

ring the information from business A to business B, in the form of knowledge, is found to be a prohibited business practice. Employers losing employees to a competitor have had some success in arguing that, in his or her new position, the former employee will “inevitably disclose” the information and should be restricted from working for the competitor (or in certain jobs for the competitor—that likely was why the competitor hired the employee) for a period of time.

The one very disturbing recent development from the California Supreme Court came in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*,<sup>8</sup> a nonemployment case, in which the court held that advising in preparation for or representing a client in arbitration is the practice of law. Due to the efforts of Dave Feller acting on behalf of the National Academy of Arbitrators (NAA) and others, the court added a paragraph specifically acknowledging that its ruling would not affect representation in collective bargaining cases subject to the National Labor Relations Act. However, it does have a profound effect on cases in employment law and the position of the NAA and others who negotiated the Due Process Protocol to include a provision that the parties could have any representation of their choosing. It is now clearly a misdemeanor—the unauthorized practice of law—for anyone (yes, human resources representative, business agent, friend, or relative) other than a lawyer to represent either party in California in an arbitration in the public sector or any employment law matter. It is not at all clear whether or not the court would reach the same conclusion regarding advice and representation in mediation, but, if it does, the chilling effect on ADR will be enormous.

## II. SEXUAL HARASSMENT FACTFINDING AND INVESTIGATIONS: ISSUES AND DILEMMAS

MEI LIANG BICKNER\*

In sexual harassment cases, it has been well established that a prompt, fair, and thorough investigation, coupled with appropri-

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<sup>8</sup>17 Cal. 4th 119 (1998).

\*Member, National Academy of Arbitrators; Professor of Industrial Relations, California State University, Fullerton.

I am indebted to Susan MacKenzie for her contributions and comments on the material presented in this paper. See also *Internal Investigations: The Perspective of an Outside Neutral*, 82 Employment L. Couns. 15 (1997).

ate corrective action, can limit if not preclude employer liability.<sup>1</sup> Since the *Cotran*<sup>2</sup> decision, at least in California, the importance of conducting a fair and impartial investigation has increased considerably. In *Cotran*, the California Supreme Court held that the proper inquiry in adjudicating a breach of contract claim is not whether the employee in fact committed the act leading to dismissal, but rather, whether the factual basis on which the employer concluded a dischargeable act had been committed was reached honestly, *after an appropriate investigation*, and for reasons that are not arbitrary or pretextual. Although the court declined to dictate detailed parameters, an “adequate investigation” includes notice of the claimed misconduct and a chance for the employee to respond.<sup>3</sup> The key issue was whether the employer had a good-faith belief that harassment occurred, based on a reasonable and thorough investigation.<sup>4</sup>

Increasingly, and even before *Cotran*, employers have turned to outside neutrals—employment arbitrators and mediators—to undertake such investigations, reflecting recent case law indicating that the adequacy and fairness of the investigation may impact substantially on the outcome of litigation over claims. Having an outside neutral conduct investigations into claims of sexual harassment and discrimination is a fairly new development in the alternative dispute resolution field. As this is not only a new procedure, but also places neutrals in a nontraditional role, the parties and the neutrals participating in this process find themselves grappling with many unresolved questions and issues.

Reducing employer liability, it must be noted, is not the only, nor even the most substantial and creditable, reason for having an outside neutral conduct a factfinding investigation of sexual harassment claims. Experience suggests, as reason would expect, that a neutral investigator will likely receive better cooperation from both witnesses and principals involved in these claims, and the resultant factfinding report will often facilitate a settlement of the dispute without the considerable financial and emotionally corrosive cost of litigation, and without a lengthy and debilitating impact on the organization.

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<sup>1</sup>*Harris v. Forklift Sys.*, 510 U.S. 17, 63 FEP Cases 225 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 40 FEP Cases 1822 (1986).

<sup>2</sup>*Cotran v. Rollins Hudig Hall Int'l*, 17 Cal. 4th 93, 69 Cal. Rptr. 2d 200, 948 P.2d 412, 75 FEP Cases 1074 (1998).

<sup>3</sup>*Id.* at 107, 108.

<sup>4</sup>See also *Kestenbaum v. Pennzoil*, 108 N.M. 766, 766 P.2d 280, 4 IER Cases 67 (1988), *cert. denied*, 490 U.S. 1109, 4 IER Cases 672 (1989).

My role today is not to preach the gospel and provide answers, but to raise questions, issues, and dilemmas that arise with the adoption of this procedure and that, in most instances, have not yet been resolved to everyone's satisfaction.

Under what circumstances might an employer turn to an outside neutral investigator to conduct its factfinding into a sexual harassment complaint? How should the ground rules be established for such an investigation, taking account of the perspectives and concerns of all parties involved, including the neutral factfinder? What role should the complainant and the respondent play in setting the ground rules and participating in the investigation? These are the types of questions that I will pose for discussion.

It should be noted that the procedure of using neutral factfinders poses some issues similar to those posed by the growing implementation of predispute employment arbitration agreements. It also should be noted, however, that the use of neutral factfinders in sexual harassment cases is, in several important aspects, different from the role of the arbitrator in predispute arbitration agreements:

- First and foremost, the complainant's agreement to participate in the factfinding—if, in fact, the complainant agrees—comes *after* the issue arises, not before, and it comes *after* the ground rules for such a factfinding are mutually agreed upon, not before, and it comes voluntarily or not at all.
- Second, the factfinder does not make final and binding decisions resolving the issue, but only resolves findings of fact.

### **Who is the Appropriate Investigator?**

The initial question to address is why an employer might retain an outside neutral investigator to conduct an inquiry into allegations of sexual harassment by one of its employees. The employer obviously has several options:

- Human Resource Department
- EEO Office
- Senior management official
- In-house counsel
- Outside counsel
- Neutral investigator

Under what circumstances might an outside neutral investigator be preferable to an internal investigator? EEO and human re-

source departments and employment attorneys routinely conduct internal investigations when an employer is faced with a complaint asserting sexual harassment or discrimination. Having the complaint investigated internally is likely to be the option of choice in a majority of situations.

However, situations may arise where it would be impractical or inappropriate to use an inside investigator because the appearance, if not the fact, of impartiality is called into question. These situations may involve complaints of sexual harassment directed toward senior officers of the company or agency, for example, or toward employees who are also union officers. When allegations or complaints of misconduct are directed against senior officers of the company or agency, an internal investigator may be inappropriate since the EEO or human resource officer will likely be junior to these officers and may be reporting directly to them or to their close associates. In complaints against employees or officers in politically sensitive positions, or in situations where the interests of the respondent/accused and that of the organization diverge, using an outside neutral investigator or factfinder with experience and expertise in this area may be prudent and necessary. In situations where it may be desirable to cover the investigation by the attorney-client privilege or the attorney work-product doctrine, there are ramifications of using the employer's in-house or regular outside counsel for the investigation. Those who are interested in that special area as it affects sexual harassment investigations should refer to Abell and Jackson.<sup>5</sup>

**Parameters of the Investigation: If a Neutral Factfinder is Selected, What Issues Should be Confronted and Resolved Prior to the Start of the Investigation?**

When an outside neutral is to conduct an investigation, it becomes important to spell out the understandings, both procedural and substantive, that will govern the investigation.

The various parties are likely to have different objectives to accomplish with the investigation and different concerns. It will be necessary, therefore, for the neutral factfinder to mediate mutually acceptable ground rules and boundaries for the investigation among the various parties if they are to be willing participants in

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<sup>5</sup>Abell & Jackson, *Sexual Harassment Investigations—Cues, Clues and How-To's*, 12 Lab. Lawyer 17 (1996).

the decision to retain the neutral factfinder and to be willing participants in the investigation. It should be kept in mind that, in many instances, none of the counsels, including counsel for the employer, but particularly counsels for the complainant and for the respondent, will have all the facts clearly in hand.

The concerns of the neutral factfinder must also be fully met prior to undertaking such an investigation. Among the issues to be addressed are:

1. Will the neutral investigator proceed if the complainant and the respondent do not join the employer in endorsing the investigation process?
2. Will the neutral investigator be given complete access to all persons deemed by the investigator to be material to the investigation, including current employees and former employees, and will the neutral investigator be permitted to contact nonemployees such as clients or vendors?
3. Will the neutral investigator be able to interview persons at a location comfortable to those interviewed, including off-site locations?
4. Will the neutral investigator be given complete access to all documents and other physical evidence deemed by the investigator to be material to the investigation? For example:
  - Prior internal investigation reports and files?
  - Records of prior complaints by the complainant?
  - Records of prior complaints against the respondent?
  - Policies, memoranda, business records, logs, diaries, calendars?
5. Will the employees interviewed be given a nonretaliation assurance from the employer for participating in the investigation? Should this assurance be in writing and a copy provided to the interviewee?
6. If a written report is issued, what will it include?
  - Summary of findings only?
  - List of persons interviewed?
  - List of documents reviewed?
  - Summaries of interviews? Reviewed and signed by interviewee?
7. Who will be given a copy of the report? Employer only? Employer, complainant, and respondent? Will it be given to all parties simultaneously, or will the employer be given an

opportunity to redact the report? If so, in what way—and with opportunity of review by the neutral investigator?

8. Will the neutral investigator provide updates of the investigation, as well as procedural complications, to the employer only, or also to counsels of the complainant and respondent?
9. Will the employer refrain from taking any intervening action that might contaminate the investigation?
10. Will the neutral factfinder be called to testify, either by the employer or by the complainant, in the event of the complaint proceeding to trial?

### **Whose Consent and Participation is Required to Conduct the Investigation?**

- The consent and/or participation of the complainant and his or her counsel?
- The consent and/or participation of the respondent and his or her counsel?
- In a unionized setting, the consent and/or participation of the union?
- What, if any, efforts should the neutral investigator undertake to secure cooperation?
- In the public sector, who is the employer?

It would be difficult to conduct a complete investigation without the consent and cooperation of the complainant and the respondent. It is particularly crucial that the complainant participate since often only the complainant can provide detailed information about the specific allegations and the names of other potential percipient or corroborative witnesses. The optimal situation is one where the consent and cooperation of everyone is secured, where the neutral factfinder can get all parties in agreement on the parameters for the investigation, and where the neutral investigator keeps all parties informed of the progress of the investigation. Employers have typically expressed concern about having the complainant and the respondent and their respective counsels involved in the investigation since it means less control over the investigation and its outcome. Close involvement in the investigation, however, may result in acceptance on the part of complainant's and respondent's counsels of the fairness and completeness of the

process, and of the impartiality of the neutral investigator. It may also result in enhanced credibility of the factfinder's report when it is finally issued.

### **What is the Scope of the Investigation?**

- Findings of fact only?
- Findings of fact and credibility determinations?
- Findings of fact, credibility determinations, and conclusions of law?
- Factfinding and recommendations for action?
- What are the substantive boundaries of the investigation?
- How should information unrelated to the specific charge of the investigation be treated?

It is imperative that all parties involved are clear about the scope of the investigation: what the investigation is to cover, and what is outside the boundaries of the investigation. It is debatable whether there should be a clear prior understanding, or whether it should be left to the discretion and judgment of the neutral factfinder, about what is to be done if other unrelated problems are uncovered during the investigation: for example, if another employee discloses a sexual harassment allegation against someone other than the respondent in the case being investigated; or, if innocent third parties will be injured by disclosure of information collected as part of the investigation.

Outside neutral investigators are generally asked to make only findings of fact and credibility determinations. As a neutral factfinder, the implications of accepting an investigation assignment where the scope includes making conclusions of law and/or recommendations for action should be carefully weighed.

### **What Other Parameters of the Investigation Need to be Clarified?**

There are other, practical considerations that need be clarified between all the parties involved.

1. How much time is anticipated for the investigation? The employer generally underestimates the time required since it often does not realize the magnitude of the problem.
2. Issues surrounding the conduct of the interviews:



- Should interviews be conducted under oath?
  - Should they be videotaped or tape-recorded? Who will have custody of those tapes and how will they be used?
  - How should the investigator take notes? With a court reporter? Who owns the transcripts?
  - Will those interviewed have an opportunity to review a summary of the interview? Will they have an opportunity to suggest or make corrections and changes? Will they sign the interview?
  - Will counsels be allowed to be present for the interviews? For the complainant? For the respondent? For officers of the employer?
  - Will summaries of the interviews be part of the final report?
  - In a unionized setting, should the interviewees be offered union representation? If they specifically request union representation?
  - What disclosures should the investigator make prior to the interview?
    - Regarding the role of the neutral investigator?
    - Regarding the nature of the investigation?
    - Regarding how the information provided in the interview is to be used?
    - Regarding who will be apprised of the information provided in the interview?
    - Regarding possible disciplinary action that may be taken?
    - Regarding the confidentiality of the investigation?
3. How much weight should be given to an internal investigation already performed? How should the investigator deal with a poorly performed internal investigation?

### **Conclusion**

Like predispute arbitration agreements, the use of neutral factfinders in sexual harassment disputes appears to be an expanding and evolving development that raises numerous issues concerning fairness of process, equity, professional responsibility, and the relation between alternative dispute resolution and legal rights and procedures. While these issues may be less urgent than is the case with predispute arbitration agreements, they deserve, and need, focused attention, discussion, and review.

This being noted, it should also be said that neutral factfinding appears to offer, if well conceived and artfully conducted, a helpful process in resolving sexual harassment claims.