

“Detect and Deter”—Performing Workplace Investigations on Behalf of Employer-Clients

by Mark J. Flynn

This column is sponsored by the CBA Labor Law Forum Committee to present current issues and topics of interest to attorneys, judges, and legal and judicial administrators on all aspects of labor and employment law in Colorado.

This article outlines the federal Fair Credit Reporting Act coverage exclusion for attorneys retained by employers to conduct employee misconduct investigations. The article also addresses privilege concerns in this context and proposes recommendations for conducting workplace investigations.

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Employers often conduct internal workplace investigations in the context of alleged unlawful discrimination or harassment, as well as for other forms of misconduct. An appropriate workplace investigation supports an employer's responsibility to prevent and correct employee misconduct. An employer's good faith defense to avoid punitive damages in these situations depends on its consideration of all the relevant facts and effective corrective action.¹ This process begins with a prompt, unbiased, and thorough investigation of the matter to support the making of informed decisions.

In many situations, employers are well advised to seek the support of a third-party investigator. Attorneys and other professionals may assist in investigating a matter to underscore attention to objective fact-finding where allegations of misconduct implicate upper management or the allegations might be publicized. In other situations, the need to maintain the availability of regular counsel in the event of future litigation promotes using an outside attorney to perform an internal workplace investigation.² In addition, the simple lack of an available experienced internal investigator often prompts the need to engage a third party.

This article provides information for attorneys who perform workplace inves-

tigations for employer-clients, as well as attorneys advising employer-clients regarding the performance of internal workplace investigations. It gives an overview of the federal Fair Credit Reporting Act ("FCRA") coverage exclusion for attorneys who conduct employee misconduct investigations. In addition, the article addresses privilege concerns in that context and provides guidance on conducting workplace investigations.

Legal Background

In late 2003, the federal legislature resolved a long-standing controversy on internal employment investigations. The subject matter was discussed at length in a 1999 Federal Trade Commission Opinion Letter ("Vail Letter").³ The Vail Letter applied the notice and disclosure requirements of the FCRA⁴ to an attorney hired to investigate a workplace sex harassment complaint.

The Vail Letter interpreted an attorney in this role as a "consumer reporting agency"; it interpreted an investigation report based on personal interviews with employees as an "investigative consumer report." Because the Vail Letter made such interpretations, it espoused FCRA coverage of an attorney's performance of an employer's internal sex harassment investigation.

The Vail Letter recognized no distinction between an internal workplace in-

vestigation conducted by a third party and an employer's criminal background check or credit history check of an employee candidate through a third-party vendor. In the latter situation, the FCRA requires that the employer obtain the consent of the candidate before using a third party or consumer reporting agency to obtain the information. Among other things, the FCRA requires providing the subject of the report with a complete copy of the report. In addition, the FCRA requires that the subject have the opportunity to dispute alleged inaccuracies where the report is used to support an adverse employment decision against the subject.⁵

The FCRA's consumer protections regarding credit checks and background checks by employers make good sense. However, these requirements are less intuitive in the context of an employer's response to allegations of unlawful harassment.⁶

Compliance with the FCRA in the typical discrimination complaint scenario conflicts with the basic tenets of an effective policy on equal employment opportunity and sexual harassment. Such a policy supports the filing of complaints by promoting confidentiality, prohibiting retaliation, and ensuring a prompt and thorough investigation.

However, where an employer retains a third-party investigator, it is not always appropriate to inform the accused employee of the nature and scope of the issues prior to conducting an investigation. Further, it is difficult to justify conditioning an investigation process on the accused employee's consent. Finally, where the investigation report supports disciplinary action against the accused, it is often not appropriate to provide him or her with a complete copy of the report, which includes witness statements.

New FACT Act

Criticism of the Vail Letter remained widespread until December 4, 2003,⁷ when Title VI, § 611 of the new Fair and Accurate Credit Transaction Act ("FACT Act")⁸ amended the FCRA, effective March 31, 2004. The FACT Act clarifies that the notice and disclosure requirements of the FCRA: (1) do not apply when an employer retains a third party to investigate employee misconduct concerns; and (2) continue to apply to communications relating to investigation of an individual's credit. Specifically, the FACT Act broadly excludes FCRA coverage

if the communication is made to an employer in connection with an investigation of (i) suspected misconduct relating to employment; or (ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer.⁹

The FACT Act also makes the exclusion contingent on limiting communication relating to the investigation to the employer or agent of the employer, or governmental agents or others required by law.¹⁰ This contingency appears to address concerns that an employer might disclose an investigation report to a complainant, but not to the accused.

Impact of FACT Act on Workplace Investigations

As a result of the FACT Act, employers may obtain professional workplace investigations from third-party sources, including attorneys, without concern for FCRA compliance measures that previously were necessary. Thus, employers need not delay anticipated disciplinary action simply because a third party investigates the matter. Employers are not required to notify the accused of an investigation regarding workplace conduct, obtain advance consent from the accused, or provide the accused with a copy of any investigation report.

Importantly, the FACT Act creates a potential notice requirement for employers using an outside investigator operating under the exemption. Where an employer takes adverse action against an employee based on the investigation report, the employer must provide "a summary containing the nature and substance of the communication upon which the adverse action is based" to the employee.¹¹ The Federal Trade Commission is likely to provide an interpretation of what this language means.¹² Currently, the FACT Act only excludes identification of the under-

lying sources of information from that summary.

For now, it is significant to recognize that attorneys, human resource professionals, and even courts that have rejected application of the FCRA to the performance of workplace investigations by third parties in the past must now address the mandate of the FACT Act under these circumstances.¹³ At a minimum, this mandate appears to be a communication, likely in writing, of specific allegations of misconduct supported in the investigation process, but without disclosure of supporting witnesses.

Privilege Concerns

An appropriate attorney-conducted workplace investigation is not always a privileged communication or protected attorney work product, in fact or intent.¹⁴ There are measures that attempt to preserve the availability of the attorney-client privilege to avoid disclosure in the course of litigation. However, these measures can negatively impact the impartial and thorough character of the investigation process, as discussed below.

This concern about demonstrating objectivity runs contrary to any defense attorney's advocacy role. However, the need for an impartial assessment as an initial component of effective remedial action is a product of both the courts and common sense. The developing case law in the area of unlawful harassment and discrimination emphasizes preventive and corrective action to avoid liability.¹⁵

Two U.S. Supreme Court cases, *Faragher v. City of Boca Raton*¹⁶ and *Burlington Industries, Inc. v. Ellerth*,¹⁷ provide an affirmative defense to employers. The defense is based on reasonable care, emphasizing that Title VII's primary objective "is not to provide redress but to avoid harm."¹⁸

Even assuming a supervisor's creation of an unlawful hostile work environment

Preservation of Attorney-Client Privilege

Measures to preserve the attorney-client privilege in the context of a workplace investigation include:

- ✓ Marking all documents "confidential and privileged attorney work product"
- ✓ Limiting disclosure and treating it as confidential
- ✓ Specifically identifying existing circumstances to support anticipation of litigation
- ✓ For attorneys assuming the factual witness role or non-attorneys assuming the role of investigator, investigating at the specific direction of legal counsel
- ✓ Including legal analysis in any documented collection of facts.

based on sex, *Faragher* and *Ellerth* provide employers with an affirmative defense to avoid vicarious liability. The employer avoids automatic liability for sexual harassment by supervisors that does not involve a tangible employment action¹⁹ where: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.²⁰

The liability rules focus on "redress" in form. However, the substance of the rules is more a means of effectuating the primary objective: to avoid harm. The rules announced in *Faragher* and *Ellerth* recognize the employer's affirmative obligation to both prevent violations and, more realistically, take prompt corrective action when inappropriate behavior is identified via the employer's complaint procedure.²¹ Thus, effective remedial action begins with a good-faith investigation of the matter.

The negligence standard applied to co-worker harassment cases similarly holds an employer liable for what it knew or should have known. The employer should not be liable where it took prompt action

Situations Warranting Investigation

In some circumstances, the need to investigate is clear, such as where a complaint is presented as a legal issue in form or substance. Following are some situations in which an investigation needs to be made:

- ✓ Allegations have been made of workplace harassment or discrimination under an employer's equal employment opportunity or sexual harassment policy
- ✓ Employee conduct demonstrated violation of a workplace violence policy
- ✓ Employees engaged in illegal activities, such as theft or drug use
- ✓ There are allegations of retribution for refusal to obey unlawful instruction
- ✓ Allegations of corporate or financial malfeasance have been made.

that was reasonably calculated to stop and prevent unacceptable conduct.²² Again, appropriate workplace investigations are a mainstay of avoiding negligence liability.

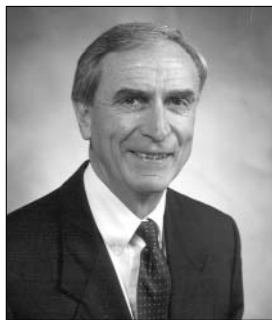
In summary, because the employer frequently presents a workplace investigation as evidence of its good faith efforts to respond appropriately to allegations of misconduct, maintaining privilege in the course of investigating often is inconsequential.²³ Any investigation process should assume that all records created will be subject to the scrutiny of litigation, where an employer's investigation efforts

will likely be attacked as biased and/or incomplete.

Recommendations for Workplace Investigations

The following recommendations are directed to attorneys assuming the role of workplace investigator, as well as outside counsel and general counsel to employers who advise on the performance of internal investigations. These recommendations are founded on the principle that an appropriate workplace investigation is thorough and impartial and that, realistically,

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such normative terms are inherently susceptible to criticism. Thus, at each step in a workplace investigation, the investigating attorney should consider conflicting perspectives.

Selecting the Investigator

An attorney who is assuming the role of investigator should consider that becoming a factual witness to the matter impedes his or her continued role as legal counsel.²⁴ However, where outside counsel is retained in the event of litigation, an in-house attorney might be best suited to assume the role of internal investigator based on familiarity with the organization and its policies. Either way, attention to the matter can demonstrate that the employer takes the matter seriously.

Where a workplace investigation is performed at an attorney's direction by internal personnel, the investigator should not be subordinate to the complainant or accused. Even the perception of influence based on hierarchy is damaging. Ideally, the investigator is removed from the working relationship in controversy. The objectivity of the investigator is challenged when he or she must investigate depart-

mental colleagues. Similarly, the investigator should not have a history of investigating the same employees.

Finally, issues arise from an investigation practice of using an investigator of the same gender in response to sex discrimination or harassment complaints. On the one hand, accommodating the request of a complainant when practicable to facilitate the investigation process is understandable. On the other hand, to establish such a protocol implies that gender affects the integrity of the investigation. It would not be a stretch for employee-complainants to maintain that to receive fair treatment, they should have an investigator of the same race, color, religion, national origin, disability, or age. Selection of an investigator based on personal characteristics does not establish fairness, which is a goal best achieved through a thoughtful process.

The Investigator's Role

No codified standard exists for determining what constitutes an appropriate workplace investigation; the investigation should be appropriate under the circumstances.²⁵ Adopting a workplace investigation process that demonstrates a comprehensive and unbiased assessment of the relevant facts is the best way to contest allegations of incompleteness or bias. Thus, to preserve the integrity of the workplace investigation, the individual assuming the role of investigator must strive to be thorough and impartial. The investigator's experience, ability, and knowledge of the potential legal issues contribute to the effective assumption of that role.

What to Investigate

As the breadth of the FCRA exemption suggests, the types of workplace investigations that take place are wide-ranging. There is no foundational minimum of proof to be met preceding a workplace investigation. As a result, employers are often bewildered as to what workplace issues require investigation. Even so, the accompanying box lists some circumstances where an investigation is almost certainly indicated.

Because a sound investigation process supports informed decision-making on any issue, performing some level of "investigation" is typically recommended by attorney advocates in response to identification of workplace conflict via internal complaint procedures, management observation, and detailed anonymous re-

ports or charges on behalf of others. Although each situation must be assessed independently, typically, the level of detail and severity of anonymous or indirect complaints will determine whether an investigation is necessary.

Employers might choose to investigate in response to identification of non-legal issues where conflict exists or important (if not illegal) performance or behavioral concerns are at issue. For example, where an employee communicates that he or she is treated differently than other employees, without identifying "discrimination" based on a legally protected characteristic (such as race or color), the circumstances still might necessitate an investigation when a reasonable inference of the concern exists.²⁶

Nevertheless, it is important for any organization to reasonably restrict the types of issues it investigates with formality. An alternative to the legal issue versus non-legal issue approach is to limit issues subject to investigation to those which, if established, would support adverse employment actions such as formal discipline or termination. There is no statutory procedure for determining the timing for a workplace investigation.

Types of Investigations

There are two types of workplace investigations. Conduct investigations pertain to claims of unlawful harassment. Motivation investigations are used in situations involving claims of unlawful discrimination.

Conduct Investigations: These investigations examine allegations of specific behaviors. Whether the conduct at issue might be characterized as sexual harassment or other inappropriate conduct based on the organization's performance or behavioral expectations, this type of investigation requires an especially fact-focused approach that often comes down to credibility assessment.

Motivation Investigations: These include typical unlawful discrimination investigations where the issue is whether an employment decision has been improperly influenced by a legally protected characteristic. This type of investigation requires examination of similarly situated individuals to assess whether improper consideration occurred.

In what is referred to as the *McDonnell Douglas-Burdine* burden shifting analysis,²⁷ the investigator strives to determine whether a legitimate, non-discriminatory justification exists for the employment ac-

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tion. The analysis further considers whether any justification advanced is a pretext for unlawful discrimination or other improper consideration.²⁸ Statistical analyses are particularly important in this context to supplement the critical examination of available facts.

Participation of Employees

It is important that the employer consider to what extent the investigation will require participation of its employees. Whether addressed in the employer's Equal Employment Opportunities ("EEO") policy, it is reasonably implied that all current employees have an obligation to support the employer's EEO policy, which includes good faith participation in an investigation process. Nonetheless, state law concerns and applicable labor agreements must be considered. In addition, the availability of witnesses and the severity of alleged conduct is a practical consideration that affects the decision.

Notice and Expectations

The FACT Act enables third-party investigators to investigate without first informing the accused. Proponents of the FCRA exclusion argue that notice to the accused affords the opportunity for destruction of evidence, intimidation of witnesses, or other acts of manipulation that might negatively impact the integrity of the investigation. In some situations, the likelihood of such manipulation of evidence supports an initially undisclosed investigation.

However, consider that, without reasonable justification, not providing notice to the accused might create unequal footing between the complainant and the accused, inasmuch as the complainant is fully informed of the process and maintains similar opportunity for manipulation of evidence and people.²⁹ To address this concern, at the inception of the investigation, all known participants (including the complainant, accused, and identifiable witnesses) should receive a similar written notice of the organization's expectation that they will participate in its investigative process.

Providing written notice allows the organization to communicate expectations regarding maintaining confidentiality, prohibiting retaliation, and telling the truth. Because employers strive to maintain confidentiality in a workplace investigation—but rarely achieve this—it often is most advantageous to inform known participants of the investigation process

and formally communicate expectations to support the investigation's integrity.

Additionally, communicating notice often affords the employer the opportunity to address other exigencies sooner rather than later, such as requests for an attorney or refusals to participate.³⁰ Moreover, contemporaneous notice to the accused helps demonstrate fairness and the investigator's intent of hearing all relevant sides of the story before reaching conclusions.

Conducting Interviews

A complaint investigation begins with a comprehensive interview of the complainant. To expedite this interview and allow the investigator to begin to assess the scope of the investigation, it is advisable to request, but not require, that the complainant provide a detailed written statement of his or her concerns. The complainant should be asked to provide identifying relevant dates, times, witnesses, and presentation of facts, instead of (or in support of) subjective characterizations. However, a complainant's refusal or failure to provide a written complaint at this

stage should not stop the investigation process from moving forward.

This interview should form the scope of the investigation and guide its course. Successful investigators establish and maintain rapport with participants to facilitate dialogue. The investigator should begin interviews by describing his or her purpose and the process of documentation involved. It also is advisable to reiterate the employer's expectations of the individual regarding confidentiality, retaliation, and truthful participation. Each witness should be permitted to tell his or her side of the story. Every witness also should be asked to clarify conflicting information, where necessary.

The investigator must be prepared to address criticism of his or her asserted objectivity in the investigation process, as well as speculative assertions of fact in interview dialogue. The investigator should close questioning by asking the witness if there is anything else the investigator needs to know about the issues.³¹ This final opportunity for a witness to convey information supports the goal of developing a comprehensive summary statement

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and is particularly important as applied to a complainant and an accused. Because the complainant and, by association, the accused, define the scope of the investigation, it is essential to obtain their complete statements as opposed to those of supporting witness with a more limited role.

Typically, an accused is not provided with a copy of the complainant's statement, because it often unnecessarily reveals information. However, in the interview, the accused should be presented with each substantive allegation against him or her to allow an appropriate opportunity for response. Some allegations require the disclosure of the source of complaint and some do not.³²

Documenting Interviews

Documenting interviews is crucial to an effective investigation. It is recommended that the interviewer obtain signed statements from each person interviewed. When a witness does not attest to the accuracy of a statement or the notes of the investigator by signature, there exists the possibility that he or she later will criticize the documentation as being inaccur-

rate or incomplete. In addition, documenting investigation interviews in this manner will not support an assertion of privilege, because the product is shared with, and likely manipulated by, the witness.

The Investigation Report

Creating an investigation report is strongly recommended as a means of detailing time frames and participants, describing the investigation process, and effectively synthesizing the relevant information around specific allegations. This presentation enables the investigator to interject credibility assessments specific to individual allegations.

Participants typically are not provided a copy of the investigation report. Nonetheless, investigators should pursue and represent information in such a way that no findings or subjective commentary within an investigation report should come as a surprise to a complainant or accused if the report eventually is disclosed. The investigation report should be designed as a tool to support the employer in making an informed decision toward effective remedial action. Therefore, the in-

vestigation report is provided only to the employer.

Whether recommendations belong in a workplace investigation report by a third-party investigator is debatable. Recommendations tied to legal analyses within a "privileged" investigation report support that assertion. However, the absence of recommendations in an investigation report that attempts to provide a comprehensive factual analysis best preserves the discretion of both legal counsel and the employer in determining appropriate corrective action.

Conclusion

Workplace investigations are fundamental to a preventive law approach to employment matters. The recent amendments to the FCRA enable employers to retain the services of attorneys or other third-party professionals to perform internal workplace investigations with greater confidence.

What constitutes an "appropriate" workplace investigation likely will continue to evolve as a result of the diverse scenarios presented in employment contro-

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versies and the critical importance of prompt corrective action. As established in this article, the efficacy of any workplace investigation depends on the investigator's ability to demonstrate objectivity in both form and function.

NOTES

1. See *Kolstadt v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (discussing circumstances in which punitive damages may be awarded under Title VII; finding that rule avoiding vicarious liability for employers accomplishes Title VII's objective of motivating employers to detect and deter violations).

2. See ABA Model Rules of Professional Conduct, Rule 3.7; Model Code of Professional Responsibility, Canon 5 DR 5-102(A), available at <http://www.abanet.org>.

3. Vail Letter (4/05/99), found at <http://www.ftc.gov/os/statutes/fcra/vail.htm>. The Vail Letter was a response by the Federal Trade Commission to a letter from Judi A. Vail regarding the application of the Fair Credit Reporting Act ("FCRA") to sexual harassment investigations.

4. 15 U.S.C. §§ 1681 *et seq.* (Pub.L. No. 104-208; Pub.L. No. 105-107; Pub.L. No. 105-347).

5. 15 U.S.C. §§ 1681-81x.

6. See U.S. Equal Employment Opportunity Commission ("EEOC"), "Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" (June 1999), found at <http://www.eeoc.gov/policy/docs/harassment.html>.

7. See record of May 4, 2000 statement of Chair of the EEOC, Ida Castro, before the U.S. House of Representatives Committee on Banking and Financial Services, available at <http://financialservices.house.gov/banking/5400cas.htm>; see also record of June 17, 2003, statement of Christopher P. Reynolds, partner of Morgan, Lewis & Bockius, on behalf of U.S. Chamber of Commerce, before the Financial Institution and Consumer Credit Subcommittee of the U.S. House of Representatives Financial Services Committee, available at <http://www.uschamber.com/press/testimony/030617reynolds.htm>.

8. Fair and Accurate Credit Transactions Act of 2003, Pub.L. No. 108-159, 117 Stat. 1952 (codified in subsections of 15 U.S.C. § 1681).

9. 16 U.S.C. § 1681a(x)(1)(B).

10. 16 U.S.C. § 1681(a)(x)(1)(D)(i), (ii), and (iv).

11. 16 U.S.C. § 1681a(x)(2).

12. *Id.* An accused subject to disciplinary action based at least in part on an investigation report provided by a third party is entitled to a "summary" of the "nature and substance" of

the report. *Id.* The ambiguity of these terms appears to necessitate clarifying interpretation or guidance in the future.

13. Federal courts consistently have rejected application of the FCRA to typical workplace investigations. See, e.g., *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144 (S.D.N.Y. 1999); *McIntyre v. Main St.*, 84 FEP Cases 1032 (D.C.N. Calif. 2000); *Johnson v. Fed. Express Corp.*, 147 F.Supp.2d 1268 (M.D. Ala. 2001); *Hartman v. Lisle Park Dist.*, 158 F.Supp.2d 869 (N.D. Ill. 2001).

14. See Archer, "Attorney-Client Privilege and Work Product Protections in an Internal Sexual Harassment Investigation," 30 *The Colorado Lawyer* 141 (Oct. 2001).

15. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

16. *Faragher*, *supra*, note 15.

17. *Ellerth*, *supra*, note 15.

18. *Faragher*, *supra*, note 15 at 806.

19. The Supreme Court has defined a tangible employment action ("TEA") as a significant change in employment status, such as a firing, failing to promote, or reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Ellerth*, *supra*, note 15 at 747. A TEA may not always involve economic harm, but in most cases, it inflicts direct economic harm. See also *Penn. State Police v. Suders*, 93 FEP 1473 (U.S. Sup. Ct. 2004) (constructive discharge does not necessarily constitute a tangible employment action affecting the availability of the affirmative defense).

20. *Faragher*, *supra*, note 15.

21. *Id.* at 784-86.

22. See *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997); see also *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 170-71 (10th Cir. 1996).

23. This is especially true where the cause of action relates to supervisor-subordinate harassment in which the employer attempts to avoid vicarious liability by asserting the affirmative defense outlined in *Faragher* and *Ellerth*, *supra*, note 15.

24. See ABA Model Rules of Professional Responsibility, Rule 3.7, Lawyer as Witness, available at <http://www.abanet.org>.

25. *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal.4th 93 (Cal. 1998); *Silva v. Lucky Stores, Inc.*, 65 Cal.App.4th 256 (Cal.App. 1998).

26. There may be a situation where an employee utilizes several of the hot-button words in employment law, such as "hostile work environment" or "discrimination," but it becomes evident that no legally-protected characteristic is involved. At a minimum, the employee

should be educated regarding these terms in their legal context to avoid misinterpretation of the employer's response (or lack thereof). The concern is that the employee would later fail to use the employer's Equal Employment Opportunities ("EEO") complaint procedures and that, in consideration of all the circumstances, a court would refuse to apply the affirmative defense otherwise applicable under the facts.

27. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

28. *McDonnell Douglas*, *supra*, note 27 at 802-04.

29. A similar, but distinct concern arises from an investigation practice of using an investigator of the same gender as the complaining employee. See the discussion in "Selecting the Investigator," *above*.

30. On June 9, 2004, in *IBM Corp.*, 341 NLRB No. 148, the National Labor Relations Board ("Board") overturned its decision in *NLRB v. Epilepsy Found. of Northeast Ohio*, 331 NLRB 676 (2000), where the Board had previously found that an employee has the right under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), to have a co-worker present when called to an investigatory meeting with management that could result in disciplinary action. The *IBM Corp.* decision concludes that, on balance, the right of an employee to have representation at an investigatory interview is outweighed by the employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations. *IBM Corp.*, *id.* Whether an important participant requests a co-worker or other person's presence at an investigation interview (including that participant's attorney), counsel should consider negotiating some resolution of this concern to facilitate moving the investigation process forward.

31. Although it is popularly suggested to close questioning with a complainant by asking what action he or she hopes to see taken by management toward resolving the issue, this query is rarely appropriately qualified to preserve management's discretion. It often supports a complainant's inference that the employer must do more than take action reasonably calculated to stop and prevent inappropriate conduct.

32. For example, where the complainant, accused, and at least one other are witnesses to alleged conduct in controversy, it is not necessary to disclose the identity of the complainant to the accused. However, where only a complainant and accused are involved, it is necessary to disclose the complainant's identity to establish conflicting accounts and move to credibility assessment. ■

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On November 4, 2004, the Colorado Bar Association sponsored the Second Annual Legislative Symposium on Civil Justice in Colorado. The program provided Colorado legislators with objective information regarding several aspects of the civil justice system. Kutak Rock LLP hosted the program at its downtown Denver offices. Speakers covered such topics as the structure and workload of the court system, contingent fee contracts, and other attorney fee and damages issues. Colorado Supreme Court Justice Rebecca Kourlis’s luncheon speech was entitled “Constitutional Tensions Among the Three Branches of Government.” The photos below were taken at the event.



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(1) *Left to right*: Symposium Presenter Jack Donley with Rep. Lynn Hefley and Rep. Terrance Carroll; (2) CBA President Steve Briggs; (3) Jack Donley; (4) Colorado Supreme Court Justice Rebecca Kourlis; (5) Symposium Presenter Patricia Dean