

Presented:
35th Annual Nonprofit Organizations Institute

June 18-19, 2018
Austin, Texas

MY EMPLOYEE DID WHAT?
Preventing, Investigating, and Remediating Extreme
Employee Misconduct

Michael J. Golden

Michael J. Golden
Boulette Golden & Marin L.L.P.
2801 Via Fortuna, Suite 530
Austin, TX 78746

mike@boulettegolden.com
512.732.8902

TABLE OF CONTENTS

I. PREVENTION	3
A. Words from the Wise	3
II. WORKPLACE INVESTIGATIONS: WITNESS STATEMENTS	4
A. Background	4
B. Protection of Work Product	4
C. Discovery Of Witness Statements	5
D. Investigative Notes Vs. Witness Statements.....	5
II. WORKPLACE INVESTIGATIONS: ATTORNEY-INVESTIGATORS	6
A. The Attorney-Client Privilege.....	7
B. Defining The Attorney's Role	8
C. Keeping It Privileged	8
D. The Rules of Ethics	9
III. WORKPLACE INVESTIGATIONS: THE FAIR CREDIT REPORTING ACT.....	13
A. FCRA Basics.....	13
B. Applied To Attorney-Investigators – Congress Saves the Day	14

MY EMPLOYEE DID WHAT?

Preventing, Investigating, and Remediating Extreme Employee Misconduct

I. PREVENTION

A. WORDS FROM THE WISE

Benjamin Franklin was right: often, an ounce of prevention is worth a pound of cure. But, sometimes a pound of cure is your only option. And, sometimes, what you end up needing is more like ten pounds of cure. This paper, called *My Employee Did What?*, discusses responses to extreme employee misconduct. But first, a few words on hiring.

Experts agree that hiring good employees is the key to avoiding employee issues down the road. The *Harvard Business Review* estimates that 80 percent of turnover is due to bad hiring decisions.¹ The Society for Human Resource Management estimates the cost of replacing an employee at over half of their annual salary and benefits.² *Forbes* estimates the cost of a single bad hire at anywhere from \$25,000 to \$50,000.³

However, it's not so easy to always hire the right person. Many have tried and failed. Discussing best hiring practices would take an entire paper all to itself, and is a field so laden with landmines that even the so-called experts give some pretty bad advice. Here are just a few samples of bad hiring advice available from seemingly trustworthy sources.⁴ One website says "A complainer is the least productive employee you could bring on as part of your team. Avoid one like the plague."⁵ Another suggests, in a top ten list, "What do you like to do outside of work?," a question that could easily lead the candidate to discuss dangerous subjects like religious practices. And the author was once handed interview guidelines from an interview consultant that suggested it was inappropriate to ask minority applicants whether they liked sports (but acceptable for White applicants) because the applicant might assume the interviewer asked the question because the applicant was a minority. A commonly-found good interview question that might be an ounce of prevention for extreme employee misconduct, however, is the question "Identify a time you have faced conflict at work and how you handled it."

¹ USA Today, *Taking the Pain Out of Employee Turnover*, available at <https://www.usatoday.com/story/money/business/2015/05/26/ozy-employee-turnover/27956697/>

² SHRM, *Placing Dollar Costs on Turnover*, available at <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/critical-evaluation/pages/placing-dollar-costs-on-turnover.aspx>

³ *Dealing With a Bad Hire? The Case to Teach And Adapt, Rather Than Fire*, David K. Williams, June 5, 2012; available at <https://www.forbes.com/sites/davidkwilliams/2012/06/05/dealing-with-a-bad-hire-the-case-to-teach-and-adapt-rather-than-fire/#3cea308c6961>

⁴ All names have been omitted to protect the guilty, but I am not making any of these up.

⁵ Cf. <https://www1.eeoc.gov/laws/practices/index.cfm?renderforprint=1> ("It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.")

Even if you can't avoid every bad hire, having processes in place to investigate and remedy workplace complaints can go a long way to avoiding major problems. Creating a strong culture where employees feel empowered to raise concerns helps management or human resources address small concerns before they become explosive ones. And having a plan in place for when things do go seriously wrong can help an organization start to address an emergency effectively, no matter whether the Vice President of Human Resources or a first-level rookie manager is the first responder. Attached as Appendix A is a proposed checklist for how to respond to allegations of employee misconduct.

The remainder of this paper will focus on legal issues associated with investigating and remedying employee misconduct.

II.

WORKPLACE INVESTIGATIONS: WITNESS STATEMENTS

A. BACKGROUND

The Texas Rules of Civil Procedure regarding discovery were substantially and extensively revised effective January 1, 1999. One of the most significant changes concerned the exemption from discovery for work product. Under the old rules, a witness statement prepared in anticipation of litigation was generally exempted from the rules requiring disclosure of relevant information. The current rules changed this.

B. PROTECTION OF WORK PRODUCT

The Texas Rules of Civil Procedure define work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a).

Work product that contains the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative is considered "core" work product and is not discoverable. TEX. R. CIV. P. 192.5(b)(1). All other work product is discoverable only upon a showing that the party seeking the information has a substantial need of the information and that the party cannot obtain the substantial equivalent of the information without undue hardship. TEX. R. CIV. P. 192.5(b)(2).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: My Employee Did What?: Identifying and Mitigating Employment Risk

Also available as part of the eCourse

[HR Issues for Nonprofit Organizations: Identifying and Mitigating Employment Risk](#)

First appeared as part of the conference materials for the
35th Annual Nonprofit Organizations Institute session

"My Employee Did What?: Identifying and Mitigating Employment Risk"