewing evidence to make findings of fact about the alleged workplace misconduct.[1] Employers who fail to conduct appropriate investigations run the risk of not addressing employee misconduct and damaging their legal position in the event a party to the investigation subsequently commences a lawsuit.

Investigator impartiality is a critical component of an investigation. There is an assumption that workplace investigators can "cognitively process, evaluate and weigh the facts presented in a neutral manner, but research challenges the accuracy of this assumption and shows that cognitive biases affect the way *all people* process information."[2] Cognitive biases can lead to "perceptual distortion, inaccurate judgment, or illogical interpretation, blind a person to new information or inhibit someone from considering valuable options when making an important decision."[3]

Investigators inevitably bring their preconceived notions and unconscious biases with them. As such, biases may seep into the investigative process at any point, including but not limited to initial discussions with the client or witnesses about the case, during the pre-interview document review, when deciding which witnesses to interview and what additional evidence to review, and when deciding which evidence to emphasize, reference or disregard in investigation reports. The employer's theories or preferences could also add an additional layer of bias and influence the investigator's decisions in determining the appropriate investigative process or its outcome. Accordingly, biases can impact investigator impartiality, steer the investigation toward predetermined conclusions and taint the investigation process.[4]

Types of Unconscious Bias in Investigations

Unconscious biases can manifest in several ways. For example:

Social Stereotype Bias: Occurs when social stereotypes or attitudes lead to an association between a group and a trait. These are "*automatically* triggered by the slightest interaction with a target group member."[5] For example, individuals may harbor unconscious biases in areas such as race, age, and gender.[6]

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Courts which have examined bias in workplace investigations have challenged efforts to dismiss cases for failure to state a claim upon which relief can be granted or otherwise considered the effect of a biased investigation on the outcome of a case.

Affinity Bias: Occurs when information is favored from parties or witnesses who are similar or "like" the investigator and have more in common based on backgrounds or interests.[7] This may result in the investigator aligning with a certain individual or information and not taking alternative information into consideration.

Confirmation Bias: Occurs when certain witnesses are selected or more weight is given to information that "tends to confirm the investigator's preconceived notion or, conversely, to give less value to information or evidence that contradicts an existing belief."[8] This can result in the investigator interpreting only evidence which confirms the investigator's hypothesis and disregarding or minimizing the relevance of evidence which supports another explanation.[9]

Attribution Bias: Occurs when the investigator attributes an individual's behavior to group affiliations or a stereotypical group characteristic, which perpetuates the stereotype.[10]

Availability Bias: Occurs when the investigator makes decisions based on information that is most readily available and disregards information that is more difficult to obtain.[11]

Priming Bias: Occurs when reactions or responses are influenced by other descriptive words.[12] For example, an investigator might be inadvertently priming witnesses by asking leading or charged questions that may influence the witnesses' responses.[13]

Anchoring Bias: Occurs when the investigator's judgments are influenced by an initial piece of information which "anchors" all subsequent decisions or judgments.[14]

Expediency Bias: Occurs when the investigator makes a "rush to judgment" in an effort to quickly "solve" the investigation without considering all available data.[15] This bias may be driven by external factors such as time constraints, budget, and employer preferences.

Halo/Horn Effect: The halo effect occurs when the investigator associates information with similar or consistent positive ideas, e.g., when a good fact about the person overshadows the interview.[16] The horn effect has the opposite influence, e.g., when the investigator associates information grouped together with perceived negative qualities.[17]

Courts which have examined bias in workplace investigations have challenged efforts to dismiss cases for failure to state a claim upon which relief can be granted or otherwise considered the effect of a biased investigation on the outcome of a case.[18] For example, in *Yanhong Li v. Metropolitan Life Insurance Company,*[19] the plaintiff brought an action against her former employer and supervisor alleging her supervisor made sexual advances to her on multiple occasions, and when the plaintiff refused the advances, retaliated against her by accusing her of misconduct.[20] The court noted, "The Human Resources investigation, conducted by someone who worked closely with [the supervisor], was allegedly biased" because the complaint involved [defendant's upper management].[21] As such, the court denied the defendant's motion to dismiss the plaintiff's sexual harassment claim under the New Jersey Law Against Discrimination.[22] This case demonstrates the importance of ensuring the selected investigator does not work with, or report to, any of the individuals to be interviewed in an investigation to avoid the potential for bias or appearance of bias.

In *Doe v. Regents of the University of Minnesota*,[23] the Eighth Circuit held that the district court erred in dismissing the university football players' sex discrimination claims under Title IX[24] because the players stated plausible claims that the university "discriminated against them on the basis of sex during the misconduct investigation and disciplinary proceedings."[25] In 2014, the Department of Education's Office of Civil Rights investigated the university for potential Title IX violations.[26] In light of the previous and unrelated 2014 investigation, the amended complaint alleged "internal pressure of the University officials to charge male football players with sexual misconduct."[27] The football players also alleged that the lead investigator "believed football players had covered-up sexual misconduct during an unrelated investigation, motivating her to punish as many players as possible" for the instant allegations.[28] In addition, the investigator agreed with sentiments regarding a "concerning pattern" of behavior "among the football team."[29] As such, the court noted that the "external pressures were if anything greater, and the detailed allegations of investigator bias and dubious investigative proce-

dures in these particular proceedings lend sufficient credence to the inference of discrimination 'on the basis of sex.'"[30]

In *Bennett v. R&L Carriers Shared Services, LLC*,[31] a shift supervisor won damages for malicious prosecution against a manager who caused his arrest and indictment. The Fourth Circuit noted that the "manager's decision to have [the shift supervisor] arrested was based on a shoddy investigation in which two workers known for prior dishonesty lied to an investigator to deflect suspicion from themselves."[32] The investigator, knowing of the dishonesty, deliberately fed this dishonest information to another witness with the apparent intent to deflect blame onto the shift supervisor.[33] The court concluded that a jury could reasonably find there was a lack of probable cause for the action taken against the supervisor as a result of the skewed investigation, especially in the absence of corroborating information against the manager.[34]

Tips for Reducing Biases in Workplace Investigations

Some warning signs of investigator bias are, for example, when an individual's past accomplishments are used as exclusive evidence that the individual cannot have engaged in current alleged conduct; when opinions are formed about conduct which is not substantiated by evidence; when lines of inquiry are narrow with the investigator using closed-ended questioning; when credibility or reliability of interview information is weighed merely by the individual's position or tenure at the company; or when making rush judgments about an "anonymous complaint" or the "chronic complainer." The first point is recognition that investigator bias can exist simply based on an investigator's attitudes, beliefs, experiences, and background. The investigator must then make efforts to reduce and eliminate their own biases to remain impartial throughout the course of the investigation.

Limiting Exposure to Employer-Driven Investigation Process.

When conducting an investigation on behalf of an employer, the investigator should not overlook the possibility of organizational bias, in which the employer is asserting excessive control or direction over the investigator's work by characterizing the parties a certain way which makes the investigator pre-disposed to reach a particular investigation outcome.[35] The investigator should carefully consider whether an employer's initial characterization or opinion of "context" in relation to parties, witnesses or information associated with an investigation, is relevant to the neutral fact-finding process or presented for the purpose of influencing decision-making.[36]

Reassess Investigation Interview and Evaluation Practices to Interrupt Biases.

- Actively doubt objectivity. Stop and question, "What is this based on?" Review and document analysis of all relevant evidence.
- Be cautious and aware of outside influences.
- Check facts all the way through the investigation process.
- Interview witnesses and review documents that can both corroborate and contradict the allegations "particularly if you recognize you might be forming impressions or arriving at conclusions before you finish gathering evidence."[37]
- Develop a reliable, consistent, accurate system of conducting and summarizing interviews.
- Ask questions that will elicit corroborating or contradicting information.
- Avoid asking leading questions.
- Pause throughout the interview to summarize facts related to a particular allegation or related to an important event or fact to ensure accuracy, and allow the individual being interviewed to repeat or clarify a response as needed.
- Avoid pre-judging the validity of the allegations presented. Even if the investigator's first instinct ends up being correct that the allegations were substantiated, the investigator's analysis should be thorough and based on the facts collected and assessed.
- Actively consider alternative hypotheses to avoid focusing on just one side of the story.

When conducting an investigation on behalf of an employer, the investigator should not overlook the possibility of organizational bias, in which the employer is asserting excessive control or direction over the investigator's work by characterizing the parties a certain way which makes the investigator pre-disposed to reach a particular investigation outcome.

- Be conscious of communicating a bias within investigation report statements and remember the investigator's role of neutrality throughout the entire investigation process.

The investigator needs to apply processes and tools to "reduce the seepage of unconscious biases into investigations."[38] Workplace investigators need to be able to support their investigation process from start to finish to avoid a claim that the investigation was cursory, shoddy, a sham, or biased. The investigation report must paint a complete picture of events where relevant evidence is properly and thoroughly considered and not discarded because it does not support the investigator or employer's perceptions of the matter. The good news is that the mere existence of biased thoughts that might creep into the investigator's mind does not mean it is impossible for the investigator to be fair and effective in the investigative process. Instead, the investigator must recognize that biases can exist, that efforts should be made to identify and interrupt biases, and that steps must be taken to eliminate and reduce the effects of bias on the investigative process, compilation and assessment of information, and findings and conclusions made, to ensure investigator neutrality.[39] ■

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4. Amy Oppenheimer, The Psychology of Bias, Understanding and Eliminating Bias in Investigations (2012), *available at* amyopp.com/wp-content/uploads/2013/07/Psychology_of_Bias_May_2012.pdf.
5. *See e.g., Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 78 (1998) (noting that biases related to social groups do not solely exist with seemingly "opposite groups." In reiterating this point, the U.S. Supreme Court stated, "We have rejected any conclusive presumption that an employer will not discriminate against members of his own race.").
6. *See e.g., Thomas v. Eastman Kodak Co.,* 183 F.3d 38, 58-59 (1st Cir. 1999) ("The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus.... The ultimate question is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1235-36 (9th Cir. 1984) (holding that disparate treatment occurs where decisionmaker applies subjective policy in racially discriminatory and subtle manner even absent malice); *Pitre v. W. Elec. Co.,* 843 F.2d 1262, 1273 (10th Cir. 1988) ("One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts" (quoting *Sweeney v. Bd. of Trs. of Keene State Coll.*, 604 F.2d 106, 114 (1st Cir. 1979)).
7. Unconscious Bias: Increasing Awareness, Providing Training and Mitigating the Impact of Bias in Workplace Investigations, Ethics & Compliance Initiative, *supra.*
8. *Id.*
9. *Id., see also* Amy Oppenheimer, The Psychology of Bias, Understanding and Eliminating Bias in Investigations (2012), *available at* amyopp.com/wp-content/uploads/2013/07/Psychology_of_Bias_May_2012.pdf, p. 7.
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16. Kavya Nambiar, What is the Halo and Horn Effect, Science ABC (Dec. 29, 2021), *available at* scienceabc.com/social-science/what-is-the-halo-and-horn-effect.html.
17. *Id.*
18. Courts have also scrutinized biases of employers that influence decision-making. See e.g., *Margolis v. Tektronix*, 44 F.App'x 138, 141-42 (9th Cir. 2002) (court reversed summary judgment for the employer in which the plaintiff alleged that gender stereotyping affected a decision to lay her off, since her supervisor "would rarely hear women in staff meetings," gave her inferior work assignments, and told her that others found her "pushy and aggressive," which she took to mean "pushy and aggressive for a woman"); *Casella v. MBNA*, 2009 U.S. Dist. LEXIS 50176, at *14, n.24 (D. Me. June 9, 2009) (court denied summary judgment for the employer in which the plaintiff was not hired for a customer relationship management program on the grounds that she needed to be "more motherly, soft, and kind, rather than aggressive, strong, and arrogant." When she asked why she was not selected, one of the decisionmakers "told her that she was 'too cocky,' 'overly arrogant,' and that she should not be 'so aggressive' and 'strong' and that she reminded him of himself." Another decision-maker told her that she "needed to become more softer, more motherly; [and] that if [she] was a man, it was acceptable, it's not acceptable out of a woman"); *Kimble v. Wisconsin Department of Workplace Development*, 690 F.Supp.2d 765, 771 (E.D. Wis. 2010) (court gave great weight to what it identified as the plaintiff's supervisor's "patterns of bias" in viewing plaintiff as "veiled with images of incompetency" and engaging in hyper-scrutiny as a result); *Moore v. Alabama,* 980 F.Supp. 426, 431 (M.D. Ala. 1997) (court noted that plaintiff presented direct evidence of sex discrimination when her male supervisor looked straight at her pregnant belly and said, "I was going to put you in charge of that office, but look at you now.")
19. *Yanhong Li v. Metro. Life Ins. Co.,* No. 16-1845 (KM), 2016 U.S. Dist. LEXIS 132187 (D.N.J. Sep. 26, 2016).
20. *Id.* at *4.
21. *Id.*
22. *Id.*, N.J.S.A. § 10:5-12, et seq.
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24. 20 U.S.C.S. § 1681(a).
25. *Doe*, *supra,* 999 F.3d at 574.
26. *Id.* at 578.
27. *Id.*
28. *Id.* at 579.
29. *Id.*
30. *Id. See also Doe v. Columbia Univ.,* 831 F.3d 46, 57-58 (2d Cir. 2016) (public criticism of a university's past failure to stop male athletes from sexually assaulting female students supported a plausible inference that the university discriminated against an accused male athlete to deflect additional criticism).
31. *Bennett v. R&L Carriers Shared Servs.,* LLC, 492 F. App'x 315 (4th Cir. 2012).
32. *Id.* at 327.
33. *Id.* at 326-27.
34. *Id.*
35. Elizabeth Bingham, "We Just Don't Believe Her": Confronting "Organizational Bias" In Workplace Investigations (Feb. 18, 2020), *available at:* rubinthomlinson.com /we-just-dont-believe-her-confronting-organizational-bias-in-workplace-investigations/.
36. *Id.*
37. Unconscious Bias: Increasing Awareness, Providing Training and Mitigating the Impact of Bias in Workplace Investigations, Ethics & Compliance Initiative, *supra.*
38. Ashley Lattal, The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator, 24 J. L. & Pol'y (2016), *available at* brooklynworks. brooklaw.edu/jlp/vol24/iss2/3.
39. *Id.* at 466 ("Neutrality is essential to the role of the workplace investigator. The science around unconscious bias clearly indicates that even those workplace investigators with a strong professional commitment to neutrality are at risk of succumbing to automatic cognitive processes that can unconsciously lead to biased conclusions. It is unlikely that bias can be completely eliminated from the workplace investigation process, given the automatic nature and deep entrenchment of unconscious biases in the human psyche. Yet, if there is to be any hope of reducing such biases in workplace investigations, workplace investigators must recognize the multiple causes and manifestations of biases, and devise deliberate, consistent, and informed practices aimed at guarding against their detrimental effects.").

Investigating Internally

for Conducting Workplace Investigations

By Ricardo Solano and Ryan Goodwin

At one time or another, most every company confronts an unexpected challenge: having to conduct an unplanned investigation into its personnel or operations. Companies of all sizes face unprecedented scrutiny from government regulators, prosecutors, whistleblowers, and private plaintiffs. And the cause for an investigation can arise from any number of sources, involve anyone at any level of the company, and present itself at any time. An employee, for instance, may allege improper conduct by a supervisor. An audit may reveal accounting irregularities. A customer may complain about mistreatment by an employee. The company may receive a government inquiry or subpoena. And the financial and legal risk may be large or small, civil or criminal, or both. But regardless of size or scope, it is essential to act quickly and efficiently, and to proceed in a manner that least disrupts business operations. Most of all, an effective workplace investigation is conducted thoroughly and objectively, and in accordance with controlling legal principles. To that end, here are five tips to effectively navigate any internal investigation.

Identify the Issue

Before an issue can be investigated, it must be identified. So as it happens, the first step to an effective workplace investigation begins long before the investigation ever occurs. More than ever, it is essential for companies to develop a sound compliance program that fosters an office culture which encourages prompt reporting of potential wrongdoing. Any sound compliance program includes promulgating policies and procedures that set a transparent and accessible process for employees to voice concerns and complaints which are then routed for proper review.

In some cases, the need to investigate is clear. Often, however, issues are not so obvious. But regardless of its opacity, the longer an issue festers, the larger the risk becomes. A robust reporting process helps to identify and stop ongoing inappropriate conduct which, in turn, can eliminate or mitigate future legal exposure.

Act Quickly

Companies are often scrutinized by prosecutors and regulators for not acting quickly enough in response to an actionable claim. And the stakes could be high. The risk of inaction could cost a business thousands, if not millions, of dollars in regulatory penalties. The failure to act could also subject a company to punitive damages in civil suits. Moreover, relevant evidence should be preserved and protected from intentional or inadvertent destruction. Once a company becomes aware of a complaint, it often has little legal defense for not responding in a timely manner. Regardless of the underlying conduct at issue, the company must act swiftly in response to a report of wrongdoing.

Plan the Investigation

Every effective investigation starts with a plan. An investigation plan should narrowly define the issue under review, outline the scope of the investigation, and sequence the steps necessary to complete the investigation. The plan should also consider whether the company intends to assert privilege over the investigation and who within the company should (and should not) have knowledge of the investigation.

A strong investigation plan should also consider document collection and witness interviews. Most workplace investigations involve, at a minimum, a two-step approach wherein investigators review relevant company documents and interview key witnesses. Reviewing documents allows the company an opportunity to gather relevant facts and analyze key evidence before proceeding with witness interviews. Document review also informs which employees to interview, the order of the interviews, and what questions to ask.

Though not every detail of an investigation can be charted at its onset, developing an initial plan and adjusting that plan as circumstances warrant will help keep the investigation focused and on track.

Know Your Resources

A threshold decision for any company is choosing who should perform the investigation. Not every internal review requires outside legal assistance, but many do. The choice of whether to leverage internal resources (such as human resources or corporate counsel), or to retain outside legal counsel is often determined by the issue under investigation. Some factors to consider include the subject matter of the review; the severity of the claims; whether the issue involves civil, regulatory, or criminal legal risk; the capabilities and experience of in-house resources; who within the business is involved; whether the company intends to assert privilege over the investigation's findings; and potential cost. Consider also whether internal conflicts could prevent an objective investigation, or risk the appearance of partiality. Retaining experienced counsel can help to ensure an investigation is conducted properly and independently.

Investigations that warrant significant electronic document and email review can also prove difficult when using only existing resources. E-discovery limitations in particular have become an increasing challenge for many small and mid-sized companies that lack sufficient IT support. In short, companies must genuinely and objectively evaluate existing resources when considering whether to perform the investigation internally or hire outside legal counsel.

Finalize the Investigation

Once the facts have been developed and assessed, the company must finalize its findings and determine an outcome. Though intuitive, many workplace investigations suffer from a lack of closure. And not every investigation necessitates a written report. Findings can be presented orally or in writing. When a written report is drafted, the report should make factual determinations but refrain from drawing legal conclusions. The report should also clearly indicate whether the company intends to assert attorney-client privilege and/or work product privilege over its contents.

The report and any documents related to the investigation, including business records, witness interviews, notes, and other communications, should be preserved. The applicable statute of limitations to file a claim against the company may be years away, making it essential to retain records of the investigation in a readily accessible but confidential location. The investigation file should also be stored separately from employee personnel files. And regardless of outcome, the company should advise the complaining party and the subject of the investigation of the result. Advising the employee who brought the complaint of the final outcome can reduce the likelihood that the employee will seek redress elsewhere, such as by filing suit against the company and/or another employee. Doing so also breeds trust between employees and the company.

Each workplace investigation presents unique circumstances and challenges and requires a tailored investigatory approach. But applying these five tips will ensure the investigation is on the right track. Companies inexperienced in performing investigations or those with further questions should consult appropriate counsel. ■

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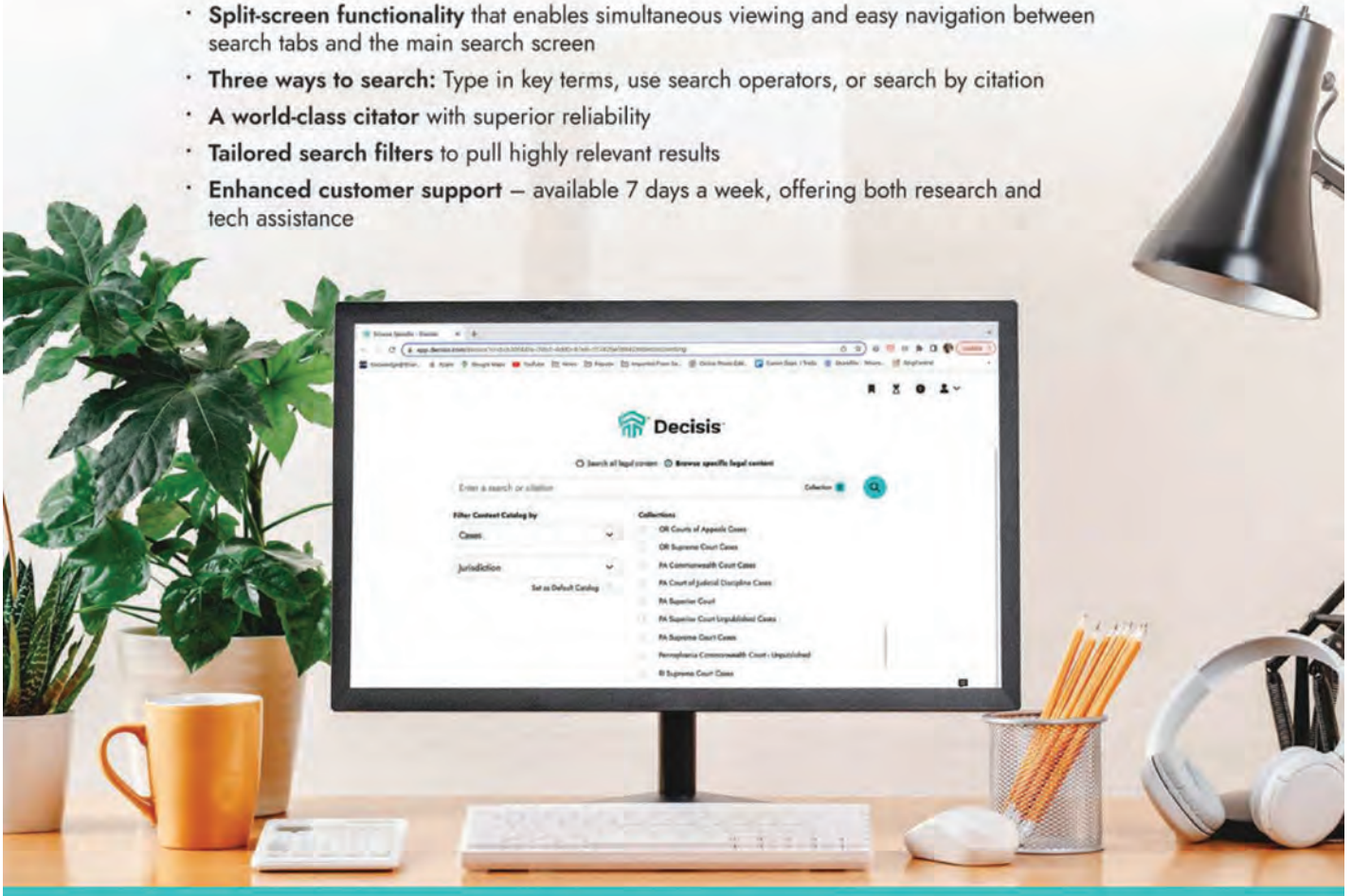

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Plaintiff's Perspective

Effectively Representing Employees in Workplace Investigations

By Ayesha Hamilton

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As a plaintiff's attorney, you are often retained before the employee is terminated. In most instances, you work in the background, guiding the employee as they navigate a difficult workplace situation. There may come a point in time when the employee is notified that human resources or an external investigator is going to investigate (a) the claims the employee is raising against a coworker/supervisor; or (b) the employee is notified that they are the target of an investigation for some alleged bad acts. In certain cases, it may be beneficial to notify the investigator that you represent the employee and ask to be an observer to your client's interview. While investigators used to refuse any counsel participation, the tide is changing as they recognize the value to both sides.

On the lucky few occasions when an employee's counsel can participate in a pre-termination investigation, the involvement is limited. However, there is great value to both the employee and employer in allowing employee's counsel to observe the inves-

tigation interview. Recognize that discovery starts in this investigation phase and you can learn a lot about your case, your client and the company from the investigation even though you will never say a word.

Typically, the investigation is going to be about an issue that the employee has raised with company human resources about a fact pattern that they are experiencing in the workplace or may be about something that they are accused of doing. In either instance, the employee has never experienced anything like this before and is ill-equipped to participate in the investigation effectively.

Representing an employee, regardless of the fact pattern, requires some patience and empathy. Whether the employee is at fault or there is something else going on, i.e. discrimination, harassment, retaliation, the employee's counsel must begin with an explanation about what the employee should expect during the investigation. Demystifying the process will go a long way to helping your client cope with the stress and anxiety that they are feeling. Take them through a step-by-step description of how the meeting is likely to go. Review "deposition" type instructions such as making sure they understand that even though they are not being sworn in, they must tell the truth. Particularly if the investigation relates to a claim that the employee has raised, the employee must be open and forthright about the basis for their claim, the facts, witnesses and documents that support their assertions. Theoretically, this will allow a truly neutral investigator to go back to the company/supervisor/alleged bad actor to ask for more information about their side of the story.

The employee must also understand what is happening to them. This means you must have a detailed understanding of the facts and claims being considered by the investigator as you prepare for the interview. In most instances, especially where the investigator is focusing on allegations raised against your client, you will have very little information about the specifics of the complaint. This is going to require a detailed, in-depth understanding of what has been happening to the client in the workplace to allow you to anticipate the acts that the client is being accused of. In some circumstances, your client is going to have to reveal sensitive information about themselves and the fact pattern, fearing judgment and disapproval from you. You will need to build trust with this client to ensure that they are telling you the good, bad and the ugly so that you can appropriately prepare them for what lies ahead.

Preparing the employee for an investigation interview is critical. Your client must understand that their recollection of the details of key fact patterns, which may have taken place many months ago, is important. While they may not know the specific questions being asked of them, they will have a general idea and recollection of points of conflict and must be prepared to answer questions regarding those instances. The employee should ask the investigator about what they can do to prepare, i.e. review documents, emails and produce information to the investigator. In most instances, the investigator, with full access to the company information, is going to ask about what the employee has in their possession and direct the employee not to take or do anything else to prepare.

Top 5 Interview Preparation Tips

1. **Employee's Counsel's Role:** Unlike a deposition, objections for relevance, scope, form of questions etc. are not permissible and you will be little more than a fly on the wall. Make sure the investigator knows that you have every intention of respecting the process and will not interfere with the questioning. Similarly, make sure that your client understands this as well. Unlike what they see on TV, there will be no fireworks and "a-ha" moments but rather, quiet strategic decisions that you and the client will make following the interview.
2. **Employee's Role in the Investigation:** Your client must understand the importance and impact of the investigation. In most instances, they are the target of the investigation, which is likely to culminate in a termination or in a finding that the claims that they have raised against a supervisor or the company are without merit. The employee must understand the lay of the land to be an effective participant in the investigation and to properly protect themselves against false or misleading allegations being raised against them. Don't forget that they are new to the process and are terrified that they are going to be fired. They must understand that they must tell the investigator the full story so that the investigator is armed with all of the details necessary to conduct a fair and balanced investigation.
3. **The Investigator:** Often the investigator is an internal human resources employee. From the employee's perspective, this person is an adversary; their role is to determine the extent of the company's exposure/risk by ascertaining how much the employee knows about what is happening, to discover all bad facts that will hurt their client (the company), and to assess the employee's credibility and ability to participate in an adversarial proceeding. Many investigations may result in the employee's termination or in a finding that the employee's claims against the company are without basis. Investigators notes, recordings and reports are discoverable under *Payton v. New Jersey Turnpike Authority*[1] and should be requested during discovery. In *Payton*, the Appellate Division reversed the trial court, finding that the plaintiff was

entitled to see the investigative reports and notes relating to an internal investigation to assess the company's response to the internal complaint. While you can discover the investigator's notes and report later in litigation, you should take detailed notes of the interview so that you can (a) compare it to the investigator's notes to verify accuracy and ensure that topics being referenced in the notes and report were actually covered in the investigative interview; and (b) review the discussion with your client immediately following the conclusion of the interview.

4. **Document Review:** The employee should ask the investigator how they should prepare for the interview; i.e. should they download company documents to show to the investigator, should they review anything ahead of time, etc. In some instances, the employee may not know the details of the complaints raised against them, making it impossible to effectively prepare. The investigator may also ask about fact patterns that may have taken place many months ago, making the process unfair if the employee is not able to review documents or know about the fact pattern ahead of time. However, employees must be very careful and ask for permission before accessing, downloading and printing any company information, especially confidential or proprietary documentation, as that may result in grounds for termination. While employees are generally just trying to be helpful and informative, they may inadvertently commit some act which may give the employer grounds for termination. The employee must understand that this is a minefield and that they must follow the investigator's instructions regarding how to prepare for the interview.
5. **The Debrief:** The debrief is as critical as the preparation phase and should not be taken lightly, even if you were only retained to guide the client through the investigation. In listening to the questions being asked by the investigator and your client's responses, you may realize that the fact pattern presented to you by the employee has some significant gaps. Similarly, you will get a preview into the employer's arguments of what constitutes a "legitimate business reason" for the termination under the *McDonnell Douglas*[2] burden shifting analysis. The investigator's questions, especially surprising ones, should prompt a more in-depth discussion with your client to understand the scope of the fact pattern and its role in the client's performance, allegations etc. While employees often believe, and will tell you, that they have a "slam dunk" case, it is your job to educate them on the law and how their facts fit in. Post interview, the picture will be much clearer than it was during the preparation phase and you must discuss the implications of the employer's arguments.

In the employee's perspective, the outcome of the investigation is already decided and the company is merely looking for justification for the eventual termination. The employee believes that the company almost always takes the bad actor's side and hence, since the investigators are paid by the company, there is little or no chance that the investigation will be neutral. However, employees must also recognize that their participation in the investigation is necessary and a required part of their job, especially if they initiated the complaint.

As an attorney, the greatest value of being allowed to observe an investigation interview is the opportunity to watch your client in an adversarial situation before you are too far into the case. By listening to their answers, watching their demeanor, and assessing their credibility, you have a glimpse into how they are likely to perform during litigation. Doing this credibility assessment before litigation is likely to allow both sides to take a more balanced view of the case.

In addition to vetting your own client, you have an opportunity to vet the theory of the case. Often, plaintiff's attorneys only have meaningful insight into one side of the story, i.e. their client's. Listening to the investigator's questions will guide you some insight into a few of the employer's arguments that you are likely to see in litigation.

While it seems counterintuitive, investigators should always allow employees to have counsel present during the investigation interview. The employee is likely to be calmer, more comfortable, and less confused, leading to more complete and thorough discussion. Counsel involvement early in the process may also have the effect of allowing cooler heads to prevail and to head off a potentially lengthy and uncomfortable litigation. Experienced counsel will know that they have a limited role in the interview and will respect the process, and experienced investigators will recognize that there is nothing to fear from allowing counsel to observe. ■

Endnotes

1. *Payton v. New Jersey Turnpike Authority*, 148 N.J. 523 (1997)
2. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)

Note to Self

These Notes May Not Be Just for Yourself

By John D. Haggerty and Anne M. Collart

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Duly Noted

Any attorney lacking an infallible memory is bound to take notes when conducting an investigation (or designate another member of the team to do so). Although this mundane task may be among the least desirable (and glamorous) tasks during the course of an investigation—and one which often receives little attention, particularly in the midst of intensive interview preparations—there are both practical and strategic considerations to take into account to ensure that any note-taking is done properly. After all, whether the outcome of the investigation will be oral recommendations to in-house counsel or the Board, a formal written report, or a presentation to a government authority seeking to avoid sanctions or prosecution, written notes throughout the investigation are critical work product. It is essential that any recommendations, report, or presentation be accurately tethered to the facts uncovered in interviews, and counsel will want to ensure that all relevant inquiries have been fully investigated to uncover and remediate any issues. An attorney's investigative notes will typically capture both facts and mental impressions. And Courts have consistently recognized the applicability of both the attorney-client privilege and work product protections in the context of corporate internal investigations, granting at least a degree of protection to attorney scribbles.[1]

Dually Noted

But there are a number of risks to keep in mind, and it is never safe to assume that notes taken during an internal investigation will remain for the drafting attorney's eyes only. First, underlying facts are never privileged.[2] Second, while legal advice may be protected from disclosure, business advice generally is not.[3] And third, disclosure of otherwise privileged information to a third party generally waives the privilege.[4] This risk is particularly salient in the context of an investigation that precedes, or is conducted in parallel to, an investigation by the state or federal government, where courts in New Jersey and beyond have concluded that once-appropriate privilege protections can be waived by virtue of disclosure to the prosecuting (or investigating) authorities.[5] This waiver can result, for example, in the Court-ordered production of draft and final versions of interview memoranda, along with typewritten and handwritten interview notes—all of which can, in addition to potentially creating a conflicting record in civil or criminal litigation, reveal information that was not previously disclosed to the authorities, give rise to concerns of bias or inaccuracy on the part of different investigators or note-takers, and undermine the integrity of the investigation more generally.

Best Practices

Awareness of the risks associated with note-taking during investigations is of little use without some practical means of guarding against them. There are a number of steps that can be employed to help mitigate against a subsequent finding of waiver and the creation of a record that can later be used by an adversary to call the investigation and conclusions reached during it into question.

First, consider limiting the number of individuals taking notes during an investigative interview as a means of avoiding potential inconsistencies among different authors. The person assigned to take notes should be given guidance in advance, and should be aware of the law with respect to attorney-client privilege and work product protections in the context of internal investigations so that they can prepare notes accordingly. While an investigator will invariably make credibility determinations during or immediately following any interview, the attorney taking notes should avoid injecting those assessments into their notes in lieu of accurately recording the interviewee's actual statements.

Second, while there will necessarily be changes in the process of converting rough notes to a more formal interview memorandum, use caution to ensure that there is consistency between the two documents. For example, if an interview memorandum purports to quote a statement made by someone during the interview, ensure that the quote matches up with the contemporaneous rough notes. And while care should be made not to create conflicting versions, this cannot come at the expense of proper document retention. For example, an approach that overwrites the contemporaneous notes and draft summaries with the final interview memorandum for a particular interviewee is a tactic that has been expressly condemned as gamesmanship in the District of New Jersey; though declining to address allegations of ethical violations, the court's frustration cautioned the litigants, and counsel conducting investigations generally, to engage in more "straightforward lawyering."[6]

Third, in preparing an interview memorandum, include at the outset of that document a statement reflecting that the memorandum is not a verbatim transcript and contains the thoughts and mental impressions of counsel. This will help to ensure that work product protections extend to the interview memorandum, absent any subsequent waiver. ■

Endnotes

1. *See Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); *In re Grand Jury Investigation*, 599 F.2d 1224, 1229-30 (3d Cir. 1979).
2. *See Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994); *Margulis v. Hertz Corp.*, No. CV 14-1209 (JMV), 2017 WL 772336, at *5 (D.N.J. Feb. 28, 2017).
3. *La. Mun. Police Emps. Ret. Sys. V. Sealed Air Corp.*, 253 F.R.D. 300, 305 (D.N.J. 2008).
4. *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991).
5. *Id.*; *see also In re Anadarko Petroleum Corp. Sec. Litig.*, No. 20-cv-576, 2023 WL 2733401, at *3-5 (S.D. Tex. Mar. 31, 2023); *United States Sec. & Exch. Comm'n v. Herrera*, 324 F.R.D. 258, 260 (S.D. Fla. 2017).
6. *United States v. Baroni*, No. 15-cr-193 (SDW), 2015 WL 9049528, at *7 (D.N.J. Dec. 16, 2015).

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What's the Law?

Attorney-Client Privilege and Work Product Doctrine in Internal Investigations

By Peter Frattarelli and Simone Adkins

For employers, navigating the complex waters of internal investigations can be difficult. It is made more complex by the fact that it is not always clear how much of the internal investigation is discoverable to the opposing party once a suit commences. Sometimes, employers rely on the assistance of counsel to conduct investigations on their behalf. In such cases, there are significant questions, and even some confusion, about what aspects of the investigation, if any, may be protected by the attorney-client privilege or work product doctrine, and outside the scope of discovery. The good news (for employers wanting to know the answer) is that New Jersey courts have evaluated and explored this issue and have developed an outline of how these thorny situations can be addressed.

The seminal case on privilege and internal employment investigations is from 1997, when an employee brought an action against her employer and her supervisors for sexual harassment under the New Jersey Law Against Discrimination.[1] She specifically alleged that her employer and two of her supervisors harassed her and that her employer failed to adequately respond to her complaints.[2] While the employer ultimately found her claims to be meritorious, the employee asserted that her employer's inadequate response to her complaints contributed to the harm that she suffered.[3] The primary question the Court addressed in this case is, what is the appropriate nature and extent of pretrial discovery that an employee—who claims she was sexually harassed—is entitled to obtain for the purpose of establishing the employer's liability based on its alleged failure to respond to her complaints of sexual harassment.[4] More specifically, the Court examined whether documents and records pertaining to the employer's handling and disposition of the employee's complaints of harassment, including its internal investigation, may be made available through discovery and the extent to which concerns related to privilege and confidentiality may preclude or limit the production of such materials.[5]

The plaintiff alleged that she endured several years of harassment by her supervisors until she decided to file an internal complaint with the defendant.[6] For approximately seven months following plaintiff's internal complaint, the alleged harassment continued, and the defendant took no remedial action against the supervisors.[7] Eventually, plaintiff filed suit in the Superior Court, Law Division.[8] Shortly after, the defendant announced that the two supervisors had been suspended without pay, demoted, and had their salaries reduced.[9] In the defendant's answer, they raised these actions as an affirmative defense to vicarious liability, claiming that their response to the harassment demonstrated that they had neither participated in, nor acquiesced in the harassment.[10]

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Through a privileged document log, the defendant represented that its Equal Opportunity Officer (EEO Officer) had made initial findings about the complaint and together with in-house counsel had issued a final investigative report, four days after the plaintiff filed suit.[11] The defendant further asserted that its Sexual Harassment Advisory Committee completed a confidential review of the EEO Officer's report, including remedial recommendations, and further that an executive session was convened regarding the matter during which they discussed the report and the appropriate sanctions.[12] Consequently, the plaintiff sought the production of materials related to the investigation in order to determine the adequacy, including the timeliness, of the employer's response.[13] Specifically, the plaintiff demanded all documents relating to any investigation that was conducted by or for the defendant having to do with the plaintiff and her employment with the defendant; all documents relating to any investigation conducted by or for the defendant regarding the plaintiff and her administrative complaint; and minutes, transcriptions, reports, support documents, agendas and recordings related to the Commissioner's meeting.[14] The defendant moved for a protective order exempting all of the requested documents from discovery due to privilege and work product protections.[15]

The Court began its analysis with a discussion about the New Jersey discovery rules which are to be construed liberally in favor of broad pretrial discovery.[16] Under rule 4:10-2(a), "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." However, while relevance creates a presumption of discoverability, that presumption can be overcome when a party demonstrates the applicability of an evidentiary privilege.[17] The defendant in essence argued the creation of a privilege that precludes discovery of confidential materials relating to internal sexual harassment investigations.[18] The Court grappled with balancing two very important interests—disclosure to ensure employers maintain effective sexual harassment procedures versus nondisclosure to enable employers to maintain effective procedures that encourage reporting and candidness.[19] The Court ultimately concluded that the appropriate balance was not to create a blanket privilege but instead to recognize a conditional privilege that applies selectively depending on the nature of the materials involved.[20]

Under rule 4:10-2(a), "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." However, while relevance creates a presumption of discoverability, that presumption can be overcome when a party demonstrates the applicability of an evidentiary privilege.

The defendant maintained that the attorney-client privilege protects the entire investigatory process because attorneys employed by the defendant participated in the investigation.[21] The Court disagreed with such a blanket contention and instead held that, on remand, the trial court needed to review the documents "in camera," and make specific determinations regarding the plaintiff's ability to access them.[22] In doing so, the Court directed the trial court to determine the exact role that an attorney played regarding each document for which the privilege was asserted.[23] The Court differentiated between an attorney who provides legal services or advice versus one who performs nonlegal duties (such as conducting a factual investigation).[24] For purposes of the privilege, an attorney who is not performing legal services or providing advice does not qualify as a lawyer.[25] Therefore, when an attorney investigates not for the purpose of preparing for litigation or providing legal advice but instead for some other purpose (such as responding to an employee complaint for purposes of how the employer would handle the alleged harasser), the privilege is inapplicable.[26] The Court more directly stated the clear distinction: "If the purpose was to provide legal advice or to prepare for litigation, then the privilege applies. However, if the purpose was simply to enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply."[27]

Accordingly, the Court explained that because the attorney-client privilege is inapplicable if the attorney was not providing legal advice or preparing for litigation, the primary inquiry must focus on the "exact" role the attorney played for each document for which the privilege is asserted.[28] The Court further explained that, if the trial court determined that the privilege applied to certain parts of the investigation, it must also determine

whether the defendant waived the privilege by raising the investigation as an affirmative defense.[29] The Court took particular issue with the idea that a party would abuse the privilege by asserting a defense and then refusing to provide the information underlying the defense based on the privilege.[30] Ultimately, the Court held that the trial court had to determine whether the privilege applies to specific documents, and if it did, whether the documents were so tenuously related to the affirmative defense that waiver is overcome despite the assertion of the defense.[31]

Since the *Payton* decision, the issue of attorney-client privilege and attorney work product has been addressed a handful of times by the lower courts, using *Payton* to guide the analysis. In 2012, the issue of discoverability and the assertion of privilege for documents created during an internal investigation was addressed in *Travelers of New Jersey v. Weisman*.[32] In *Weisman*, the plaintiffs sued Mercedes-Benz USA, LLC (MBUSA) after a defective or negligently repaired Mercedes caused a fire that destroyed parts of a condominium when it spontaneously combusted.[33] Plaintiffs sought to obtain through discovery from MBUSA factual information about other vehicle fires that MBUSA had investigated in hopes of confirming their contention that defective parts caused the fire.[34] The trial court compelled MBUSA to produce documents relating to its internal investigations of vehicle fires but in doing so, MBUSA redacted hundreds of materials claiming that they were privileged on various grounds.[35] Primarily, MBUSA asserted the attorney-client privilege and attorney work product doctrine.[36] Defendant MBUSA contended that the withheld materials were entitled to protection because their legal department was involved in internally investigating all such fire claims.[37] Specifically, MBUSA asserted that its legal department directed a product analysis engineer, technical specialist, or service parts operation manager to investigate each vehicle fire, and to prepare an investigation report.[38] MBUSA further claimed that this was always done "in anticipation of litigation."[39]

The Court first examined the parties' competing arguments concerning the asserted privileges.[40] Relying on *Payton* to support their argument, the plaintiff argued that the limited involvement of MBUSA's in-house legal department in fire investigations took the internal materials outside the scope of the asserted privileges.[41] MBUSA argued that a document-by-document review is not required because its general description of the manner in which fire investigations were conducted was enough to demonstrate that its attorneys and agents were acting in their legal capacity and not acting to enforce the company's policies.[42] The Court disagreed with MBUSA. As in *Payton*, the Court directed the trial court to make a privilege determination for each document, explaining that while the exercise is tedious, it is necessary to determine exactly which documents plaintiffs are entitled to.[43]

In 2013, the Superior Court again applied *Payton*. In *Edwards*, the plaintiff filed, in part, a wrongful termination suit amongst other claims against his employer.[44] One of the issues on appeal was whether the trial court erred by not compelling the defendants to produce allegedly privileged documents.[45] The Court stated that the attorney-client and work product privileges do not generally apply to documents created during the course of an internal investigation, particularly when the defendant uses the investigation as an affirmative defense, because such documents are generally not created in anticipation of litigation but to comply with an employer's policies and procedures for internal investigations.[46]

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Notably, for the attorney client privilege, the New Jersey Supreme Court has provided a three-part test that a party seeking to pierce the attorney-client privilege must satisfy. First, the party must demonstrate a legitimate need to reach the evidence.[47] Secondly, there must be a showing of relevance and materiality of that evidence to issue before the Court.[48] Finally, it must be shown that the information could not be secured from any less intrusive source.[49] Of course, for *Kozlov* to apply,

the requested materials must be privileged in the first place. But ultimately, a *Payton* analysis could lead to a *Kozlov* analysis down the road for whichever documents the Court finds to be protected by the attorney-client privilege.

The Court addressed the issue of the attorney work product doctrine in *Payton* as well. The *Payton* Court stated that for the doctrine to apply, the materials must have been prepared in anticipation of litigation and not in the ordinary course of business.[50] The Court further noted that there must not be a substantial need for the materials under Rule 4:10-2(c) and the doctrine's protection must not have been waived.[51] Consequently, the Court decided that the work product doctrine most likely did not apply to the case because the investigation had allegedly already begun months before the plaintiff commenced the action.[52] The Court emphasized that the plaintiff needed to know exactly what the defendant knew and when, which is information that she could obtain only by gaining access to the investigatory materials.[53] The Court further clarified that like the attorney-client privilege, the defendant may have waived the protection of the doctrine by asserting the investigation as an affirmative defense.[54]

While the *Payton* Court cited the length of time between the investigation and the eventual suit as evidence that the materials were not produced in anticipation of litigation, in anticipation of litigation does not necessarily mean that litigation has to occur. A document prepared at the direction of an attorney before litigation has commenced may be protected if its use for litigation was the predominant purpose for preparing the document and if the attorney had an objectively reasonable belief that litigation would ensue.[55] Further, an additional analysis is required when addressing issues related to the attorney work produce privilege. A party may still obtain discovery of documents that are prepared in anticipation of litigation upon a showing of substantial need. The Superior Court, Appellate Division addressed the standard for evaluating a claim to pierce the work-product privilege. In *Paladino v. Auletto Enterprises, Inc.*,[56] the Court decided that substantial need requires a showing that the requesting party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. This rule is memorialized in New Jersey Court Rule 4:10-2(c).

Consequently, these are considerations for employers and counsel to remember when conducting internal investigations. The role of counsel is paramount in determining what is privileged. If counsel conducts an internal

investigation, much of that investigation and its findings are likely discoverable, and depending on the role counsel played in each document, the attorney-client privilege may not apply. New Jersey courts have made it clear that the attorney-client privilege is reserved for when the attorney is engaged in offering legal advice or legal services. An internal investigation conducted by in-house counsel (or outside counsel) does not always fit the bill.

Nevertheless, the legal advice provided by an attorney-investigator may still be protected from disclosure. For example, if an attorney conducts the underlying factual investigation, but then gives purely legal advice concerning what actions should be taken, the legal advice in most circumstances should be privileged. Why "should be"? If an employer not only intends to rely upon the factual conclusions but also assert as an affirmative defense that they should avoid liability because they relied on legal advice, that legal advice then becomes discoverable. Moreover, the line between a factual conclusion during an investigation, and legal advice, can be a fine one, which is often why employers choose to separate the investigator from the "advice-giver."

Lastly, as a reminder, once a suit is commenced, documents prepared in anticipation of litigation, even if the litigation pertains to the same situation that the investigation was conducted for, are likely privileged and protected absent a showing of substantial need or a successful argument under *Kozlov*.

The privilege analysis is never an easy one when internal investigations are conducted. But, as shown above, the straightforward analysis in the cases cited above give a clear direction to employers as to how counsel should be used in internal investigations. ■

Endnotes

1. *Payton v. New Jersey Tpk. Auth.*, 148 N.J. 524, 532 (1997).
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*. at 533.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*. at 534.
14. *Id*.
15. *Id*.
16. *Id*. at 535 (citing *Jenkins v. Rainner*, 69 N.J. 50, 56, 350 A.2d 473 (1976).
17. *Id*. at 539.
18. *Id*. at 540.
19. *Id*. at 542.
20. *Id*.
21. *Id*. at 550.
22. *Id*.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*. at 551.
27. *Id*.
28. *Id*. at 550.
29. *Id*. at 553-53.
30. *Id*. at 553.
31. *Id*. at 554.
32. No. A-4085-10T4, 2012 WL 850615, at *1 (N.J. App. Div., Mar. 15, 2012)
33. *Id*.
34. *Id*. at 2.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*. at 3.
39. *Id*.
40. *Id*. at 6.
41. *Id*. at 7.
42. *Id*.
43. *Id*. at 8.
44. *Edwards v. State Casino Control Comm'n*, No. A-4738-11T4, 2013 WL 5989304, at *10 (N.J. App. Div., Nov. 13, 2013).
45. *Id*. at 4.
46. *Id*. at 10, (citing *Payton*, 148 N.J. at 551-55).
47. *Matter of Kozlov*, 79 N.J. 232, 243 (1979).
48. *Id*. at 243-44.
49. *Id*. at 244.
50. *Payton,* 148 N.J. at 554.
51. *Id*.
52. *Id*. at 555.
53. *Id*.
54. *Id*.
55. *K.L. v. Evesham Twp. Bd. of Educ.*, 423 N.J. Super. 337, 354, 32 A.3d 1136, 1145 (App. Div. 2011).
56. 459 N.J. Super. 365, 371 (App. Div. 2019)

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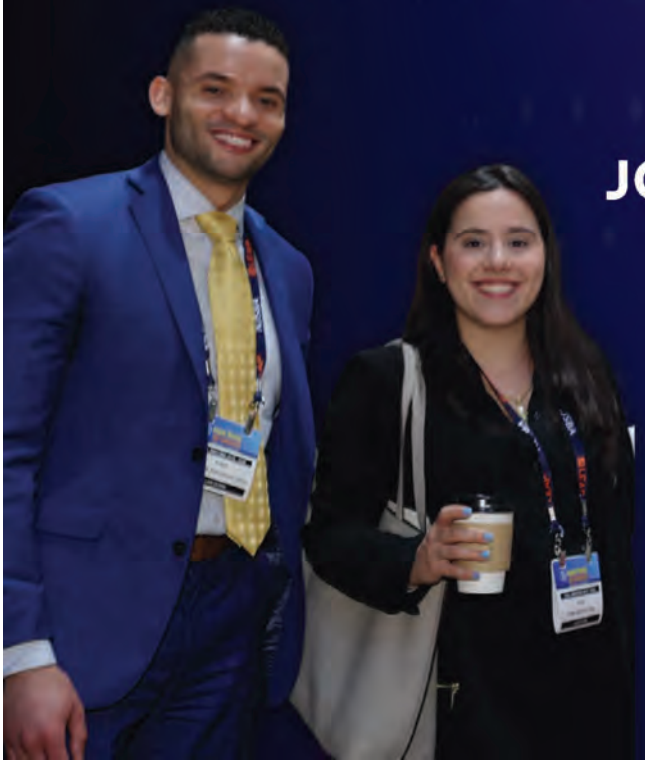

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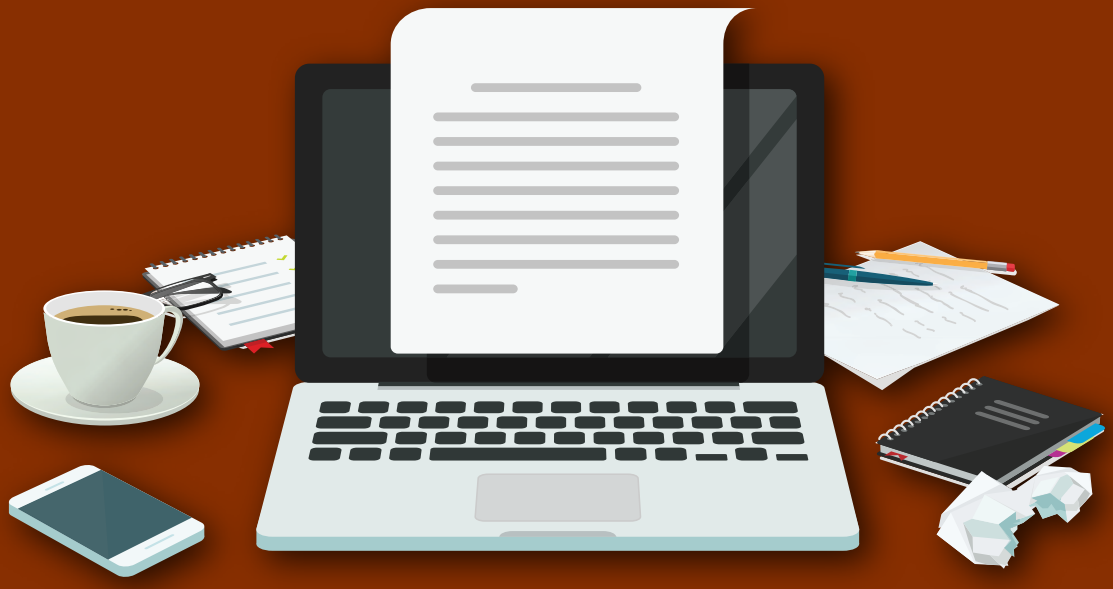

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