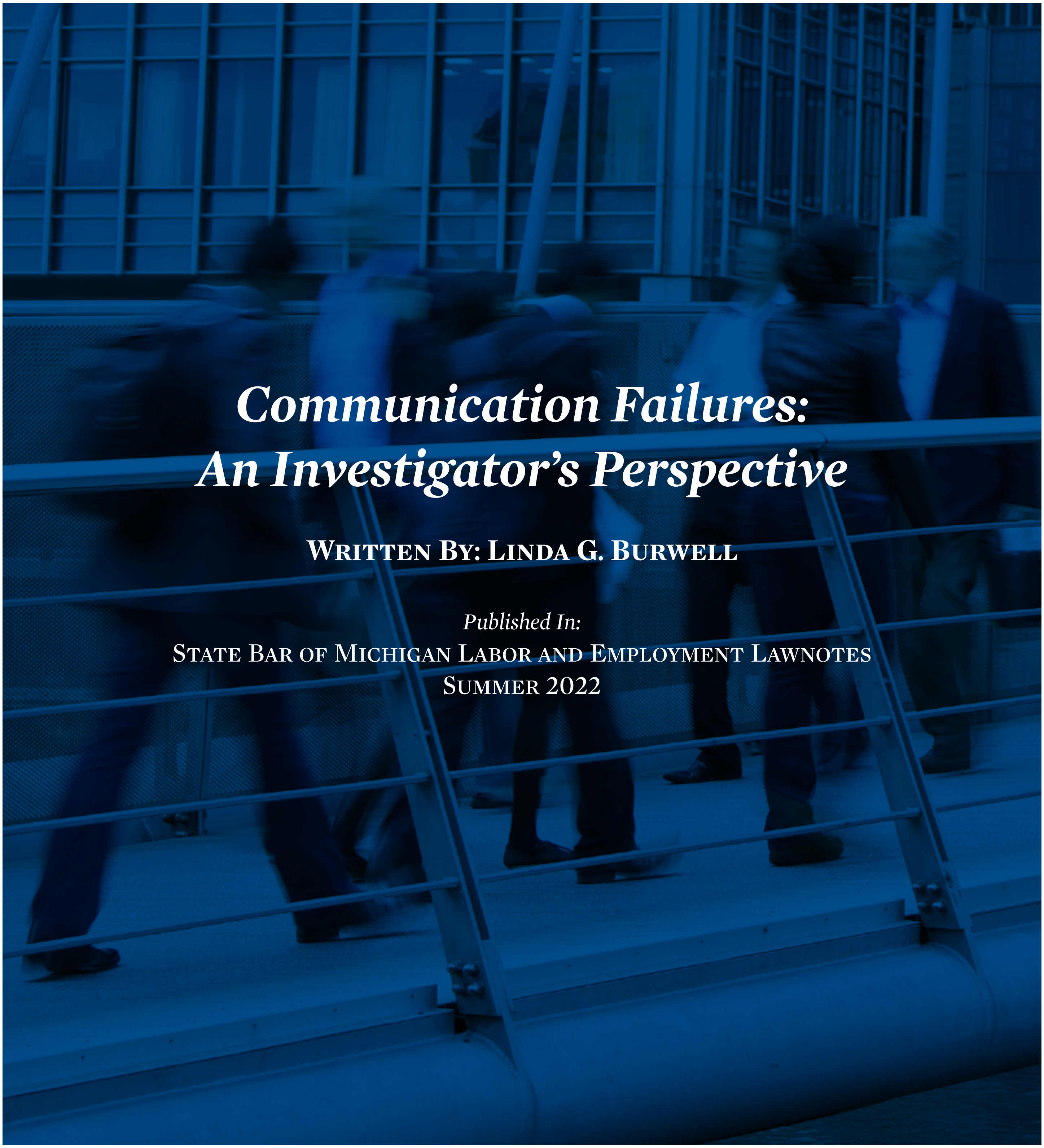

# *Communication Failures: An Investigator's Perspective*

**Written By: Linda G. Burwell**

*Published In:*
State Bar of Michigan Labor and Employment Lawnotes
Summer 2022

**P** 248.730.5583 | **E** linda@nationalinvestigationcounsel.com | nationalinvestigationcounsel.com

# COMMUNICATION FAILURES: AN INVESTIGATOR'S PERSPECTIVE

**Linda G. Burwell**
***National Investigation Counsel, PLLC***

Having conducted hundreds of workplace investigations at the C-Suite (*i.e.,* executive-level managers within a company level like CEOs, CFOs) (COO), I have noticed patterns that often appear in situations involving allegations of bullying, discrimination, or harassment. These patterns surface consistently, even though the organizations involved may vary, from closely-held businesses to governmental entities to educational institutions to Fortune 100 corporations.

Ahead, I identify common themes, discuss how they may impact the workplace and identify measures organizations might implement to help prevent these problems from occurring.

The common themes and patterns that I have observed, and that will be discussed here, appear to be related, in one way or another, to board oversight of management and to the efficacy and availability of avenues of communication for employees, executives and board members.

One oft-repeating scenario involves a close relationship between the CEO and the board that results in blocking avenues to communicate complaints about the CEO. This may be most apparent where the CEO is also the board chair, but also may occur where the CEO has uncritical support from the board and exercises his or her authority and board relationships to impede access of other management personnel to the board. What can occur in this scenario is that the CEO or others may be engaged in misconduct and the adversely effected employee may have nowhere to turn. Even in a large organization that has an effective HR department and policies to channel complaints to HR, the HR director typically still reports upward, directly or indirectly, to the CEO, so the elevation and redress of complaints may be stymied.

Another hazard of overly close CEO/board relationships is that the board may have uncritical faith in the CEO, or over an extended period of time may become too comfortable with or too reliant upon, the CEO, so as to miss signs of problems in the organization.

The flip side version of the above problems may also occur when board members become too involved in day-to-day management issues, or too close with members of the management team. This kind of activity may result in some executives trying to leverage board relationships in a way that undermines the authority of the CEO and disrupts the functional chain of command of the organization.

In my experience, these situations do not have simple solutions. In an ideal world each board member is mindful of his or her obligation to represent the shareholders, whose interest lies in promoting sound management policies and in effectively preventing and addressing incidents of misconduct that could result in liability of the company and, thus, each board member puts aside his or her personal relationship with the CEO or other executives to retain objectivity and focus on sound management practices and accountability. However, our world sometimes proves to be less than ideal, so it can be helpful for an organization to build in some guard rails and practices to encourage critical board involvement and independent oversight. Understanding that each board is unique and each must strive to achieve the right balance between not getting tied up in day-to-day operations while remaining close enough to be able to identify problems as they occur, one or more of the guardrails suggested below may help.

One thing an organization can do is review its policies to assure that it is providing for the ability of any employee to raise a complaint of wrongdoing by senior management, where the handling of such a complaint may proceed independent from involvement or interference by the senior executive involved. This may include creating direct lines of communication from the HR director or general counsel to an independent board member designated to address such issues. Even where an organization has an HR department, and appropriate policies on reporting and retaliation, if HR is not, or does not believe itself to be, empowered to act with independence in its ability to address and report complaints against the CEO or other senior managers, this may slow or derail the complaint process.

Another way for a board to gain insight into the organization independent of the CEO's filter is to encourage presentations by members of management other than the CEO at board meetings. While it may be common for a limited group of the management team – CFO, general counsel, COO, for example – to regularly join the CEO at board meetings, it may be helpful for the board, and for the development of executive skills, for the board to invite participation and presentations by other executives from time to time, such as the HR leader and other department heads. This can help the board better understand the organization and gain insight into the relationships among the executive team.

Another important tool is an effective exit interview process. Over a period of time, a practice of conducting and analyzing detailed exit interviews can reveal a pattern of problems in an organization and identify the source(s) of those problems. Is there more turnover than one would expect? Is turnover higher with certain managers? Are departing employees voicing similar reasons for leaving? Are they dancing around pointed questions about those reasons? Exit interviews with open ended questions that allow the employee to express him or herself on anything they deem important, can prove helpful. Further, implementing a reporting process to the board (providing a summary report of exit interviews and complaints) with the ability for the board to ask questions and look for patterns can also be helpful. These don't have to be "legal" issues. Problems dealing with communication or management style or leadership style may be enough to trigger the board to make further inquiries.

Similarly, conducting 360 reviews on a regularly scheduled basis, documenting the process and making the review reports of management personnel available to the board for review may provide insight into the existence of nascent issues and thus an ability to address them before they blow up into bigger problems. These reviews can also present opportunities for the board to suggest measures to address weaknesses, such as executive coaching programs or other forms of training.

Yet another tool is a periodic audit or review of the methods and channels of communication with the board (both upstream to the board and downstream). This might be an effective way to determine if board members are becoming too involved in the day operations. Such a review could also be helpful if the organization has grown, merged, acquired other entities or if it has changed simply because of the Covid pandemic.

Few of the complaints I have investigated over the years, include a solitary "out of the blue" type event. In most instances, there were multiple problematic acts, typically occurring over an extended period of time. The lesson to be learned is that rigorous attention and oversight by management and by board members, and the implementation of communication and reporting tools to enable that awareness and oversight, may often provide a company the ability to identify and address issues before they become bigger problems that interfere with the success of the organization. ■