Ethical Issues for Internal Professionals Who Conduct Workplace Investigations
By Barry Chersky

Professionals who are employed by the firms that they investigate face important ethical issues. Although many of the potential dilemmas are comparable to those that third-party private investigators and attorney investigators encounter, others are unique to the in-house professional. While acknowledging some of the similarities, this article highlights ethical concerns that are of particular significance to the internal investigator.

Defining the scope
The range of internal professionals who conduct workplace investigations is extensive. Some investigators are employed by large organizations; others by smaller employers. Some in-house investigators have multiple responsibilities; others occupy the role full time. Some organizations have departments or units dedicated to conducting internal investigations. The expanse of this landscape can introduce particular concerns that are specific to the type of organization and investigator.

Further, there are various capacities in which internal investigators function. Some, for example, are attorneys or private investigators (and sometimes both). Acting in those capacities, they are bound by particular codes of ethics as well as legal frameworks. Yet others work under the direction of attorneys, whether in-house or external counsel. This article focuses on the internal professional who is working in the role of neither an attorney nor a private investigator.

Similar requirements between in-house human resources investigators and third-party attorneys or private investigators include, among others, the following:

1. Understanding the variety and nature of different kinds of investigations (e.g., discrimination, harassment, whistleblower, fraud, workplace violence, etc.);
2. Having the necessary experience and competence to conduct particular types of investigations;
3. Maintaining knowledge of employment laws;
4. Refraining from engaging in deceptive practices such as misrepresentation or luring parties in under false pretenses;
5. Being familiar with guidelines regarding surveillance and invasion of privacy;

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6. Understanding standards concerning social media; and
7. Handling evidence appropriately.

**Ethical standards for the internal investigator**

Unlike attorneys and private investigators, internal investigators do not have statutory or other detailed ethical guidelines for conducting workplace investigations. The leading code of ethics for human resources professionals is the SHRM human resources (Society for Human Resource Management) Code of Ethical and Professional Standards in Human Resource Management.

Excerpts from the Code provide the core principles that can guide internal investigators (emphasis added below):

1. “As human resource professionals, we are responsible for adding value to the organizations we serve and contributing to the ethical success of those organizations.”
2. “As professionals we must strive to meet the highest standards of competence…”
3. “Human resources professionals are expected to exhibit individual leadership as a role model for maintaining the highest standards of ethical conduct.”
4. “As human resource professionals, we are ethically responsible for promoting and fostering fairness and justice for all employees…”
5. “As human resources professionals, we must maintain a high level of trust with our stakeholders. We must protect the interests of our stakeholders as well as our professional integrity and should not engage in activities that create actual, apparent, or potential conflicts of interest.”

Internal investigators must maintain high ethical standards because, as they ultimately “live” in the organization as its employee, they have to live with their decisions, the potential consequences of those decisions, and ultimately the impact on the people with whom they continue to interact. Clearly, this distinguishes the in-house professional from the third-party investigator.

Many employers have their own internal code of ethics or mission/vision/values statements which, as the organization’s underlying core principles, can provide guidance to the in-house investigator. This, however, does not preclude ethical dilemmas from arising. For example, the employer might have a protocol or defined process or template for conducting interviews, the requirement of (or prohibition against) tape recording, informing parties, documentation, report writing, etc.

An ethical concern may emerge should these protocols differ from what an individual investigator views as a standard practice or guiding principle. In such a situation, the internal investigator is ultimately bound to follow the employer’s guidelines and protocols.

**Ethical issues**

The determination of *when* and *if* an investigation should be conducted can present the first ethical dilemma. This is an area that also differentiates the internal and third-party investigator insofar as when the outside investigator is initially contacted, the decision to conduct the investigation has essentially been made.

AWI’s first Guiding Principle for Conducting Workplace Investigations’ is the **Decision to Conduct an Investigation**, something that is determined by the employer—typically the human resources director, in-house or outside counsel, or a combination thereof. An ethical concern may develop when the internal investigator believes an investigation is warranted and the employer determines it is not. In the end it is the employer’s decision to make. In such a situation, the investigator can consider documenting a disagreement with the decision, providing leadership information about the employer’s legal obligation to investigate, and encouraging training of administrators, managers, and employees.

On the other hand, there are situations in which the employer, based on the presentation of the complaint, may determine that an investigation should be conducted, while the internal investigator believes it might not be necessary. In some situations—for example, when the behavior is perceived differently by the parties, when intent has been misconstrued, when the conduct is subtle and is an isolated occurrence, or when there has been genuine miscommunication—mediation, coaching, or another facilitated process might provide an effective alternative to the escalation of a formal investigation.

In such a situation, however, a thorough assessment must be conducted with careful consideration before such a decision is made. Again, while ultimately it is the employer’s determination, the internal investigator may leverage influence to impact the decision.

The decision to conduct an investigation is followed by the ethical consideration of determining who should investigate. Among the factors that must be examined are the following:

1. Competency of the investigator, which requires an honest self-assessment;
2. Necessary skill set for the type of investigation, including whether specialized expertise is required (e.g., fraud, violence, forensics, etc.);

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1. See http://www.shrm.org/about/Pages/code-of-ethics.aspx (last visited March 30, 2014)

3. The complainant’s comfort level with the investigator;
4. Potential or actual conflict of interest, such as a functional alignment of the investigator with any of the parties;
5. Pressure to protect the organization (for instance, when the investigator is in the same chain of command as the accused);
6. Whether the investigator is a party to the situation (e.g., in another capacity the investigator might have assisted with a reorganization of the affected department);
7. A review of whether the prospective investigator has conducted multiple investigations of the same person(s) or work group;
8. Positions of the involved parties and the potential impact the investigation might have on ongoing relationship dynamics given the level or position of the employee being investigated; and
9. The existence of a prior history or relationship with any of the parties.

After a careful assessment of these considerations, it must be determined whether the investigator in question is appropriate. If not, another internal investigator (should there be one) should be assigned.

An ethical consideration that often follows is whether the investigator has the time and resources to conduct a timely, thorough, and fair investigation. For internal professionals there are often in-house scheduling dilemmas, especially when managing multiple human resources responsibilities. It must be determined whether the prospective investigator has the ability and authority to manage priorities. Delays due to limited resources can have a negative impact on the investigation process and clearly present an ethical concern.

If the above criteria cannot be met and there is no suitable internal alternative, a third-party investigator should be selected. Though the costs of retaining a third-party investigator are greater, cost should not be the sole determining factor. This calculation in itself may raise an ethical issue for the employer to consider. There is also the question of managing a third-party investigator, including how much information to reveal to that individual. Withholding information, in the service of protecting the organization or otherwise (such as genuinely not wanting to bias the investigator), can be viewed as unethical.

Once the selection of an appropriate internal investigator has been made, the scope of the investigation must be decided. In some cases the parameters are determined by the employer who assigns the investigation; in some instances the investigator makes the determination. In either case, a mutual understanding should be reached between the two, and it should be modified if the fact-finding process reveals information that would result in expansion of the scope.

Issues of particular concern to internal investigators include the dilemma of balancing the necessity of conducting a thorough investigation with the potential disruption it may cause to the workplace. The investigator must determine how many people to interview while taking care to not shortcut the investigation process due to knowledge of the organization (e.g., the reputation of the accused). Further, the internal investigator must assess whether the “wrong” people are involved in the process (e.g., those who have no business reason to be involved).

An important ethical consideration concerns the independence of the internal investigator. The following questions must be honestly addressed:

1. Who is directing the investigation?
2. Is the investigator really allowed to do what is needed?
3. Does the investigator have access to information, records, and critical data?
4. Does the investigator appear to be independent or credible?

The most important ethical dilemma exists when there is pressure, implicit or explicit, to influence the findings of the investigation. This issue arguably is the biggest challenge and test for internal investigators. In such circumstances, the investigator might consider documenting the pressure being exerted and/or escalating the concern higher in the organization.

As an ethical matter, what is most important for internal investigators is to make determinations of findings based on the fact-finding process even when and if the results are unfavorable to or inconvenient for employers. The investigators must stand their ground.

Additional factors for in-house investigators involve issues of impartiality and objectivity. Questions to consider include:

1. Is there preconceived knowledge? (Does the investigator know too much?)
2. Does the investigator know some of the parties from other activities? (This situation creates added pressure for the investigator to remain impartial and to avoid jumping to conclusions.)
3. Has the investigator spoken to peer investigators who have previously investigated the complainant/accused? (This circumstance could potentially bias the investigation.)
4. Can the investigator put aside any personal feelings about the individuals involved?
5. Is the investigator pushing for admissions?
6. Are there actual or perceived breaches of confidentiality?
7. Is there a vested interest in the outcome?
In smaller organizations it can be challenging to remain neutral. The investigator must remember that both parties are also colleagues and that each individual needs to be treated fairly.

In addition, there are dynamics, regardless of the size of the employer, such as organizational culture, hierarchy, and politics, which can create ethical challenges for the internal investigator. For example, the investigator should consider the pitfall of inconsistent outcomes based on the perceived value to the organization of the involved employee.

Communication should be carefully considered. This includes informing the accused of the complaint and investigation in a timely manner, providing periodic updates to key parties, informing those who have a business need to know with relevant information, and communicating investigation results.

There are also ethical questions regarding the aftermath of the internal investigation. For example, what is disclosed? How much? To whom? By whom? Minimally, findings should be reported to the complainant and the accused. In some circumstances, witnesses will be provided with information. Specific information about disciplinary measures, however, should not be shared.

In some situations, in-house investigators will be asked for recommendations, for example, to ensure that the disposition of the matter and any disciplinary or remedial actions taken are consistent with past practice. In other cases, recommendations are not requested so as to avoid potential exposure should the employer elect not to implement the recommendation.

Of particular concern to in-house investigators is the potential impact on the ongoing relationships between the investigator and parties to the investigation. Ethical challenges may arise when the investigator functions in multiple, potentially conflicting roles—both during and/or after the investigation has concluded—such as serving as the investigator, mediator, and coach.

While not every potential ethical issue has been identified or addressed in this discussion, it is important to conclude that despite the absence of a detailed ethical code to direct the investigation process, internal investigators must perform their work according to a high ethical standard.

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3 In preparing this article the author also consulted Amy Oppenheimer and Craig Pratt, Investigating Workplace Harassment: How to be Fair, Thorough, and Legal; Society for Human Resource Management, 2008; and i-Sight Ethics Blog, http://i-sight.com/topics/ethics (last visited April 26, 2014).