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Audit Response Letters
What They Never Taught You in Law School, and What You Need to Know in a Civil-Defense Practice

By: Robert Ford

As a young associate at a law firm that does any measure of civil-defense work, you’re not going to make it terribly far in your career before a partner saunters into your office one afternoon, hands you a nondescript letter printed on a Big Four accounting firm’s letterhead, and tells you to “crank out” an “audit response letter.” If your law firm is like many, the partner is probably out the door and off to a tee time before you can even ask him or her what an audit response letter is, let alone what should go in it.

Fret not. You’re not alone, and you weren’t sick the day they taught audit response letters in law school. The simple fact is that, for most young lawyers, their introduction to the wonderful world of audit response letters coincides with the first time they’re asked to write one. So, here are the nuts and bolts of what you need to know.

So what is an “audit response letter,” anyway?

An audit response letter is what it sounds like. Third-party accountants who have been retained to conduct routine audits of a company’s books and records will often request letters from their clients’ outside lawyers “regarding loss contingencies” associated with pending and possible litigation, and the accountants will rely on those letters as they report to regulators—and, in turn, investors—on the client’s financial status. It is for this reason that commentators have noted the
“significant role” that audit response letters play in the “financial disclosure processes” that our public companies undergo.¹

**What key issues should you be mindful of when preparing an audit response letter?**

Audits and audit response letters have been around for ages, but since the high-profile collapses of companies like Enron, Worldcom, and others in the early 2000s—collapses which experts attributed, at least in part, to systemic failures on the part of some of the world’s largest accounting firms to reliably and independently fulfill their auditing functions—there has been renewed emphasis (and scrutiny) placed on accountants’ audits and lawyers’ audit response letters.

The list that follows is by no means exhaustive, but here are some key issues that you should be mindful of when drafting an audit response letter:

1. **Consult the ABA Policy Statement on audit response letters.** Your starting point in drafting an audit response letter should be the American Bar Association’s (ABA) Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, first promulgated in 1975. This policy statement was “intended to facilitate lawyers’ provision of information to auditors regarding client loss contingencies in connection with the preparation and examination of client financial statements, while minimizing the risk of loss of attorney-client privilege in the process.”² It ought to be your North Star when drafting an audit response letter. Notably, the ABA’s policy statement gives good advice on how one should distinguish between unasserted claims and potential litigation when drafting the audit-response letter.³ There are certain “magic words” that the ABA policy statement advises lawyers to deploy in their audit response letters, and you would be wise to follow the ABA’s lead on this front.

2. **Don’t forget your SOX.** As a trio of commentators astutely observed, “[t]he importance of the ABA Statement and the need for attorney diligence in preparing Response Letters and communicating with auditors were magnified when on July 30, 2002, President Bush signed the Sarbanes-Oxley Act (H.R. 3763) (‘SOX’).”⁴ Drafted in the wake of the accounting scandals of the early 2000s, SOX conscripted accountants and lawyers into the roles of “gatekeepers,” affirmatively obliging them to self-police and ensure that their clients are not making material misrepresentations upon which regulators or investors could rely to their detriment.

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² Id.


⁴ Egan, Goldsmith & Lotter, supra n. 1, at 1.
3. **Protect the privilege(s).** As already explained, the ABA drafted its policy statement with an eye towards reconciling the twin aims of facilitating disclosure while preserving the attorney-client, work-product, and other evidentiary privilege(s). However, it remains unclear whether the ABA achieved its goal with respect to the latter. Whether and to what extent attorney statements in an audit response letter are privileged varies by jurisdiction,\(^5\) although there is a modest majority of authority that suggests that the work-product privilege shields audit response letters from discovery.\(^6\) Still, you should take a peek at the law in the applicable jurisdiction(s) before putting pen to paper.

Robert Ford is a partner at Fogler, Brar, Ford, O’Neil, Gray, LLP in Houston, Texas, and represents both plaintiffs and defendants in all manner of high-stakes civil matters, including complex commercial litigation, legal-malpractice actions, personal-injury suits, and product-liability claims.

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**Ethical Concerns in Ex Parte Communications with Adverse Employer’s Employees**

By: Elisaveta Dolghih

It’s an axiomatic rule that attorneys may not have *ex parte* communications with a represented party. However, this simple rule become complicated when an attorney needs to talk an adverse company’s employees to investigate a claim or discover information. This article explains when an attorney may contact the adverse parties’ employees directly without violating the ethical rules.

The rule that governs communications between an attorney and an adverse party’s employees is Rule 4.2 of the Model Rules of Professional Conduct, which states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in

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\(^6\) See Egan *supra* n. 3, at 465 (“With respect to whether work product protection survives disclosure to auditors, the opinions are divided, but the majority view seems to be that work product includes any material prepared ‘because of’ actual or potential litigation (thus encompassing analysis of litigation exposure prepared in response to an Inquiry Letter) and survives disclosure to the auditors.”)

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the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Specifically, Comment 7 to Rule 4.2 further explains that "[i]n the case of a represented organization, [the Rule] prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Comment 3 reminds that Rule 4.2 "applies even though the represented person initiates or consents to the communication."

Thus, an attorney may initiate ex parte communications with an adverse party’s employees unless (1) those employees “supervise, direct or regularly consult with the organization’s lawyers concerning the matter”; (2) have “authority to obligate the organization with respect to the matter”; or (3) their “act or omission in connection with the matter” may be imputed to the company. Comment 7. If an employee falls into one of the above categories, an attorney may not have ex parte communications with them even if the employee reached out to the attorney. Comment 3. However, Rule 4.2 does not apply to former employees, therefore, the consent of the company’s lawyer is not ordinarily required in order for opposing counsel to initiate contact with a former employee. In sum, adverse company’s employees are free game unless they are tied to the corporate attorney-client relationship or their acts and/or omissions give rise to vicarious liability.

As a practical matter, any time an attorney contacts employees of an adverse party, he or she should ask the following questions to determine whether these employees fall in one of the anti-contact categories under Rule 4.2: (1) what is your status at the organization? (2) are you represented by counsel? (3) have you spoken to the organization’s counsel concerning the matter at issue? (4) were you involved in the events underlying the lawsuit? The attorney then should evaluate whether the employee witness was personally involved in the underlying events that may give rise to the employer’s vicarious liability for the employee’s acts and/or omissions, before getting into substantive questions. While the courts around the country have interpreted and applied Comment 7 and the state equivalent statutes in different ways, the above-described approach provides a universal first step in determining whether employees of the adverse party could be off-limits in an informal investigation.

Elisaveta Dolghih is a Senior Attorney at Godwin Bowman & Martinez, in Dallas, Texas. Her practice focuses on enforcement of non-competition agreements, unfair competition practices, and trade secret misappropriation. She is the author of www.northtexaslegalnews.com and may be contacted at LDolghih@GodwinLaw.com.

NEWS AND ANNOUNCEMENTS >>

YLD Fall Conference

October, 20-22, 2016
Detroit, Michigan
The YLD Fall Conference will be held October 20-22, 2016 in Detroit, Michigan. The YLD has a jam-packed schedule of CLE programs, networking events and meetings. Don't miss out on this chance to network with other young lawyers, earn CLE credits, and hear from well-known speakers. It's important that we have a wide range of voices, experiences, and opinions at the meeting where young lawyers come to share ideas. We hope you can be part of that discussion.

ABA Midyear Meeting

February 2-5, 2017
Miami, Florida

The ABA Annual Meeting will be held February 2-5, 2017, in Miami, Florida. The YLD has a jam-packed schedule of CLE programs, networking events and meetings. Don't miss out on this chance to network with other young lawyers, earn CLE credits, and hear from well-known speakers. It's important that we have a wide range of voices, experiences, and opinions at the meeting where young lawyers come to share ideas. We hope you can be part of that discussion.

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