A PRACTICAL GUIDE TO CONDUCTING INVESTIGATIONS IN A SCHOOL SETTING

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I. BEFORE THE INVESTIGATION

A. Document the Discovery. Whoever brought the complaint to your attention and/or discovers the alleged misconduct should create a written statement that describes everything the person knows about that conduct, including the names of potential witnesses, the identity of the alleged wrongdoer (if known), the date that the misconduct occurred or was discovered, and any other potentially relevant information.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2017 Ratwik, Roszak & Maloney, P.A.
B. Before Investigating, Some Up-Front Reporting May Be Necessary.

1. **Report any suspected crimes to law enforcement.** Examples of crimes that should be reported to law enforcement include, but are not limited to, theft, embezzlement, possession of child pornography, etc.

2. **Maltreatment of Minors Reporting.** Remember your obligation as a mandated reporter when you know or have reason to believe a child is being neglected or physically or sexually abused or has been neglected or physically or sexually abused within the preceding three years. *See Minn. Stat. § 626.556.*

3. **Report to law enforcement and the State Auditor, under certain circumstances.** Minnesota law requires public employees and officers to “promptly” report to law enforcement and the State Auditor whenever the employee “discovers evidence of theft, embezzlement, unlawful use of public funds or property, or misuse of public funds” by anyone who is “authorized to expend public funds.” *Minn. Stat. § 609.456, subd. 1.*
   
   a. Note that the reporting requirement is triggered by the discovery of “evidence.” Rumor is not enough. However, because these reports must be made “promptly,” a school district may wish to make them before conducting its own internal investigation. The State Auditor may make adverse findings against the district if the report is not prompt.

   b. The written report to the State Auditor must contain a detailed description of the alleged incident. The report must include all relevant data, including data classified as not public under the Minnesota Government Data Practices Act.

   c. Even if you are not required to report an incident, the State Auditor may still investigate it if you provide a voluntary report.

   d. The State Auditor’s office typically only investigates issues it considers to represent a “violation of a state law, rule, or an accounting standard.”

   e. For more information about the State Auditor’s investigation process visit [http://www.auditor.state.mn.us/default.aspx?page=20090724.102](http://www.auditor.state.mn.us/default.aspx?page=20090724.102)
C. **Determine Whether an Investigation is Necessary.** To determine whether an investigation is necessary, school officials should consider the following:

1. Does the behavior complained of violate the law or the District’s policies?
   a. Each District should look to its own policies. Contact counsel with any questions regarding the law.

2. Is an investigation required by policy?
   a. Some Districts require an investigation upon the discovery of evidence of certain violations. It is important to be aware of these policies and conduct an investigation in accordance with them.

3. Does the conduct in question involve a pattern of prohibited behavior?

4. Could the conduct result in liability to the School District?

5. Did the alleged wrongdoer admit to the conduct?

6. Even if a complainant or subject is no longer an employee or student of the School District, the District may have an obligation to investigate. Such an investigation could pose a logistical problem because, for instance, employers cannot compel non-employees to participate in investigations. Any refusal to participate should be documented.

D. **Determine Whether the Alleged Employee Wrongdoer Should be Placed on Administrative/Investigatory Leave Pending the Outcome of the Investigation.** Depending on the nature of the alleged misconduct, the employee’s duties, and the duration of the planned investigation, it may be appropriate or necessary to immediately place the alleged wrongdoer on administrative leave pending the outcome of the investigation. When making such a decision, the School District should consider the following factors:

1. Whether the employee has the ability to destroy relevant information;

2. Whether a secret investigation may adduce more relevant evidence; and

3. Whether placing the employee on administrative leave is necessary to limit the employer’s potential exposure to losses and/or negative publicity.

4. Depending on the specific situation, employers may wish to issue specific directives to employees placed on paid leave. Such directives typically
include: (1) prohibiting the employee from doing any work for the District; (2) requiring the employee to turn in all District property, including electronic files; (3) directing the employee to appear for an interview; and (4) ordering the employee to not access any of the District’s electronic resources during the investigation.

E. **Act Promptly.** If the District decides to conduct an investigation (or is mandated to conduct one pursuant to District policy), even minimal delays may result in lost evidence or provide the alleged wrongdoer with an opportunity to conceal the truth or come up with a “story.”

F. **Choosing an Investigator.** The District should decide whether it will investigate alleged misconduct internally or whether it will hire a third party investigator. In making this determination, the District should consider the following:

1. The potential ramifications of the problem, both practical and legal;
2. Whether an internal investigator will be viewed as biased because of his/her position with the employer;
3. The long-term impact of using an internal investigator, including the future work relationship, if any, between the investigator and the subject of the investigation;
4. The ability of an internal investigator to efficiently conduct the investigation in a thorough, objective, and timely manner; and
5. The likelihood of the investigator having to testify at a grievance arbitration, litigation, or other matter related to the investigation and subsequent discipline.

II. **DATA PRACTICES CONSIDERATIONS IN INVESTIGATIONS**

A. **Tennessen Warnings.**

1. **Legal Requirements.** The Minnesota Government Data Practices Act (“MGDPA”) states that an individual who is asked to provide any private or confidential data concerning the individual shall be informed of the following: (Minn. Stat. § 13.04, subd. 2)

   a. The purpose and intended use of the requested data;
b. Whether the individual may refuse or is legally required to supply the requested data;

c. Any known consequences arising out of supplying or refusing to provide the private or confidential data; and

d. The identity of other persons or entities authorized by state or federal law to receive the data.

2. Best Practices.

a. Give Tennessen Warnings at the Start of All Investigation Interviews. Although several decisions from the Minnesota Court of Appeals suggest that public employers do not need to give a Tennessen Warning when seeking information arising out of an employee’s employment for use in the employment context, the best practice is to administer a Tennessen Warning at the start of all investigation interviews, especially when interviewing the subject of the investigation.

Tennessen warnings should also always be given when students are interviewed as part of an investigation. The failure to administer a Tennessen Warning may result in the District’s inability to use, store, or disseminate the collected data.

i. When interviewing students, the specific language of a Tennessen Warning can be tailored to the age/understanding of the student being interviewed, as long as all required elements are present.

b. Tennessen Warnings should be in Writing. The MGDPA does not require written Tennessen Warnings. However, in order to avoid issues of proof, the best practice is to give written Tennessen Warnings, signed by the individual being interviewed. Above the space for the individual’s signature, the warning should contain language to the following effect: “By signing below you acknowledge that you have read this notice prior to being interviewed. A copy will be provided to you upon request.”

c. Broadly Drafted. The Tennessen Warning should broadly address the legal components discussed above. School District’s should not limit themselves to overly specific uses of the data or omit any person or entity that may have a right to access the collected data.
B. **Garrity Warnings.**


2. **Consequences of Garrity Warning.** If a public employer directs an employee to answer interview questions upon penalty of discipline, the information obtained by that employer and any subsequent information obtained as a result of the compelled statement cannot be used in subsequent criminal proceedings against the employee.

3. **Language.** Like a Tennessen Warning, a Garrity Warning should explain the interview subject’s rights under the MGDPA. Unlike a Tennessen, however, the Garrity Warning should: (1) direct the subject to answer the interviewer’s questions accurately and truthfully under penalty of discipline for insubordination; and (2) inform the interview subject that the information he/she provides and any information resulting from the interview may not be used against them in criminal proceedings. The Garrity Warning should also stress that any information obtained independently by law enforcement or prosecuting authorities may be used in any criminal proceeding.

4. **Coordination with Law Enforcement.** If law enforcement officials are also investigating the conduct in question, it may be a good idea to contact the investigating officer before administering a Garrity Warning.

III. **DETERMINE THE SCOPE AND STRATEGY OF THE INVESTIGATION**

A. Most investigations follow the same pattern: (1) receive complaint and/or interview complainant; (2) interview fact witnesses; and (3) interview alleged wrongdoer. At each stage of this process, school districts should reevaluate whether additional investigation is warranted or needed and who should be interviewed next.

B. It is beneficial to review any applicable school district policies prior to conducting the investigation.

C. **Identify Fact Witnesses.** When considering which fact witnesses to interview, the investigator should take the following into consideration:

1. Does the complaint list witnesses to the alleged misconduct?
2. Does the complaint leave out individuals who may have important information relevant to the investigation?

3. Who was present for the alleged misconduct?

4. Who received the initial complaint?

5. Who can provide necessary background information?

6. Under the circumstances, is it necessary to interview students?

Keep in mind that additional witnesses are often identified through both the interview process and a review of relevant documents or other evidence.

D. **Determine Who Will be Present at Each Interview.**

1. Depending on the circumstances, it may be beneficial to have more than one School District representative present.

2. Upon request, an employee who is in a union has a right to have a union representative present if it appears that the interview may result in discipline. Some union contracts provide this right even if there is not a request by the employee.

3. If the investigation involves minor students, the investigator (or the district) should determine in advance whether parents will be permitted or invited to attend the interview. Factors such as the age of the student and the subject matter of the investigation should be considered. Unless the district has adopted policy to the contrary, school officials are not required to permit parents to attend the interview.

E. **Prepare a Response to Common Distractions.** Before conducting any interview, the investigator should decide how he/she will respond to the following types of complications:

1. The interview subject demands that the interview be taped;

2. The interview subject requests that a parent, friend, co-worker, or attorney be present during the interview;

3. The interview subject’s union representative repeatedly interjects or tries to help the interview subject frame his or her answers;
4. The interview subject refuses to answer questions;

5. The interview subject asks who you have interviewed or plan to interview;

6. The alleged wrongdoer asks whether the employer is going to discipline him or her; and

7. The alleged wrongdoer or his/her union representative asks for a written list of questions or asks to be allowed to submit written answers to questions in lieu of a face-to-face interview.

IV. INTERVIEW BASICS

A. Explain the Purpose of the Interview. Do not make any comments that could be perceived as minimizing the complaint.

B. Define your Role in the Investigation. Regardless of your other roles, make it clear that you are there as an impartial investigator. Do not take sides.

C. Explain the Investigation Process. Explain that the District will follow up on information it receives. Ask the interviewee to report any contact from the alleged wrongdoer or any retaliation (from whatever source) immediately.

D. Do Not Promise Confidentiality. Information received during the scope of an investigation is subject to the MGDPA and must be released in accordance with its provisions.

E. Ask Specific Questions. Who, what, when, where, why, how? Get as detailed of information as possible. Do not allow an interview subject to make generalizations or to offer conclusions as opposed to facts.

F. Ask the Tough Questions. Even if the subject matter is uncomfortable.

G. Ask for Documents. Ask each interviewee if he/she has any tangible evidence that corroborates his/her recollection of events. Documents such as e-mail correspondences, notes, diary entries, time sheets, or calendars, might all contain relevant and valuable information. Recordings of voice mail messages might also contain helpful information.

H. Ask Each Interview Subject to Identify Other Witnesses to the Misconduct.
I. **Do Not Guarantee Results.** Investigators should not expressly or implicitly guarantee any particular outcome of the investigation. Nor should they suggest or imply that disciplinary action will be taken against the alleged wrongdoer.

V. **GENERAL TIPS FOR INTERVIEWING COMPLAINANTS AND FACT WITNESSES**

A. **Ask Short, Open-Ended Questions.** The goal is to have the witness talk more than the investigator. Investigators should avoid “leading” questions. This is not a time for cross examination.

B. **Always Cover the Who, What, When, Where, Why and How Questions.** Follow each line of questioning to its logical conclusion based on the witness’s *personal knowledge*, as opposed to what he or she has heard from others. Get the details.

C. **Assume that the Investigator will Defend the Interview Questions in Court.** Be impartial and thorough. Keep in mind that the investigator’s notes *may* become discoverable evidence at some point.

D. **Observe Witness Demeanor.** Document those observations in the investigation notes.

E. **Follow Up.** If a witness answers “I don’t know” or “I can’t recall,” break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive. If you believe the witness is being evasive, circle around and come back to the question at other points in the interview. If you have an objective reason to believe that the witness would know or remember particular information, do not hesitate to express surprise when the witness answers “I don’t know” or “I don’t remember.”

F. **Visual Representations.** If you believe it would be helpful, have the witness draw a picture of the alleged misconduct or the location at which it occurred. It may also be helpful to have the witness take you to the site of the alleged misconduct for a personal inspection.

G. **Disclose as Little as Possible.** Use your judgment as to how much to tell the witness about the complaint.

H. **Ask the Complainant if Extent of Complaint Has Been Covered.** In order to safeguard against the Complainant later coming up with additional complaints/accusations the District has never been informed of and then saying that the District did not respond appropriately to those complaints/accusations, it
is important to ask the Complainant whether what they have stated is everything that forms the basis of his/her complaint.

I. **Ask that the Witness not Discuss the Process with Anyone Else.** Witnesses should not talk about the allegations, the content of their individual interviews, or the fact that there is an investigation being conducted.

J. **Impact.** Inquire about the impact of the alleged conduct.

K. **Understand the Complainant’s Concerns.** Remember the complainant may be embarrassed or fear retaliation.

L. **Complainant’s Desired Outcome.** Inquire as to what the complainant would like to see happen, but do not make any promises.

M. **Take Appropriate Action.** If the complainant expresses a desire that you do not do anything with the information he/she tells you, explain that the school district must take appropriate action and why.

N. **Do Not Make Promises.** Do not make any promises about who will be interviewed or when the investigation will be completed. Do not disclose the identity of witnesses.

O. **Retaliation.** Ask the complainant to bring any retaliation to your attention and explain what that means.

VI. **INTERVIEWING THE ALLEGED WRONGDOER**

A. **Union Representation for Employee Subjects.** If applicable, the investigator should determine whether a union representative will be available for the interview in the event that the subject requests such representation at the start of, or during, the interview itself. The U.S. Supreme Court has held that individual employees have a right to refuse to participate in an investigation without union representation if they reasonably believe that discipline may result from the investigation. *N.L.R.B. v. Weingarten*, 95 S.Ct. 959 (1975). Consequently, if the alleged wrongdoer requests union representation, the employer might have to reschedule the investigation until such time as representation is available.

B. **Opening Remarks.** Prior to asking any questions, the investigator should explain the following to the alleged wrongdoer and his/her union representative:

1. The role of the investigator as a neutral fact finder;
2. The Tenessen warning, which the investigation subject should be asked to sign prior to asking any questions;

3. Ground rules for the interview, such as not interrupting each other and professional conduct; and

4. The alleged wrongdoer should be expressly informed that this interview may be his/her only opportunity to tell his/her side of the story before a decision is reached.

C. Refusals to Answer. The investigator should decide in advance how to respond to the alleged wrongdoer’s refusal to voluntarily answer questions. Typically, an individual will voluntarily cooperate if he/she knows that the interview may be his/her only chance to tell his/her side of the story. A typical Tenessen warning contains language to that effect. If the individual being questioned is an employee and he/she decides not to answer anyway, the investigator should consider whether he/she is willing or able to issue a Garrity warning to compel answers.

D. Follow-up Questions. Be prepared to ask appropriate follow-up questions in order to obtain the full response to each allegation. In addition to the general considerations discussed above, the following tips may help an investigator get the full response from an alleged wrongdoer:

1. **Be Blunt.** Do not dance around delicate topics. Ask the question directly.

2. **Ask Why.** If the alleged wrongdoer admits to any particular action, ask what his/her intent was.

3. **Check Credibility.** If the alleged wrongdoer denies the allegations, ask whether he/she believes anyone would have a reason to fabricate the allegations.

E. Closing Remarks. Before ending the interview, the investigator should:

1. Ask for any other information that may be helpful, or other information that the alleged wrongdoer would like to provide;

2. Explain that retaliation will not be tolerated. Direct the alleged wrongdoer not to take any action that could reasonably be perceived as an attempt to retaliate against any person who may have participated in the investigation. Stress that the term “retaliation” will be considered as broadly as possible;
3. Direct the alleged wrongdoer not to take any action that could give the appearance of attempting to influence the testimony of other witnesses; and

4. Direct the alleged wrongdoer employee not to discuss the investigation or the allegations with anyone other than his/her union representative and attorney.

F. Additional Tips for Interviewing the Alleged Wrongdoer

1. Be prepared for anger and defensiveness on the part of the alleged actor.

2. Insist on details of the alleged wrongdoer’s version of the facts. Do not settle for a general denial.

3. Do not merely state the complainant’s allegations and ask the alleged actor to simply verify or deny.

4. Do not threaten.

5. Do not describe what disciplinary action might be taken. Advise the alleged wrongdoer that any decisions regarding disciplinary action will be made at the conclusion of the investigation.

6. Do not make any promises about when the investigation will be completed or who will be interviewed.

7. Do not reveal the names/identities of witnesses.

8. Emphasize that the alleged wrongdoer will be subject to discipline for retaliation.

VII. ASSESSING CREDIBILITY

A. Credibility Clues. When interviewing each witness and subject of the investigation, the investigator should look for credibility clues.

1. Eye contact;

2. Unnatural or inconsistent hesitancies;

3. Change in skin coloration (i.e. face turning red or white);
4. Change in pitch of voice;
5. Change in affect over the course of the interview;
6. Subtle or direct attempts to influence the outcome of the investigation through inducement or threat;
7. Statements reflecting a skewed view of reality.

B. **Consistency.** When assessing credibility, consider the consistency of the witness/subject statements.

1. Are there other witnesses or documents that support or refute the interviewee’s testimony?
2. Is the conduct of the parties consistent with their description of the overall environment?
3. Does the chronology make sense from a practical standpoint?
4. Is the described behavior consistent with what came before and afterward?
5. Are there unexplainable lapses in recollection or periods of time that are not accounted for?

VIII. **PRESERVING ELECTRONIC EVIDENCE**

A. **Computer Evidence.** School districts should take steps to preserve any evidence of wrongdoing that may exist on school district computers. For example:

1. Secure the employee’s computer by physically removing it from the employee’s office or work area.
   a. Where the investigation involves a student who does not have a specific computer, secure any computer evidence available. Involve IT where necessary.
2. Disable the employee’s password and ability to access the employer’s computer system.
3. Allow only a knowledgeable computer technician, technical coordinator, or computer forensic specialist to access the computer. Do not hesitate to hire an outside computer forensic specialist when necessary.

4. Preserve the chain of custody. You should be able to identify everyone who touched the computer from the time it was removed from the employee’s work area or office.

5. Before searching the computer, verify that the school district’s computer use policy states that the computer is the sole property of the district and that the computer and any data stored or processed on it is subject to monitoring at any time without notice. Such language will defeat a claim that the employee had a reasonable expectation of privacy in the data stored on the computer.

B. **Video Surveillance.** Preserve any surveillance video footage.

C. **Bank Accounts.** Disable the employee’s access to district bank accounts, where applicable.

D. **Utilizing Social Media in Investigations**

1. Public social media sites. At least two courts have held that individuals have no expectation of privacy with respect to information posted to a completely public social media site. *See Moreno v. Hartford Sentinel*, 172 Cal.App.4th 1125 (Cal. App. 5, 2009) (no reasonable expectation of privacy regarding Myspace writings open to public view); *see also U.S. v. Charbonneau*, 979 F.Supp. 1177 (S.D. Ohio 1997) (no reasonable expectation of privacy regarding posting in a public “chatroom”).

2. Private pages on social networking sites. At least one court has held that individuals do not have a reasonable expectation of privacy in material posted on a “private” social media page. *Romano v. SteelCase Inc.*, 30 Misc.3d 426 (N.Y. Sup. Ct. 2010). The court’s decision was based on the nature of social media as a tool for mass dissemination of information, a fact that users are well aware of. The court specifically noted that hundreds of people may be able to access a “private” social media page and held that, “in this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.” *Id.* at 434 (citing Dana L. Fleming and Joseph M. Herlihy, *Department Heads Up: What Happens when the College Rumor Mill Goes Online? Privacy, Defamation and Online Social Networking Sites*, 53 B.B.J. 16 (Jan./Feb. 2009).
E. **School Officials Should Not Retain Copies of Actual or Suspected Child Pornography.** In March, 2008, a high school assistant principal in Loudoun County, Virginia, was charged with possession of child pornography and failure to report child abuse because he mishandled a sexting investigation. *State v. Ting-Yi Oei*, Loudon County, Virginia (2008).

IX. COORDINATING INVESTIGATION WITH LAW ENFORCEMENT

A. **Spoliation of Evidence.** When a complaint involves accusations of criminal activity, the District should be careful to conduct its investigation in a manner that does not spoil or disturb the evidence that law enforcement will need to gather.

1. As stated above, the District should report any suspected crime to law enforcement. The District should then attempt to work cooperatively with law enforcement so that the District’s investigation does not inadvertently impair the criminal investigation.

2. The District should preserve the evidence it collects.

B. **Relying on a Police Investigation.** A school district generally may not rely on the results of a police investigation in lieu of conducting its own investigation. There are several reasons for this.

1. The degree of sophistication and quality of police work can vary from one town to the next. Some school districts conduct more thorough investigations than law enforcement.

2. A school district has no control over the police investigation, and no ability to assess the credibility of witnesses in a police investigation.

3. A school district is not always able to access all the information the police gather. This impacts the school district’s ability to assess the reliability of the information and to obtain the full picture of what occurred.

4. Police operate under a different standard than public employers. The police may find insufficient evidence to proceed, which could mean that there is not enough evidence to convince a jury beyond a reasonable doubt that a crime has been committed. At the same time, there could be more than sufficient evidence to take action in the employment/school setting, which generally operates under a much lower standard. Similarly, even
where police do not wish to proceed with charges, there may be enough evidence for a school district to proceed with discipline.

X. WHAT INFORMATION, IF ANY, CAN BE SHARED WITH A COMPLAINANT FOLLOWING COMPLETION OF AN INVESTIGATION?

A. The answer to the above question is very little.

B. The MGDPA prohibits the District from releasing private educational data and private personnel data to the complainant.

   a. The reality is, the MGDPA prohibits the release of private educational data and private personnel data such that the District is left with very little it can tell a complainant after conclusion of an investigation into his/her complaint.

      i. Cannot release whether allegations were substantiated or not.

      ii. Cannot release whether discipline will be or was imposed. Remember, a subject employee has the right to grieve such discipline (a process which can take a very long time), and non-final disciplinary action is not public. In addition, information regarding whether a student subject was disciplined is never public.

      iii. Can tell complainant what you are doing for him or her (or his or her child), as long as you do not name any other students/employees involved or release any private data about others.

      iv. Can tell complainant that an investigation was conducted and has now been completed. Can also tell the complainant that the District “has taken all appropriate action.”