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MCLE SELF-STUDY:

ATTORNEYS CONDUCTING IMPARTIAL WORKPLACE INVESTIGATIONS: RECLAIMING THE INDEPENDENT LAWYER ROLE

PART I

INTRODUCTION: A NEW PRACTICE AREA

Workplace investigations have become a substantial and distinct practice area for California employment law attorneys. Employers are mandated to and risk liability if they fail to conduct impartial investigations of discrimination and harassment.[1]

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As a result, many employment lawyers have fled the grind of litigation to embrace a new role as independent workplace investigators.

Skeptics in the plaintiff's bar and investigation community contend that attorneys cannot be truly impartial, because they conduct independent investigations on behalf of employers in an attorney-client relationship. Critics claim that an attorney *cannot* conduct an impartial investigation on behalf of a client, because the Rules of Professional Conduct impose a duty of loyalty.[2] They also allege that attorneys *in fact* do not conduct impartial investigations, because the pull of future business from the client undermines their neutrality. Finally, some question whether investigations under the attorney-client privilege are incompatible with impartiality.

We conclude that outside attorney-investigators can and do conduct independent investigations, under the right circumstance and when free from conflicts of interest. The attorney-client privilege does not vitiate lawyer independence. Finally, this new practice area should be embraced as an exercise in independent judgment, which has motivated many to join our profession in the first place.

IMPARTIAL INVESTIGATIONS AND THE NEED FOR EXTERNAL INVESTIGATORS

California laws requires employers to conduct "impartial" or "objective" investigations of workplace discrimination and harassment.[3] In-house staff are not always the right choice as investigators, because they often lack authority and the real or perceived impartiality to conduct a credible investigation. This gives rise to the need for external investigators, who are sufficiently "independent" of the organization.[4]

IMPARTIALITY VERSUS INDEPENDENCE

Although employment laws and guidance refer to "impartial" or "objective" investigations,[5] we focus this article on "independent" investigations. These are related but distinct notions, with "independence" as one of several factors affecting impartiality. An "independent" investigation is where the lawyer exercises her independent professional judgment in conducting an investigation, and remains uninfluenced by her relationship with the company or counsel who retain her. In contrast, an "impartial" investigation is potentially a much broader concept, encompassing not only "independence," but also freedom from a wide array of other biases (e.g., unconscious racial bias, confirmation bias, anchoring bias, etc.).[6]

BIFURCATED STRUCTURE OF WORKPLACE INVESTIGATIONS

California workplace investigations conducted by attorneys are usually fact investigations. The attorney investigator does not render traditional legal advice or recommendations, but is engaged strictly to conduct an objective inquiry to produce factual findings for the employer.[7] To safeguard the neutrality of the investigation, the advice-giving function is normally performed by the employer's regular counsel.[8] Although the retainer agreement limits the attorney-investigator's role to that of conducting an impartial factual investigation, she nonetheless provides a legal service in an attorney-client relationship.[9]

Critics contend that if the attorney is "representing" the client, she cannot be "impartial," because her professional duty of loyalty precludes it. This criticism is based on a misunderstanding of how "limited scope representation" defines the lawyer's ethical role in workplace investigations.

MISCONCEPTIONS ABOUT THE VARIOUS ROLES LAWYERS MAY PLAY FOR THEIR CLIENTS

Critics premise their complaint on a mistaken belief that functioning as an attorney necessarily requires engaging in zealous advocacy on behalf of the client. This is rooted in a larger misconception of lawyering, one which "treats . . . advocacy as the defining metaphor for the profession," and which improperly conflates the various roles attorneys can, should, and do play in the American legal system.[10]

The ABA Model Rules of Professional Conduct identify the various roles attorneys play for clients apart from advocacy, including advisor, negotiator, and fact-finder.[11] Each of these roles has distinct ethical requirements.[12] Yet the "adversarial-advocate" role "continues to dominate lawyers' public discourse about ethics." This view is "severely deficient" and does not accurately depict the lawyer's ethical duties in other important roles (i.e., as advisor or evaluator).[13]

Indeed, the advocacy role pertains only in settings where a judge and an adversary operate as check and balance to the dangers of zealous partisanship. In other settings, however a lawyer may be *required* to be non-partisan. Retention as an independent investigator is one of those settings.[14]

LIMITED SCOPE REPRESENTATION ALLOWS ATTORNEYS TO ASSUME THE ROLE OF IMPARTIAL FACT-FINDERS

Legal developments in California have given attorneys new tools to explicitly delineate their roles. Attorneys are permitted to limit the scope of their services, so long as the scope is reasonable and the services can be performed

competently.[15] This form of legal service is known as "task-based" or "limited- scope" legal services and is an increasingly common way of serving the needs of employers and other clients in California.[16]

Over the past decade, attorneys engaged in workplace investigations have utilized limited scope engagements to explicitly reclaim an independent and objective lawyer role. They have crafted engagement agreements with their clients that clearly specify their retention as impartial investigators, and that explicitly disclaim any role of zealous advocacy.[17] Limited scope retention is "an appropriate form of task-based representation to comply with employment laws."[18]

Thus, the duty of loyalty does not prevent a lawyer from conducting an objective and impartial investigation.[19] If the lawyer has been retained for and is capable of performing that function, she satisfies her duty of loyalty by using her expertise to conduct an unbiased investigation.[20] Far from *precluding* impartiality, the Rules of Conduct *require* it.

THE EMPIRICAL QUESTION: CAN ATTORNEY INVESTIGATORS BE INDEPENDENT?

Aside from an important recent study in the context of financial fraud investigations conducted by external investigators,[21] we are not aware of empirical research on this question. Based on our personal experience, we believe that outside attorney-investigators can and do conduct investigations independent of inappropriate influence by management, under the right circumstances and when free from conflicts of interest. Moreover, scholarship in the field has identified factors conducive to the exercise of lawyer independence as discussed below.

IS THE ATTORNEY-INVESTIGATOR FREE FROM CONFLICTS OF INTEREST?

To conduct an independent investigation, the investigator must be free from conflicts of interest. These include conflicts that may arise from: previous representation of individual personnel (i.e., executives or employees); law partners having been parties to the events under investigation; as well as an investigator seeking unrelated business from a client.[22]

Conflicts similarly may arise from attempting to play conflicting roles (e.g., acting as investigatory counsel and defense counsel).[23] Likewise, a company's regular outside counsel is not positioned to conduct an independent investigation, because: the desire to maintain a future business relationship undermines independence; the investigation could implicate previous advice given; and the wrongdoing to be examined could affect relationships with senior management or executives.[24] In addition, the conflicting role of investigator and advisor/litigator implicates ethical rules on the lawyer as witness,[25] and creates the potential for complex privilege issues.

DOES THE INVESTIGATOR HAVE THE RIGHT KNOWLEDGE BASE?

The investigator should have adequate training in the substantive law at issue and investigative skills. The right knowledge base also includes the standards by which investigations are judged: structuring an investigation so as to safeguard independence; training in unconscious bias and methods to counter it;[26] and an understanding of the investigator's proper ethical role. The grounding in ethics should include a clear understanding of who the client is—the organization (or board or audit committee)—*not* the individual members of management.[27] An investigator who is not solid in the above knowledge base is more susceptible to improper influence from client constituents.[28]

DOES THE INVESTIGATOR UNDERSTAND HER ROLE AND HAVE THE RIGHT PERSONAL QUALITIES?

The investigator should see herself as an independent professional retained to render her candid and neutral assessment to the client, rather than retained to protect management, or to whitewash organizational wrongdoing.[29] The attorney-investigator should be someone who sees independence as "an admirable part of her professional role."[30] Other personal qualities include a high degree of integrity and an ability to have an open mind.

IS THE INVESTIGATOR PART OF A COMMUNITY OF PRACTITIONERS THAT SUPPORTS THE ABOVE NORMS AND STANDARDS?

"The first requisite of independence is that the lawyer have some source of norms, rules, or conventions to refer to in resisting client pressures."[31] In addition to substantive legal rules, discussed below, "informal norms and conventions are sometimes more powerful than legal ones."[32] The creation of the Association of Workplace Investigators (AWI) in 2009 has been a significant development in the field of workplace investigations—one which holds promise to bolster the ability of attorney-investigators to exercise independence.[33] AWI's mission is "to promote and enhance the quality of impartial workplace investigations."[34] It executes this mission through offering training and educational programs on impartial workplace investigations; publishing Guiding Principles for Conducting Workplace Investigations and the AWI Journal, a peer-reviewed professional journal; and offering other benefits, such as a members' list-serv and "Local Circles," where colleagues can meet to share questions and concerns.[35] Because many workplace investigators are sole practitioners, AWI plays an especially important role in providing them

with colleagues to whom they can turn for ethical and other advice. Indeed, one of the factors cited as militating against lawyer independence in the world of sole practitioners is the "solitude" of the lawyer (i.e., the absence of colleagues to turn to for needed expertise).[36]

DOES THE SYSTEM POSSESS MECHANISMS OF ACCOUNTABILITY?

"Institutional conditions" are a prerequisite to the exercise of lawyer independence. These include "strong norms, strongly institutionalized in laws, ethics, codes, liability rules, and practice standards."[37] These conditions are manifested in professional negligence rules; the substantive liability rules that apply in discrimination and harassment cases; and the ethics rules that pertain to the independent attorney investigator. In addition, "the most potent" influence on independence is "the client's need to impress or reassure third parties of the soundness or legitimacy of its conduct."[38]

As independent investigators, we are mindful of our contractual and fiduciary obligation to the organization to conduct an impartial investigation. If we fail to exercise the appropriate standard of care, both we and the client could face significant repercussions:

- A biased or sub-standard investigation could cause a client to fail to remediate on-going harassment, thereby perpetuating harm and creating liability, as well as causing other long-term problems for the organization: undermining the company's compliance function, damaging employee morale, and hurting credibility within the organization and larger community. Conversely, employers can reduce their exposure if they properly investigate (and remediate) allegations of discrimination and harassment.
- If the matter goes to litigation and the investigation is offered in defense, the investigation and investigator will be subjected to rigorous, adversarial scrutiny, and will need to answer to a judge or jury. A finding that the investigation was a sham or conducted in bad faith could subject the organization to damages, including punitive damages.[39]
- Likewise, the investigator could be sued for malpractice by the client.[40]
- Finally, the professional reputation of the investigator could be tarnished, leading those in need of independent investigations in the future not to retain them.[41]
- Additionally, in some cases, the court of public opinion may provide accountability, with organizations motivated to restore their credibility in the community through a fair and credible investigation process.[42]

DOES THE CLIENT WISH TO COMPLY WITH THE LAW? [43]

Independent investigations are more likely to occur when clients (and outside counsel) understand and desire an independent investigation.[44] A common criticism of independent investigators is that they simply "serve the client's interest."

However, this criticism is based on some false assumptions. First, "it confuses the managers . . . with the lawyer's actual client, the corporate entity."[45] Second, it identifies the client's purported "interest" with the narrowest, most short-term, and anti-social vision of that concept (i.e., covering up rather than addressing a problem in order to escape consequences in the near-term). However, many organizations recognize that a company's true long-term interests lie in conduct that upholds the legal system and its requirements. Third, it relies on a stereotype of the company decisionmaker as someone who desires a specific pre-determined outcome, and who tries to manipulate the investigation accordingly. In our experience, however, this scenario is the exception, rather than the rule—at least among the organizations we have been called upon to investigate. Rather, many decisionmakers truly desire a thorough and independent investigation to find out what happened.

This is not to deny the existence of unenlightened and even malfeasant heads of companies. Therefore, what might be usefully added to the workplace investigations field is more focused training from professional associations, such as AWI, on the:

- concept and definition of independence;
- conflicts of interest that undermine independence;
- ways constituents of an organization may intentionally or inadvertently subvert independence;
- strategies the lawyer can employ, both to educate clients and to guard against compromises; and
- methods to diminish the potential for unconscious bias in favor of management.

PART II: INDEPENDENT INVESTIGATIONS AND THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is sometimes raised as a factor that can undermine independence.[46] The contention is that, if an investigation was truly independent, it would be non-privileged and accessible by the complainant. If an employer uses an investigation as a defense in litigation, it is well settled that the employer cannot maintain the privilege.[47]

However, plaintiff's attorneys may contend it is not fair for an employer to choose to assert the privilege—likely when the facts gathered would be adverse to the employer's interests—but waive the privilege when it is to their advantage. Rather, some contend the complaining employee should have full access to the information gathered regardless of whether the investigation is used as a defense in actual or potential litigation.

We believe this argument is based on the false premise that a complaint brought by the employee and the employer who has initiated an investigation of a complaint are similarly situated, when they are not. Centered in the litigation model, plaintiff's attorneys view the investigation as narrowly relevant only to litigation. An independent investigation is not done only in anticipation of litigation, but rather for the employer to prevent and respond to harassment and discrimination, and to take steps to fix any problems uncovered, whether or not litigation ensues. If an investigation could not be kept private, it would be a disincentive to uncovering all the facts, regardless of how private or potentially harmful. It also could dissuade future claimants and witnesses from coming forward.

Moreover, an employer has a duty to **all** of its employees, not just the individual who brings the complaint. This duty is often served by maintaining confidentiality of the investigation. Plaintiff's attorneys, on the other hand, are focused on what is best for their client in litigation, which includes maximizing a damage award. While attorneys for employers also focus on minimizing damages, they are also duty-bound to protect other employees in the workplace. This includes safeguarding employee privacy rights,[48] protecting witnesses from retaliation,[49] considering the reputational harms arising from unjustified accusations, and guarding against the very real risk and increasing threat of defamation claims (to witnesses, investigator, and employer).[50]

A proper Investigation has the potential to unearth all kinds of sensitive information, including information that is not relevant to the complaint. Because investigators cannot know in advance what information is relevant, they must be given a wide berth to chase down various avenues of inquiry, without concern as to where this may lead. The attorney-client privilege allows an employer to give an investigator wide latitude to review documents and interview witnesses without worrying that communications that are best left private become public. This, in turn, allows for a greater possibility of conducting a truly thorough and independent investigation. Indeed, this is the purpose behind the attorney-client privilege in the first place "to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice."[51]

If employee witnesses are not afforded confidentiality, and facts uncovered that are not directly relevant to the complaint cannot be kept private, investigations may have less opportunity for true independence. This is true both because the employer may be more inclined to constrain or "stage manage" the investigation; and because employee candor may be chilled by the knowledge that whatever they say will necessarily become public.[52]

Although having full access to an employer's investigation might help plaintiff's attorneys better value their cases prior to litigation, the broader public policy considerations outweigh that interest. Were the rules otherwise, any internal complaint, no matter how baseless, could compel an organization to hand over sensitive employee and institutional data—including non-germane information—to individuals who have no duties to the larger whole. This has the potential to hinder, rather than further, the enforcement of equality laws and staff morale in the work place. Moreover, should a plaintiff's claim proceed to litigation, the attorney-client privilege does not prevent access to the pertinent underlying *facts* of a case. Rather, U.S. civil discovery procedures are among the most demanding in the world in requiring employers to turn over relevant evidence to employee litigants.[53]

CONCLUSION

The dominant ethic of the American legal profession has long been one of "partisan advocacy."[54] However, this view fundamentally misconceives the role of the lawyer outside of the adversarial setting. Nothing in the professional rules of conduct prevents lawyers from conducting impartial investigations, if that is the role for which they have been retained. We do not claim that attorneys always live up to this ideal. However, under the right circumstances, attorneys can, do, and should embrace their role as independent investigators. It is a vital role for society, and lawyers are well-suited to the task. It is high time for attorneys to reclaim independence as a valued part of their professional identities.

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1. Under California law, employers must investigate claims of harassment, discrimination, and retaliation. This obligation arises from the employer's affirmative duty under the Fair Employment and Housing Act (FEHA) to take all reasonable steps to prevent harassment and discrimination from occurring; and employers may limit their potential damages if they are able to show that they responded effectively to complaints. Cal. Gov't Code § 12940(k) (2022); Cal. Code Regs., tit. 2, § 11023(a), (b)(4)(C) (2022); *State Dep't of Health Servs. v. Superior Ct.*, 31 Cal. 4th 1026, 1045 (2003). Similarly, under federal law, an employer may defend against certain claims by showing that it conducted an adequate investigation. The *Faragher-Ellerth* affirmative defense allows employers to avoid liability for hostile work environment claims by proving they (1) exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

2. Cal. Rules Prof. Conduct, R. 1.7, cmt 1.

3. *Supra*, n. 1.

4 *See* Kirsten Branigan, Carole Nowicki, Lori Buza, & Jessica Allen, *Conducting Effective Independent Workplace Investigations in a Post-#MeToo Era*, 74 Disp. Resolution J. 85, 86 (2019) ("Utilizing outside, independent investigators is beneficial to maintaining the objectivity of the investigation."); Ashley Lattal, *The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator*," 24 J. L. & Pol'y 411, 464 (2016), available at https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1510&context=jlp (last visited Aug. 15, 2022). ("Ultimately, where there is any possibility of bias, a company would be best served by retaining an external investigator who has no stake in the outcome.")

5. According to the California Department of Fair Employment and Housing (DFEH), the investigation must be "impartial" and based on "objective weighing of the evidence collected." *Harassment Prevention Guide*, at 8, (DFEH 2017) available at https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide-1.pdf (last visited Aug. 15, 2022). The Equal Employment Opportunity Commission (EEOC) requires an investigation to be "prompt, thorough, and impartial." *Vicarious Liability for Unlawful Harassment by Supervisors*, (EEOC 1998), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors#:~:text=An%20employer%20is%20subject%20to,had%20supervisory%20authority%20over%20the (last visited Aug. 15, 2022). *See also Guiding Principles for Conducting Workplace Investigations* (AWI 2020); *Workplace Harassment Guide for California Employers*, (DFEH 2016), available at https://www.wagenerlaw.com/pdf/DFEH_Workplace_Harassment_Guide.pdf (last visited Aug. 15, 2022).

6. While impartiality "resists easy definition," it generally means "free from bias." *See generally* Ashley Lattal, *supra*, n. 4, at 421-422. *See also* Amy Oppenheimer, *The Psychology of Bias: Understanding and Eliminating Bias in Investigations (Parts I and II)*, 2 Cal. Ass'n of Workplace Investigators Q1 (2011). In turn, "bias" is an encompassing concept which includes any number of unconscious or other cognitive processes that may distort the evaluation of evidence by actors in the legal system. Such biases include hindsight bias, outcome bias, belief perseverance, confirmation bias, anchoring effects, tunnel vision, and more. Neil Bewer & Amy Bradfield Douglass (eds.), Psych. Science and the Law, at 30 (2019). "Bias" may also include unconscious bias based on categories such as race and gender. *Id.*, at XX. Judges in our system may also fall prey to the same cognitive biases that affect lay people. *Id.* at 400. *See also* Tracy A. Pearson, "After a Neutral and Impartial Investigation . . .": Implicit Bias in Internal Workplace Investigations, Dissertation, Rossier School of Education, University of Southern California (August 2021), available at https://www.proquest.com/openview/a35986837bb473f3a238837bde954473/1?cbl=18750&diss=y&pq-origsite=gscholar (last visited Aug. 15, 2022).

7. *Harassment Prevention Guide*, *Supra*, n. 5; *see* Lindsay E. Harris & Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, 25 Cal. Lab. & Emp. L. Rev. 4, 1-7 (2011), available at https://cdn.ymaws.

com/www.awi.org/resource/collection/6FBE4315-CBBB-443D-B005-8B0F2329CB57/Module%2011%20-%20Attorneys%20Conducting%20Workplace%20Inv.pdf (last visited Aug. 15, 2022).

8. Workplace investigations are bifurcated in this manner to avoid the types of conflicts of interest that could arise when an employer's regular counsel purports to conduct an independent investigation on behalf of a client for whom they also provide advice and advocacy, or where they receive significant fees for services unrelated to compliance or investigative functions. *See* Peter G. Peterson, *Com. on Public Trust and Private Enterprise: A Personal Postscript*, at 12 (2003) available at https://www.conference-board.org/pdf_free/SR-03-04-ES-postscript.pdf (last visited Aug. 15, 2022) (concluding that "independent" investigations by an entities' regular law firm, and combining auditing and advocacy roles, present conflicts of interest which undermine good corporate governance, which requires truly independent, outside professionals acting in the corporation's best interest). Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 36 Conn. L. Rev. 1185, 1187 (2002-2003), available at https://www.semanticscholar.org/paper/A-New-Role-for-Lawyers-The-Corporate-Counselor-Gordon/88b6d33d7830a9e3bc8ff908bacc744f4d2db82d#paper-header (last visited Aug. 15, 2022) (discussing regular law firm's conflict of interest in conducting review of Enron deals it had previously signed off on).

9. In California, external investigators must either possess a private investigator license, or fall into one of several statutory exemptions. One of these exemptions permits attorneys to conduct investigations, but only if they do so in their attorney capacity, namely, if they are performing "legal services" within the context of an attorney-client relationship. Cal. Bus. & Prof. Code § 7522; Lindsay E. Harris & Mark L. Tuft, *supra*, n. 7, at 1-7.

10. *See generally* Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 Case W. Res. L. Rev. 86, 137 (2010).

11. "As a representative of clients, a lawyer performs various functions. ¶As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. ¶As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. ¶As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. ¶As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or others." Model Rules of Prof'l Conduct Preamble ¶ 2, R. 2.1 (ABA 2020).

12. Kevin H. Michels, *supra*, n. 10, 137. For example, the advisor is bound by different ethical standards than the litigator: ABA Model Rules of Professional Conduct R. 2.1 ("Advisor") mandates that a lawyer acting in an "advisor" capacity "shall exercise independent professional judgment and render candid advice." The Comments to the rule explain that in rendering such advice, it is "proper to refer to relevant moral and ethical considerations" (cmt. 2) and that the lawyer "shall not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client" (cmt. 3). In other words, far from serving as the proverbial "hired gun," the lawyer as advisor is duty-bound to maintain "sufficient detachment from his client's interests" so as not to be "unduly influenced by the client's desire for a favorable answer." Kevin H. Michels, *supra*, n. 10. 100.

13. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1, 20 (1988); *see also* Robert W. Gordon, *A New Role For Lawyers*, *supra*, n. 8, at 1205. ("In the trial setting, aggressive advocacy (at least in theory) supposedly operates to bring out the truth, by testing one-sided proof and argument against counter-proof and counter-argument. . . . Outside of such settings, one-sided advocacy is more likely to help parties overstep the line to violate the law, and to do so in such ways as are likely to evade detection and sanction, and thus frustrate the purposes of law and regulation.").

14. See Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 Fordham L. Rev. 639, 645-46, n.24 (1999) (listing situations in which lawyers are required to be impartial).

15. See Paul W. Vapneck, Cal. Practice Guide: Prof'l Responsibility, ¶ 1:333.5 (Rutter Group 1997); Model Rules of Prof'l Conduct R. 1.2(c) (ABA 2020).

16. The California State Bar has promoted the use of "limited scope legal assistance," which it defines as a "relationship between an attorney and a person seeking legal services in which it is agreed that the scope of the legal service will be limited to the defined tasks that the person asks the attorney to perform. *Attachment A: Statement in Support of Limited Scope Legal Assistance (Unbundling) Resolution* (State Bar of Cal. May 15, 2009), available at https://www.calbar.ca.gov/portals/0/documents/publiccomment/2009/Limited-Scope-Statement.pdf (last visited Aug. 15, 2022).

17. Further, these concepts are part of the Association of Workplace Investigators' (AWI) legal ethics curriculum, as well as in its webinars and trainings on how independent attorney investigators should define their ethical role in investigative retention agreements.

18. Lindsay E. Harris & Mark L. Tuft, *supra*, n. 7.

19. That is, the lawyer possesses no interests or responsibilities that undermine achieving that objective. *See* Model Rules of Pro. Conduct R. 1.2(c) (ABA 2020); Model Rules of Pro. Conduct R. 1.7(a)(2) (ABA 2020).

20. Indeed, many attorney-investigators specify in their contracts with clients that they are being engaged for the specific purpose of conducting an impartial investigation,

and that the client agrees that the attorney fulfills her duty of loyalty by so doing.

21. Rebecca Files & Michelle Liu, *Unraveling Financial Fraud: The Role of the Board of Directors and External Advisors in Conducting Independent Internal Investigations*, 1 (2022) ("We find that firms whose internal investigations are led by independent teams are more likely to retain external advisers, have a higher likelihood of chief executive officer (CEO) turnover, and face a lower likelihood of SEC enforcement action than do firms whose investigations are led by non-independent teams. . . . These results also suggest that appointing independent groups to lead internal investigations protects the firm, at the expense of the CEO, following accounting fraud.")

22. *See*, *e.g.*, Peter G. Peterson, *supra*, n. 8, 12 (Conflicts created where law firms and auditors are awarded largest portion of their fees by management for services unrelated to their monitoring functions.)

23. Amer. College of Trial Lawyers Fed. Criminal Proc. Com., *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, at 24 (2020), available at https://www.actl.com/docs/default-source/default-document-library/newsroom/reprint_federalcriminalprocedures_conducting_internal_investigations-29oct08 (last visited Aug. 15, 2022); *see also* Nat'l Ass'n of College and University Attorneys, *Ethics and Internal Investigations*, 2 (2020) ("Nor should the law firm that conducts the independent investigation later represent the organization in litigation on the subject of the investigation.")

24. *See* William C. Wagner & Trent J. Sandifur, *Legal Malpractice Claims Resulting from Internal Investigations*, XX (volume) For the Defense 39, 41 (2013); Douglas R. Richmond, *Navigating the Lawyering Minefield of Internal Investigations*, 63 Vill. L. Rev. 617, 688 (2018), available at https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3383&context=vlr (last visited Aug. 5, 2022).

25. Cal. Rules Prof. Conduct R. 3.7 (Lawyer as Witness) (2021).

26. Regarding unconscious biases, "workplace investigators should understand the potentially detrimental impact such biases can have at each stage of the process and make conscious efforts to reduce the impact." Ashley Lattal, *supra*, n. 4, at 414. *See also* Amy Oppenheimer, *supra*, n. 6.

27. *See generally* Robert W. Gordon, *A New Role For Lawyers*, *supra*, n. 10, at 1205 (2003) ("The advocacy ideology regularly and persistently confuses the managers, who ask for lawyers' advice, with the lawyers' actual client, the corporate entity.")

28. *See*, *e.g.*, Milton C Regan Jr., Zachary B Hutchinson & Juliet R Aiken, *Lawyer Independence in Context: Lessons from Four Practice Settings*, 29 Geo. J. Legal Ethics 153, 163 (2016) (operating outside one's area of expertise may jeopardize the lawyer's ability to be independent). Conversely, where the lawyer possesses authority deriving from her expertise and "special knowledge," her ability to exercise independence increases. Robert W. Gordon, *The Independence of Lawyers*, n. 16, at 37.

29. Robert W. Gordon, *The Independence of Lawyers*, *supra*, n. 13. ("Before they can assert positions independent from their clients, lawyers have to want to do so;" arguing that attitude and motivation of lawyer is necessary but not sufficient condition of independence.)

30. *Id.*

31. *Id.*

32. *Id.*

33. The authors both formerly served on the AWI Board of Directors. Ms. Oppenheimer founded the organization.

34. *About AWI*, Ass'n of Workplace Investigators, available at https://www.awi.org/page/about_AWI (last visited Jul. 6, 2022).

35. *Id.* AWI currently has more than 1400 members internationally.

36. *See*, *e.g.*, Milton C. Regan Jr., Zachary B. Hutchinson & Juliet R. Aiken, *Lawyer Independence in Context: Lessons from Four Practice Settings*, 29 Geo. J. Legal Ethics 153, 166 (2016) (solo lawyers may lack colleagues who can advise them on ethical concerns, potentially "placing them at risk of acting improperly on behalf of clients with requests.")

37. Robert W. Gordon, *The Independence of Lawyers*, *supra*, n. 13, at XX.

38. *Id.*, at 37. In the white collar investigations context, these constraints are especially acute, as companies that desire leniency from third-party regulators such as the SEC and the Justice Department must meet the standards for independent investigations articulated by those agencies. *See Evaluation of Corporate Compliance Programs*, at 7 (USDOJ 2020), available at https://www.justice.gov/criminal-fraud/page/file/937501/download (last visited Aug. 15, 2022) ("What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and properly documented?"). *See also Rep. of Investigation Pursuant to Section 21(a) of the Sec. Exch. Act of 1934 and Comm'n Statement on the Relationship of Coop. to Agency Enf't Decisions*, *Exchange Act*, No. 44,969, 76 SEC 220 (2001) (listing independence of investigations as among criteria they will consider "in determining whether and how much to credit self-policing, self-reporting, remediation and cooperation. . . .")

39. *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91, 108 (2009) (Court cited employer's "sham" investigation as among justifications to reinstate one million dollar punitive damages award); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (7th Cir. 2001) (reversing trial court's grant of summary judgment on punitive damages based on evidence

that employer conducted a "sham" investigation designed to discredit plaintiff and protect company managers.).

40. See *Kirschner v. K & L Gates LLP*, 46 A.3d 737 (Pa. Super. Ct. 2012) (malpractice suit against law firm allowed to proceed where firm's deficient investigation failed to uncover fraud, where firm inappropriately allowed suspected wrongdoer to influence investigation, and where investigation report misled independent directors to believe no improper conduct had occurred); see also Purva Patel, *City of San Diego Files Lawsuit Against Vinson & Elkins*, Houston Chron. (July 29, 2006), available at https://www.chron.com/business/article/City-of-San-Diego-files-lawsuit-against-Vinson-1892021.php (last visited Aug. 15, 2022) (City sued law firm for professional negligence and breach of contract and fiduciary duty for aligning itself with accused city officials and failing to conduct adequate and independent investigation into their alleged financial mismanagement); *see also* Douglas R. Richmond, *supra*, n. 24, at 620 (lawyers who conduct internal investigations face "very real risks" of malpractice if they negligently conduct investigations).

41. *See, e.g.*, Vivia Chen, *Could the Cuomo Investigation Taint Davis Polk?*, Bloomberg L. Bus. & Prac. (May 27, 2021), available at https://news.bloomberglaw.com/business-and-practice/could-the-cuomo-investigation-taint-davis-polk (last visited Aug. 15, 2022) (arguing that short-term benefit of lucrative investigation not worth long-term risk to reputation, where Davis Polk Firm had potential conflicts of interest in undertaking investigation) available at https://news.bloomberglaw.com/business-and-practice/could-the-cuomo-investigation-taint-davis-polk (last visited Aug. 15, 2022). *See also supra*, Robert W. Gordon, *The Independence of Lawyers*, *supra*, n. 13, at 38. ("When called upon to certify to . . .outsiders the legality and respectability of a company's past or future conduct, one of the assets lawyers (or their firms) can bring is a reputation for integrity and independence.").

42. *See, e.g.*, Robert W. Gordon, *The Independence of Lawyers*, *supra*, n. 13, at 37 ("News media reporting allegations of corporate scandal or malfeasance want proof that the company is not engaged in a cover-up.").

43. *Id.* at 36 (A factor which facilitates lawyer independence in representation is "receptive clients, those with strategically placed officers who can be led toward creative voluntary compliance with the spirit of regulatory regimes rather than of formal perfunctory compliance or intense scorched-earth guerrilla resistance.").

44. *Id.* at 25 ("[Many] business executives want their lawyers to . . . serve as the 'corporate conscience,' to monitor middle-managers tempted to cut legal corners to meet profit targets, to follow the spirit as well as the letter of the law in order to preserve employee morale as well as a public image of civic leadership.").

45. *Id.*

46. The fact that an investigation is conducted by an attorney does not, in and of itself, mean that the investigation will necessarily be privileged. *See generally* Lindsay E. Harris & Mark L. Tuft, *supra*, n. 7, at 1.

47. See *Wellpoint Health Networks, Inc. v. Superior Ct.*, 59 Cal. App. 4th 110, 128 (1997).

48. The right of privacy in the California Constitution permits employees to sue employers for violations of the employee's reasonable expectation of privacy. *See, e.g.*, Branigan Robertson, *Employee Privacy in the Workplace*, available at https://brobertsonlaw.com/practice-areas/privacy/ (last visited July 10, 2022).

49. Employers have a duty to protect complainants and witnesses who cooperate in investigations from retaliation. Cal. Gov't Code § 12940(h); *Workplace Harassment Guide for California Employers*, *supra*, n. 5, at 8.

50. See, e.g., *Pearce v. E.F. Hutton Grp.*, 664 F. Supp. 1490 (D.D.C. 1987) (manager terminated for misconduct sued employer and investigating attorney for defamation based on company's disclosure of investigation report at press conference.). *See also* Douglas R. Richmond, *supra*, n. 24, at 687 (investigations pose significant risk of defamation claims and therefore lawyers "should not publish reports they prepare beyond delivering them to the client, or, in appropriate cases, sharing them with the government.").

51. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.") . Of course, this argument assumes "we can count on lawyers to give good advice on compliance (and on clients to take that advice)." In other words, it assumes the lawyer will give sound advice based on independent, professional judgment. Kevin H. Michels, *supra*, n. 10, 101.

52. *See* Nancy Bornn, *Breaking Through: How Investigators Balance the Competing Priorities of Claimant and Employer Counsel, Part 3*, 10 Ass'n of Workplace Investigators J. 1, 15 (2019) (Employer counsel in survey said they would not prospectively waive privilege: "A big reason for the attorney-client privilege is to prevent the chilling effect in this context. It would have too many repercussions throughout the entire investigation and the way the investigation is conducted if you don't have some sort of protection over it."). *See also CRD Response to Public Record Act Requests*, at 1 (DFEH 2018), available at https://calcivilrights.ca.gov/prarequests/ (last visted Aug. 5, 2022) (DFEH may withhold records from public disclosure in order to "'prevent a 'chilling' effect on people who are victims of discrimination," in order to safeguard the privacy rights of complainants who "provide sensitive, personal and confidential information," and of respondents and third parties who submit confidential information; and to prevent interference with the DFEH's ability to "perform its statutory obligation to investigate, conciliate, mediate, and prosecute complaints.").

53. *See*, *e.g.*, Squire Patton Boggs, *Gathering Evidence: How Does France Compare*, La Revue (June 10, 2013), available at https://larevue.squirepattonboggs.com/gathering-evidence-how-does-france-compare_a2075.html (last visited Aug. 15, 2022) ("Parties to civil litigation in France have no duty imposed on them to disclose any evidence of particular documents to the opposing party" and "are not actually able to compel their opponent to disclose any evidence."); See also Bernhard Schmeilzl, *The Process and Main Stages of Civil Litigation in Germany*, available at https://www.germancivilprocedure.com/guide-to-german-civil-proceedings/ (last visited July 20, 2022) ("[T]here is neither any discovery procedure under German civil procedure rules, nor are there any depositions or written witness statements.").

54. Robert W. Gordon, *Imprudence and Partisanship*, *supra*, n. 14, at 645.

Editor's Note: Andrew Friedman and Courtney Abrams will co-author a rebuttal article on attorney-investigator impartiality in the March 2023 issue of this publication.