

The Performance Review Podcast
Episode 20
Greenberg Traurig

Speaker 1 ([00:06](#)):

Welcome to The Performance Review, Greenberg Traurig's California Labor and Employment Law Podcast, where we discuss and review important trends and topics for California employers with hosts, Ryan Bykerk and Philip Person.

Philip Person ([00:18](#)):

Welcome back to The Performance Review, where this episode we have an excellent guest. But before I talk about our excellent guest, I want to remind our listeners about our last episode, where we talked about the Chambers vs. Bonta decision and how that affects California arbitration agreements. Today, we want to talk about when an employer should hire an external investigator to assess employee complaints. As I said, we have an excellent guest. Our guest is Sue Ann Van Dermyden. And yes, I asked her how to pronounce her name before this, and I think I nailed it. She is a senior partner at Van Dermyden Makus, an investigation law firm. Sue Ann, welcome and please tell us about your practice so our listeners can know about that.

Sue Ann Van Dermyden ([01:05](#)):

Well, thank you for having me. It's an honor to be here and I love talking about my favorite topic, workplace and campus investigations. So I have been an employment lawyer, I guess, since 1993 now, and currently, I'm a senior partner at our firm and we have almost close to 50 employees, and all of our attorneys conduct neutral workplace investigations and campus sexual assault investigations. And then we have a part of our practice where we also act as adjudicators or hearing officers on campus for their investigations. So we like to say that we help employees get back to work and students get back to class.

Ryan Bykerk ([01:47](#)):

Wow. Yeah, that's great Sue Ann. And thank you again for being a guest here on our podcast today. We really appreciate it. So I think maybe to start, under what circumstances should an employer ... Would an employer want to hire a third party attorney investigator like yourself?

Sue Ann Van Dermyden ([02:05](#)):

Maybe the easiest way to answer that is any time a decision maker at the workplace or on campus is faced with a dispute of facts or potential misconduct by an individual that is under their power or control. So in that case, they need somebody as a third party neutral to look at the facts and to say whether or not the conduct more likely than not occurred, which then allows them to take appropriate action. We also see employers and campuses retaining third party attorney investigators when there's potential legal liability, and they really want to have a better understanding of what the facts are, so they can again, make it right or remedy whatever the issue might be.

Philip Person ([02:48](#)):

That makes a lot of sense, and you brought up liability. You mentioned liability. Can you give us some examples or scenarios of when an employer might want to hire a third party investigator?

Sue Ann Van Dermyden ([02:59](#)):

So if you're talking strictly about legal liability, certainly a large part of our practice is we do investigations when there's internal claims of either harassment, discrimination, or retaliation. Also, on campuses, we often get cases where there's claims of sexual assault, and in that case there's two things that's happening for either the employer or the campus, right? One is I have an issue in my workforce and I need to make it safe and I need to build morale and make people get back to work and feel productive. At the same time, they're also potentially seeing if this is left unchecked and/or even if we remedy it, conduct may have occurred that lends itself to later litigation, and they need to have a better understanding of what the facts are so they can appropriately respond in litigation as well.

Ryan Bykerk ([03:50](#)):

Well, and I think it's important to note as well here in California, employers have a legal duty to investigate certain types of claims including discrimination and sexual harassment. And one of the sort of hot button ones that's coming up more and more is equal pay, which is getting a lot more attention these days.

Sue Ann Van Dermyden ([04:07](#)):

Yes, it certainly is. In situations when there's payroll, including equal pay, employers may want to consider hiring an investigator that's educated in those areas. You have to understand better about finances and books and the practices as well, and it's a complex area of law. Very complex. So having an attorney investigator who is well versed in wage and hour law can be a huge benefit.

Philip Person ([04:35](#)):

Let's say we find ourselves in a scenario where we need an investigator. That happens a lot. Let's talk about who employers can hire for the workplace investigation. Sue Ann, as I'm sure you already know, California requires that any investigator an employee hires to explore allegations of workplace discrimination, harassment, you name it, other misconduct, must be either a state-licensed investigator or a state-licensed attorney. It's codified in California Business and Professional Code sections 7520 through 7539. I'm not going to bore our listeners with reading that code section, but look, we have our roles, Ryan, I'll let you be the boring one. I'll be the entertaining one.

Ryan Bykerk ([05:29](#)):

Okay, that's fair enough. Fair enough.

Philip Person ([05:31](#)):

I joke. I joke. But can you tell us, Sue Ann, can you tell us how this came about and why this is important?

Sue Ann Van Dermyden ([05:39](#)):

Yeah, it's much like it is for law enforcement and security guards, California regulates any person that's engaging in the business acting as a private investigator. And it's not just California, across the country there are the statutes that typically are referred to something like the Private Investigator Act in

California. It was enacted in 1994, and it was really to standardize the training and the advertising and to submit public trust in private investigations through these very, I guess, strict licensure requirements.

[\(06:10\)](#):

And as a result of that, you're right, in order to conduct an investigation, which includes workplace investigations, you have to either be a licensed attorney practicing as a lawyer or a licensed private investigator or an in-house person doing an investigation for their employer. And what that means, practically speaking, is if you're a third party human resources consultant, you cannot legally conduct investigations unless you also have either a PI license or an attorney license. And that's not to say they're not skilled, they're able to do it, they're just not allowed to under the law.

Ryan Bykerk [\(06:48\)](#):

Yeah, that makes sense, and it's an important distinction, right? So internally, your HR team can do investigations, but it's when you go outside to find someone, that's where some of these rules apply. So speaking of those rules, if employers have a choice between a state-licensed private investigator and a state-licensed attorney, which one should they prefer?

Sue Ann Van Dermyden [\(07:09\)](#):

That's a great question. It really depends on the situation. There I would say are some definitely situations where it's preferable to hire an attorney over a licensed investigator because the attorney may be more likely to understand the law, and therefore, can ask more probing questions or better know what the evidence might be important or relevant or how it plays out in a court of law. Attorney investigators are also familiar with court proceedings and understand cross-examination and deposition and trial testimony and how that might play out. And that's not to say a private investigator is not very apropos in a particular situation, but I think as employers are thinking about it is having someone who understands how it may play out in court proceedings can be really beneficial.

[\(07:55\)](#):

I think the other reason that employers may consider hiring an attorney investigator is that it often it can be, and it typically is, covered by the attorney-client privilege and the attorney work product privilege. So that means not everything they find can be forcibly disclosed or produced to third parties and so having that protection sometimes is a benefit. It allows the employer to get really valuable information, take appropriate action, without admitting something for purposes of litigation.

Philip Person [\(08:27\)](#):

Because I'm not that original, I'm literally going to take Ryan's question and just flip to the other side of the coin. When might it be more beneficial to hire a state-licensed investigator over an attorney?

Sue Ann Van Dermyden [\(08:39\)](#):

Well, private investigators certainly are very skilled at conducting interviews and documenting the evidence, it's often beneficial too, I think, to have a state-licensed investigator when you perhaps have non-employee witnesses who do not wish to be found or interviewed, or they're somewhat reluctant in some manner because they have a very good skillset at identifying and finding and convincing them, I guess, if you could, to participate in an investigation. They're also really skilled and trained in finding people and tracing assets so that may be helpful as well for an employer. I think the one consideration there is unless there's some attorney on the side of the employer that the private investigator may not be able to invoke the attorney-client privilege if that's of interest to the employer.

Ryan Bykerk ([09:34](#)):

So some of our listeners are those who might find themselves in a position where they're thinking about that they may need to retain someone to do an investigation. Do you have any kind of insights you might give to someone in that position? What do they need to know? What questions should they ask? What should they be looking for when they're trying to hire an external investigator?

Sue Ann Van Dermyden ([09:55](#)):

A lot of it depends on the sophistication or understanding of the client. If you have a smaller organization that hasn't gone through the process, they're certainly going to want to understand better what the process is. For those clients or employers who have gone through the process and better understand, I think they consider when they reach out to us, they know they have really one chance to get it right. And a botched investigation can almost be worse than no investigation, so really vetting the investigator, understanding what their process is, understanding their experience is key.

([10:28](#)):

And there's several things I think that employers think about when they reach out to a third party investigator. One is do you have involvement of a very high level employee? Do we have concerns around the C-suite, a board of directors, the city manager, someone at a high level when it may be a conflict of interest, either actual or appearance of a conflict if somebody internally conducts the investigation? And often it has much higher risk when it's much higher up the food chain. And certainly, I think they're going to want to understand what is your experience if there is litigation. What's your training? How do you understand how the jury trials work and what if the privilege is waived is you will be the witness, what's your experience in that regard?

([11:14](#)):

And so I think the other thing that we see too is third party investigators are retained more and more often when there's a high publicity event, when they're concerned perhaps about anticipated litigation as much as they are about their reputation because you have potentially publicity around the issues that are happening. And I know that too employers sometimes retain third party investigators when they want to show that they care about their employees. They care enough that they're going to expend the resources and the time to really get it right and get the expert to come in.

Ryan Bykerk ([11:49](#)):

Yeah. No, that all makes sense. One of the things you've mentioned a couple times now is privilege, and I think it's important to maybe pause on that just for a second. And as Philip previewed, I am the boring one, so I'm going to talk about some of the ...

Sue Ann Van Dermyden ([12:02](#)):

I'm sure you're going to make this entertaining. I'm looking forward to you making a privileged discussion entertaining.

Ryan Bykerk ([12:09](#)):

Philip is going to hold his breath just to see how beautiful this can be. No, it is. Look, it's an important thing to think and talk about and really to think about, I think, before from a client's perspective, before you really go down this road because I think you need to plan ahead and understand what that issue is, what it entails, and what some of the pitfalls are. So we're not going to do a major primer on attorney-client privilege, but there's just things to understand. So certainly in some cases you're going to want

that investigation at the end of the day to be disclosed, and so you're going to want to use it maybe to make out a good faith defense. And so it may not even be your ultimate goal to have the investigation itself remain privileged, but most often at the front end, you aren't necessarily going to know whether you want that ultimate conclusion to be privileged or not privileged.

[\(12:57\)](#):

So I would say from a client perspective, you really want to think about the extent to which you can preserve that attorney-client privilege from the front end. Assuming you do want to do that, I think there's just a couple of key ideas for our listeners to keep in mind about that. Before you even start, I think it's important to know there is an attorney-client privilege. There's also attorney work product doctrine. They're not the same. Some of the rules are different and some of them even vary by jurisdiction, so it's important to have a pretty good handle on those things before you go down this road.

[\(13:28\)](#):

And it's also important to kind of understand a couple of really key points. First, who the client even is. In the corporate context, I think it's easy for a corporate client in particular to think that look, if I'm employed, I'm part of the privilege. Well, that's not the case. It's also not the old control group test of sort of yesteryear. It's those generally speaking, and these are very general rules, it's those who are reasonably necessary to accomplish the purpose for which their lawyer is being retained. So in this case, the investigation itself, and you can lose that privilege by copying people who don't qualify, so that's something to be careful about. That's point one.

[\(14:09\)](#):

Point two is really trying to understand that the privilege doesn't just mask carte blanche all communications you're going to have that exists in the privilege. This is an area that pretty recently has given courts fits, including the *In re Grand Jury* case in the Ninth Circuit that actually cert was granted. It went up to the Supreme Court and there was argument heard on that case, but then it was ultimately, cert was I think dismissed as I confidently granted. But it's a really interesting case because it deals with dual purpose communications, that is communications that are maybe in part for a privileged purpose, for rendering legal advice, but in part for some other purpose, maybe a business purpose, and so these are all kind of important things to keep in mind.

[\(14:56\)](#):

So I would say at the risk of already having gone on too long, just a few quick tips I think for our listeners to better ensure that investigations remain privileged. One, decide in advance whether you need to hold onto that attorney-client privilege or the attorney work product protection. Two, if so, decide that any engagement agreement should make sure that it's very clear that the purpose is not just to investigate and gather facts, but also so that the investigator can provide legal advice. Three, make sure each report that the attorney provides includes some legal advice to ensure that the privilege attaches. And then fourth, I mentioned this already, don't include unnecessary individuals on communications with attorney investigators. Don't share the report with people who don't need to see it. You got to act consistent with maintaining the privilege for it to remain.

[\(15:49\)](#):

All right, so that's all I got, but how was that, Philip?

Philip Person [\(15:53\)](#):

I say well done. Very entertaining.

Ryan Bykerk ([15:57](#)):

Yeah.

Philip Person ([15:57](#)):

No, let's make it three gold stars. That's what you get for that. I would've sat through a law school class listening to your explanation about privilege.

Ryan Bykerk ([16:06](#)):

You're so generous. And it's three out of a hundred stars, I think, so thank you very much. But Sue, so that was sort of a really rough and high level explanation for maybe looking at it from a client's perspective, but from the attorney investigator's standpoint, what else should we be thinking about as it relates to privilege?

Sue Ann Van Dermyden ([16:23](#)):

Yeah, I think I would only add maybe two or three things. One is if you are faced with an attorney-client privilege issue, I would highly recommend you read the 2016 case, City of Petaluma versus Superior Court. That really does talk ... I think, give some guidance about how the courts are looking at this issue. From the third party external investigator, really there's two things that I think are important from us from a very practical standpoint. One is we're almost always retained under the privilege, but we always act as though it will one day be waived. So all of our communications we anticipate will one day be available for the front newspaper, right?

([17:04](#)):

But I guess the other point for us is we really don't have an interest in it. It really is the client who holds the attorney-client privilege, and it's really their interest. So we follow the lead of the ... Excuse me, of the employer, of the client, when it comes to those issues.

Ryan Bykerk ([17:24](#)):

Well said, and thank you. As you know, one of our favorite parts of The Performance Review podcast is asking our guests about their crazy employment stories. We're certain that you have some. In fact we're certain you have scores of them. But right now we'll settle for one if you would be so kind to share.

Sue Ann Van Dermyden ([17:42](#)):

You bet. And you're right, I have hundreds and hundreds of investigation stories. As you can appreciate, most of them are confidential. All of them are interesting and all of them demonstrate that we as humans are fascinating. But let me share this one, it's a kind of a hair-raising, cautionary tale for all of us. (18:01) Two employees were taking a rideshare from a late night company event. One is a manager I will refer to as 'Carl.' The other is his subordinate I will call 'Julie.' They are friends. And they work on a team of around ten people, most of whom are young females. And during this 7 minute drive – and keep in mind it's 7 minutes – they talk about work. They use first names of the people at work, first names only. And in doing so, they discuss a recent hire on the team, a male we will call 'Damon.' He was chosen over another internal applicant (18:36) whose name is 'Samantha' for this purpose. The two riders, Carl and Julie, discuss how Damon had struggled on a recent task. And Carl expressed frustration that he had to direct Damon to re-do it. By contrast they then talked about the internal candidate who didn't get the

job, Samantha. Even though she wasn't hired for this other position, she had a joint project and she was crushing it, so they were talking about the contrast between the two of them. Julie asks Carl whether he regrets hiring Damon over Samantha because of it. (19:07) And Carl responds with something to the effect of: nope, I'm already surrounded by too many young, attractive females, haha. They both chuckle, they're friends. The rideshare driver then drops them off. The driver then creates a video. She repeats everything she heard and she does it in a mocking tone, and she concludes it with "and if your name is Samantha and Damon got hired over you, call me and I'll be your witness in a lawsuit." She posted online. Not surprisingly, it goes viral. And almost immediately, the audience identifies the company, the two riders, and the two applicants because of the unique nature of their name and because they had talked about the specific industry they were in. The audience post comment after comment about each of the four individuals involved. And some of the audience members reached out directly to Samantha and to Damon. Some reached directly out to the two riders and threatened them. The comments were pretty vitriol. And so then get called in to do the investigation. And without saying my findings, the two questions I had to answer were: did they make the comments attributed to them, and was the hiring decision based on gender. In short, this 7 minute ride changed four people's lives in a significant way. (20:28) And the moral of the story is... beware never assume you're in a private – that private conversations will remain private and never talk shop in a rideshare.

Philip Person(20:40):

Do not talk about work when you're in a rideshare. And if so, please don't make it offensive.

Ryan Bykerk (20:50):

Oh my goodness. Wow, I mean, wow. Okay, yeah, cautionary tale, you learn all kinds of things on The Performance Review.

Philip Person(20:57):

The other question I would have had is like, did that rideshare person still get five stars or whatever it is.

[laughter]

Sue Ann Van Dermyden

That's a great point, Philip

Philip Person(21:17)

Thank you for that lovely story. We appreciate having you on as a guest. Thank you to our listeners for tuning in, and we'll catch you on the next one.

Speaker 1 ([21:44](#)):

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