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## WORKPLACE HARASSMENT INVESTIGATIONS

### When to Use Outside Counsel to Investigate a Sexual Harassment Complaint and What to Look for in an Investigator

Conscientious corporate officers and managers know that a complaint about sexual harassment in their workplace must be investigated thoroughly, objectively, fairly and without delay. From multi-national companies to family-owned local businesses, responsible employers have anti-harassment policies and complaint and investigation procedures in place to protect their employees and their organizations from the corrosive effects of discrimination and harassment in their workplaces.

Sexual harassment has the potential to be extremely damaging and sexual harassment complaints are different. They involve sensitive often painful allegations that are difficult to talk about for the accuser and the accused—and certainly difficult to thoroughly ask about as part of an investigation.

When faced with an internal sexual harassment complaint, there are times when organizations should use an outside counsel to investigate the allegations. And there are qualities they should look for in an investigating outside counsel to make sure the process is handled thoroughly and professionally.

**Use outside investigating counsel when your internal people are too close to the situation to be objective or when a potentially widespread problem may exist.**

Your internal investigation procedures may designate a supervisor, HR person or in-house lawyer to investigate discrimination complaints including sexual harassment complaints. In most situations, that's a good approach—but sometimes going outside is preferable. For example, if the sexual harassment allegations involve people who are well known to inside investigators; if the people involved work closely with the inside investigators; if the investigators have pre-existing opinions about the people involved or if the investigators report to the people involved either directly or indirectly, it's best to hire an investigator from outside your organization. If the allegations involve high level officers or managers in your organization, outside investigating counsel is the best choice. For some of the same reasons, you may not want to use the same lawyer that does your everyday legal work to do an independent outside investigation. You should consider whether an attorney in your outside firm who doesn't normally work with you would be a better choice. Outside investigating counsel is also the wise choice if there is more than one accuser and particularly if there is a potentially widespread problem.

**Use outside counsel rather than a consultant or non-lawyer investigator to conduct the investigation.**

A quality outside investigation is not done from a defensive point of view; it's a waste of your time and money for outside investigating counsel to look into facts with only the aim of creating your legal defense. You want a thorough determination of the facts and an unbiased set of findings and recommendations based on the investigation. Why then, can't you use the usually cheaper option of a consultant or even a private investigator to find those facts for you? Years ago, the executive vice president of a Washington, DC based organization called me looking for an attorney to investigate

wide ranging sensitive allegations made by a high level officer of the organization. The E.V.P. had used non-attorney consultants in the past, he said, and found that the resulting reports of investigation did not provide him with the level of factual detail or insight he needed in order to make decisions for the organization. People understandably joke about lawyers but we are used to asking difficult questions, making logical inferences and writing thorough but clear and readable reports that you can rely on to make decisions for your organization.

**Qualities to look for when choosing your investigative outside counsel.**

You need to have faith in the person you choose to investigate a sexual harassment complaint. You want someone experienced, but not cynical or unwilling to listen to concerns that are particular to your organization. No two complaints and no two organizations are ever the same. You need someone who recognizes that and is flexible enough to adapt and respond to your needs. But you need that person to keep the investigation objective and thorough; someone not afraid to ask uncomfortable questions and find and deliver bad news if it exists. Although you need those tough qualities, you also need someone who is respectful of your organization and of your employees. The person must conduct the investigation with a low profile and minimum disruption of your workplace—and make every person involved in the process feel respected and heard.

**CONTACT**

Hiring the right person to investigate a workplace harassment issue and provide guidance on the most appropriate course of action can be one of the most critical decisions a business leader can make. Please contact me if you would like to discuss these issues or the services I provide.

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