

2019 PUBLIC SECTOR EMPLOYMENT LAW
ANNUAL CONFERENCE

Tactical Considerations in Investigations

Presented by: Shelline Bennett & Jesse Maddox



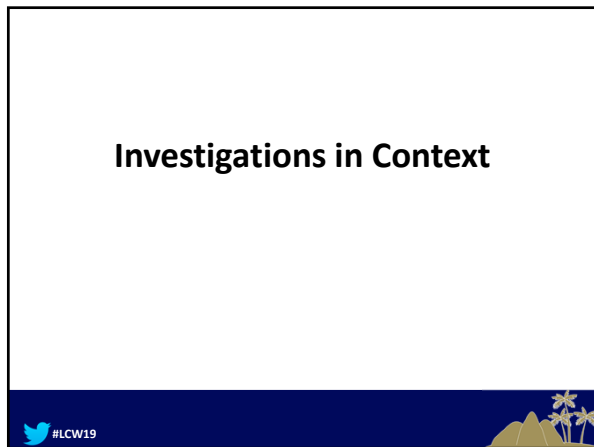
Tactical Considerations in Investigations

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Investigations in Context  #LCW19


- FEHA prohibits discrimination, harassment, *etc.* based on protected classification (ethnicity, sex/gender, *etc.*)
- Investigations are part of agency responsibility to take “all reasonable steps necessary to prevent discrimination and harassment from occurring” (Gov. Code, sec. 12940(k))
- Training plays a crucial role in preventing workplace harassment and discrimination
 - New Harassment Training Requirements: **SB1343** (2018)

Investigations in Context  #LCW19

Why Investigate?

- Cal. Code of Regs., Title 2, sec. 11023 requires it
- Assists in stopping inappropriate behavior
- Shows that employer takes complaint seriously
- Helpful in litigation:
 - Assists in preservation of evidence
 - Supports a good faith belief that there are grounds to discipline
 - Supports defense against a failure to investigate/prevent claim

Investigation Basics

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Law Shaping Investigation Recommended Practices  #LCW19


What standard does an investigation have to meet?

“Investigative **fairness** contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case without the procedural formalities of a trial.”

Cotran v. Rollins Hudig Hall Intern, Inc. (1998) 17 Cal.4th 93, 107

Law Shaping Investigation Recommended Practices  #LCW19

- Cal. Code of Regs., Title 2, sec. 11023: Investigations must be: (1) fair, (2) complete, and (3) timely
 - Regulations are the **law**
- DFEH Workplace Harassment Guide For California Employers
 - Comprehensive **guidelines** on entire investigative process (not law)
 - Guidelines reflect best practices and gold standards
 - Investigators should closely adhere to guidelines
 - Courts will almost certainly consider Guide in evaluating fairness of investigation
 - DFEH tests investigations against the Guide

Protect the Complainant  #LCW19


- Protecting the complainant is an important step to ensure that:
 - The conduct complained of does not escalate or repeat
 - Additional damages do not accrue
 - The subject of the investigation does not retaliate
- Options:
 - Consider administrative leave for the subject
 - Separate complainant from co-worker
 - Appoint or assign a temporary supervisor
 - Transfer employee to separate workspaces
- Be careful that actions taken do not amount to retaliation against the complainant

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Who Can Conduct an Investigation



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- A licensed private investigator (Bus. & Prof. Code [BPC], sec. 7520-7539)
- An attorney at law “performing his or her duties as an attorney at-law” (BPC, sec. 7522)
 - *City of Petaluma v Superior Court* (2016) 248 Cal.App.4th 1023: attorney duties include using legal expertise to identify pertinent facts, synthesize evidence, and reach conclusions on what happened
- An Internal Investigator: a person engaged exclusively and regularly by any employer who does not provide contract security service (BPC, sec. 7522)
- Impartial, qualified/knowledgeable about standard investigatory practices (DFEH Regs, & Guide)
 - Questioning witnesses
 - Documenting interviews
 - Analyzing information
 - Adequate communication skills to conduct interviews & deliver findings in written or verbal form
 - For more complex & serious allegations: prior investigative experience


Investigation Steps



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- Step 1: Create an Investigation Binder
- Step 2: Determine Scope of Investigation
- Step 3: Gather & Review Relevant Rules/Laws
- Step 4: Gather & Review Relevant Documents & Other Evidence
- Step 5: Identify Potential Witnesses
- **Step 6: Prepare for Witness Interviews**
- **Step 7: Conduct Witness Interviews**
- Step 8: Write the Report
 - Assess Credibility
 - Analyze the Evidence
 - Make Factual Findings

Investigation Best Practices




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- Plan ahead and remain organized
- Follow statutes, personnel rules, MOU, etc.
 - May provide additional procedural protections for employees
 - Impact searches, interrogations, and other investigative steps
- Keep all communications professional – they may become public!
- Provide uniform, accurate admonitions
 - *Weingarten* Admonitions
 - *Lybarger* Admonitions
- Be careful with “gag orders,” use only when justified


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Investigation Best Practices 

- Interviews
 - Inform interviewee when interview is being recorded
 - Be thorough and follow up
 - Ask open-ended questions (understand, don't just confirm)
 - Give opportunity to fully explain answers
 - Don't forget "wrap-up" questions
 - Avoid commentary on evidence, discipline, etc.
 - Avoid legal or conclusory language (e.g. "harassment" or "victim")
- Maximize confidentiality, but don't guarantee it
- Do not promise specific results or involve yourself in the case

Investigation Best Practices 

- Don't ignore new complaints; but
- Don't unilaterally expand the investigation to include new allegations
- Don't leave any stones unturned
- Don't reach conclusions before completing investigation or make assumptions
- Don't comment on the complainant, witnesses, or the evidence during interviews
- Don't take action that could be perceived as retaliatory
- Don't make conclusions of law, just findings of fact
- Don't comment on or suggest discipline

**Tactical Considerations
in Investigations**





Tactical Considerations in Investigations

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The Investigator As A Witness



The Investigator As A Witness #LCW19

- Witnesses establish facts
- If investigation is used in litigation, investigator will testify
- Lawsuit
 - Deposition
 - Trial before judge and/or jury
- Arbitration/Administrative Hearings
 - Maybe a deposition
 - Hearing before arbitrator, hearing officer or ALJ




The Investigator As A Witness #LCW19

- Plaintiff's/Appellant's counsel will try:
 - To discredit you or your investigation
 - To diminish your deposition or trial testimony regarding your investigation
 - To show that you are biased
- Common challenges to investigators:
 - Proper investigator not selected
 - Investigator is biased
 - Not accurate, thorough, complete, or prompt
 - Questions asked (or not asked) during interviews
 - Witnesses interviewed (or not interviewed)
 - Factual findings were not supported by the evidence


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The Investigator As A Witness  #LCW19

- Direct examination will focus on qualifications and facts
- Cross-examination
 - Be careful with leading questions
 - Examples of questions intended to lead you astray
 - “Did you ever discuss this with anyone?”
 - “Are you certain about your point?”
 - “Do you want the jury to understand...”
 - “Have you ever made a mistake?”
 - Attack your training, experience, and qualifications
 - Attack the investigation methodology or report
 - Demonstrate bias

The Investigator As A Witness  #LCW19

- Why do attorneys want your deposition?
 - Plaintiff’s tool to discover information during litigation
 - To size you up
 - To discredit you and/or your investigation
- Preparing for deposition
 - Meet with attorney for the employer
 - Educate yourself about the litigation process/tools
 - Do careful document review
 - Practice answering questions
 - Go over questions that could call for privileged or confidential information


The Investigator As A Witness  #LCW19

- Preparing for trial
 - Thorough preparation is not happening in 1 day
 - Attention spans are short
 - Need time to digest information
 - Should not happen too close to time of testimony
 - To have time to fix issues
 - Meet early and often
 - Meet away from your office so give undivided attention
 - Role play
 - Assess performance and be open to feedback and coaching from counsel or trial consultant
 - Go over key documents in the case that may come up during your examination

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The Investigator As A Witness  #LCW19

- Tell the truth
- Mind the court reporter
- Pause before answering
- Answer only the question asked
- Don't volunteer information
- Only answer questions you understand
- Don't speculate
- Be professional and polite
 - Dampen emotions
 - Don't appear anxious, nervous, uneasy

How Investigations Are Used In Litigation

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How Investigations Are Used In Litigation  #LCW19

- By the Plaintiff/Employee
 - Attack the adequacy of the investigation
 - Attack the credibility of employer or witnesses
 - May try to use investigation findings to establish legal claims
- By the Defendant/Employer
 - Investigation may support defenses
 - Shows that corrective action was taken
 - Shows that adequate investigation was conducted
 - Attack the credibility of employee or witnesses


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How Investigations Are Used In Litigation  #LCW19

- Usually used in a limited fashion
- Credibility assessments and factual findings usually not determinative
 - The court/jury ultimately assesses credibility and makes factual findings
 - Judge makes legal conclusions
- The complainant/subject/witness interviews are a big deal
 - The witnesses in the investigation can establish facts relevant to the case
 - Interviews can be used to impeach witnesses at deposition or trial
- Investigator may...
 - authenticate interviews and lay foundation
 - introduce physical evidence
 - testify to prove that adequate investigation occurred

How Investigations Are Used In Litigation  #LCW19

- Ensure investigations are at their best **before** they need to be used in litigation
- Follow best practices in every investigation
- Write everything as if it will be seen by a jury, judge, or arbitrator
 - Includes correspondence and emails


Protecting The Investigation From Disclosure

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Protecting The Investigation From Disclosure  #LCW19

- Litigation Discovery:
 - “Any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” (Code Civ. Proc., § 2017.010)
- Due Process in Administrative Proceedings:
 - Due process includes providing “a copy of the charges and materials upon which the action is based” (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194)
 - Public safety officers: Gov. Code, §§ 3303(g) and 3253(g)

Protecting The Investigation From Disclosure  #LCW19

- Do not guarantee confidentiality to witnesses/complainants
 - Disciplinary action: agency must provide evidence
 - Litigation: parties have discovery rights
 - Other reasons that information may be disclosed:
 - As part of the investigative fact-finding process
 - Witnesses may make assumptions or have outside knowledge
 - Employer may make investigation public
- Hiring an attorney investigator may *help* to protect investigation
- Special privileges exist for peace officer investigations


Protecting The Investigation From Disclosure  #LCW19

- Attorneys are typically hired when:
 - Want option to maintain confidentiality
 - Nature of the allegations require legal expertise
 - Investigation involves a higher level employee or governing body member
 - Potential for substantial legal exposure to liability
 - Trying to minimize or eliminate negative publicity
- Application of Attorney-Client/Work Product Privileges
 - Not automatic: privilege applies when attorney is providing a *legal service* through his/her investigative expertise without providing any legal advice
 - (*City of Petaluma v. Sup. Ct.* (2016) 248 Cal.App.4th 1023)
 - Privilege may only be “qualified” as to some interview notes and recordings


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Protecting The Investigation From Disclosure  #LCW19

- Protecting the attorney-client privilege before and during the investigation
 - Documentation describes the relationship as attorney-client privileged
 - Investigator retained through employer versus general/outside counsel
 - Carefully mark all potentially protected documents as “Attorney-Client Privileged,” “Work Product,” or “Confidential”
 - Consider the pros and cons of written versus verbal communication
 - Avoid including non-legal information in otherwise privileged communications

Protecting The Investigation From Disclosure  #LCW19

- Employer (not investigator) may waive attorney-client privilege
 - To support a litigation defense
 - To address public relations concern
- Avoid inadvertent disclosure
 - Privilege is waived if the holder, without coercion, discloses a significant part of the communication (Evid. Code, § 912(a); c.f. Fed. R. Evid. 502)
- Scope of waiver
 - California law: relates only to the particular communication revealed
 - Federal law: voluntary disclosure can waive the privilege as to all communications on the same subject

Protecting The Investigation From Disclosure  #LCW19


Additional privilege applicable to peace officer personnel records:

- Application:
 - Internal investigations of police officers, deputies, troopers, custody officers, etc.
 - Discipline imposed on above
- Penal Code 832.7: discoverable only through a “Pitchess Motion”
 - “Materiality” is the touchstone for disclosure
 - Evid. Code, § 1043
- Protection applicable in state court and administrative proceedings
 - *Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624
- Federal courts will ignore the Pitchess privilege

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Protecting The Investigation From Disclosure  #LCW19


- Employers often issue “gag orders” to keep employees from discussing pending investigation
- General Rule: **do not use them**

“An employer may have the right to demand confidentiality of its investigations” so long as the employer demonstrates a “legitimate justification” for the need for confidentiality. Valid justifications include when “witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up.”

Perez v. Los Angeles Community College District (2014) PERB Dec. No. 2404E, at p. 13; see also Banner Health System (2012) 358 NLRB No. 93

Responding To Requests For Investigation Reports

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PRA Requests For An Investigation Report  #LCW19

“The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”
California Constitution, Article I, section 3


- Litigation is not the only means through which an investigation can be made public
- The Public Records Act (“PRA,” Gov. Code §§ 6250, *et seq.*) provides an additional means by which investigations may be made public
- **Agency is familiar with PRA, and should take lead on response**

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PRA Requests For An Investigation Report



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- General rules on responding
 - Treat all requesters the same
 - Response timelines are tight... Don't delay
 - The PRA does not require creation of records
 - Must provide reasonable assistance to requesters
 - Cite to the specific exemption or exception protecting the record from disclosure
- Common exceptions for personnel investigations
 - Attorney-Client/Work Product Privileged (Gov. Code, § 6254(k))
 - Personnel Records (Gov. Code, § 6254(c))
 - Public Interest Exception (Gov. Code, § 6255(a))
- Need not be in possession of public entity to constitute "public records"


Responding To PRA Requests And RFI For An Investigation Report



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- Peace officer personnel records – differences
- Subject to the same PRA exceptions from disclosure as other employee records
 - Potentially also law enforcement records exception (Gov. Code, § 6254(f))
- SB 1421 and AB 748 increase public access, through PRA
 - Discharge of a firearm
 - Use of force resulting in death or great bodily injury
 - Sustained finding of sexual assault against a member of the public
 - Sustained finding of dishonesty
- Effective January 1, 2019

Union Request for An Investigation Report



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- Union may request information "necessary and relevant" to its duty of representation
 - Right arises from labor relations statutes, *not* PRA (Sacramento City Unified School District (2018) PERB Dec. No. 2597)
 - Includes witness statements and investigative reports (City of Redding (2011) PERB Dec. No. 2190-M)
- Limited exceptions, *e.g.*
 - Privacy rights subject to a balancing test
 - Extra-contractual forum

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Managing An Outside Investigator to Ensure A Defensible Investigation



Managing An Outside Investigator To Ensure A Defensible Investigation #LCW19

- Pick appropriate investigator:
 - Qualifications (see DFEH Regs & Guide)
 - Attorney investigator may improve confidentiality of investigation
 - Private investigator
- Communicating with investigator:
 - **Keep it professional**, as investigation records may become public
 - Protect the attorney-client privilege, if applicable
 - Documentation describes the relationship as confidential
 - Don't mix privileged communications with non-privileged communications
 - Don't copy non-employees, witnesses, unnecessary parties, etc.



Managing An Outside Investigator To Ensure A Defensible Investigation #LCW19

- Monitor the investigation:
 - Keep legal counsel in the loop
 - Be prepared to modify scope of investigation to address new allegations and facts
- Remember the purpose of investigation:
 - Provide fairness
 - Assist in stopping inappropriate behavior
 - Show that employer takes complaint seriously
 - Helpful in litigation





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Conclusions




Conclusions



- The information discussed informs best practices
- Always follow investigation best practices
- Questions?

Thank You!



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