CONDUCTING AN ETHICALLY SOUND INTERNAL EEO INVESTIGATION

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As employment relationships become more highly regulated, the demand for attorney compliance review services continues to rise. Today, attorneys are routinely called upon to conduct internal EEO investigations for organizational clients. Indeed, conducting such investigations is one of the core advisory services employment attorneys perform for organizational clients. One can imagine a host of scenarios when a lawyer may be called upon to conduct an internal investigation relating to EEO compliance or alleged wrongdoing. Prominent examples include:

- gathering information to respond to an internal EEO complaint, an EEOC charge, or an EEO lawsuit
- creating the factual basis for a defense, such as the affirmative defense to vicarious liability for a hostile work environment claim

1 This article was written in the author’s private capacity. The views expressed in this article do not necessarily represent the views of the EEOC or the United States government.

2 See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (“In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, ‘constantly go to lawyers to find out how to obey the law’”) (internal citation omitted); EEOC v. City of Madison, No. 07-C-349, 2007 WL 5414902, at *3 (W.D. Wisc. Sep. 20, 2007) (“Attorneys are almost always consulted on a business’ in house investigations and, in fact, it is at the core of an attorney’s job to generally advise clients about conducting such investigations.”).
• assessing whether a client’s hiring, promotion, or recruitment processes pose any barriers to the employment or advancement of protected groups

Each of these scenarios raises fundamental questions about who should be conducting the investigation (an attorney, a different type of professional, or both), what information can be treated as confidential, and what information can reasonably be expected to be subject to disclosure in a subsequent lawsuit even if it would otherwise be confidential.

The ABA Model Rules of Professional Conduct provide some guidance on the range of ethical issues that may arise when an attorney takes on an internal EEO investigation. The application of those rules is informed by a variety of factors, including the nature and purpose of the investigation and the expected use of the results of the investigation. This article first reviews the applicable ethical rules, and then examines the ethical considerations that arise in planning and conducting internal EEO investigations. The article then analyzes the situations in which the internal investigation must be disclosed to others, in particular the EEOC.

The ABA Model Rules

In several provisions, the ABA model rules specifically target the attorney investigation function. Model Rules 1.6 and 1.13 regulate how an attorney must treat information he obtains during an internal investigation. As it relates to internal investigations, Model Rule 1.6 requires attorneys to treat information “relating to the representation of a client” as confidential unless: 1) “the client gives informed consent” to disclose, 2) “the disclosure is impliedly authorized in order to carry out the representation” or 3) the disclosure is necessary “to comply with other law or a court order.”3 Comment [5] to the rule clarifies that a disclosure is “impliedly authorized” when “appropriate” and not expressly limited by the client, and provides as an example “admit[ting] a fact that cannot properly be disputed …”4 This comment provides no other guidance on the range of circumstances in which a disclosure of confidential information may be impliedly authorized, and yet, as discussed below, this question is a recurring one when a lawyer obtains information through conducting an internal investigation of an EEO complaint.

Model Rule 1.13 elaborates on the disclosure obligations and limitations in the context of conducting an investigation for an organizational client. That rule permits disclosure of confidential information to prevent substantial injury to the organization when the lawyer knows

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3 ABA Model Rules of Prof’l Conduct at R. 1.6.

4 Id. at R. 1.6 cmt. 5.
the client is violating the law, the organization’s highest authority insists upon such conduct or fails to act to prevent it, and the lawyer reasonably believes that the violation is reasonably certain to cause substantial injury to the client.\(^5\) However, the rule expressly states that this provision does not apply to “information relating to a lawyer’s representation of an organization to investigate an alleged violation of law …”\(^6\) Comment [7] to the rule indicates that this limitation on the lawyer’s authority to disclose is “necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation …”\(^7\) Comment [2] to the rule states that when an organizational client requests the lawyer to “investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6.”\(^8\) The comment also indicates that the lawyer “may not disclose to [] constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.”\(^9\) As with Model Rule 1.6, little guidance is provided on when a disclosure would be impliedly authorized. The rule also provides that, “[i]n dealing with an organization’s … employees, … a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”\(^10\) Finally, comment [3] to the rule indicates that “[d]ecisions concerning policy and operations” are not “in the lawyer’s province” and “must be accepted by the lawyer even if their utility or prudence is doubtful.”\(^11\)

Model Rule 2.1 requires attorneys to “exercise independent professional judgment and render candid legal advice” to clients.\(^12\) Comment [5] to the rule generally indicates that an

\(^5\) See id. at R. 1.13(c).
\(^6\) Id. at R. 1.13(d).
\(^7\) Id. at R. 1.13 cmt. 7.
\(^8\) Id. at R. 1.13 cmt. 2.
\(^9\) Id.
\(^10\) Id. at R. 1.13(f).
\(^11\) Id. at R. 1.13 cmt. 3.
\(^12\) Id. at R. 2.1
attorney has no obligation to give advice to a client until asked, but also makes clear that conducting an “investigation of a client’s affairs” falls within the scope of this rule and that an attorney may initiate such an investigation when doing so “appears to be in the client’s interest.”13

Several principles can be distilled from these general ethical rules and applied to attorney internal EEO investigations. First, the ethical rules apply only when the attorney is conducting an internal investigation in an attorney role, that is, as a legal counselor, rather than as a policy-maker, decision-maker, or human resources specialist for the client. Thus, one of the first questions an attorney must decide when asked to conduct an internal investigation is what role he would play in the investigation and in the subsequent decision-making process. Second, attorneys have an ethical obligation to consider whether conducting an internal investigation is in the client’s interest, even when not specifically asked, and to use professional judgment and provide candid legal advice in the conduct of any such investigation. Third, the ethical rules apply to interactions with a client’s employees, and create special obligations to clarify the attorney’s role in dealing with those employees. Although the ethical rule on identifying the client applies only when the client has interests adverse to the client’s employee’s interests, in the context of an internal investigation, it is often unknowable whether a client’s employee’s interests are or may become adverse to the client’s. Therefore, adversity should be assumed, and counsel should provide a full explanation of his role to the client’s employee. Fourth, assuming the attorney is acting as a legal advisor, the rules create a presumption that an attorney is ethically obligated to preserve the confidentiality of information he obtains in an internal EEO investigation of a client’s affairs. Fifth, the rules contemplate situations when counsel may disclose otherwise confidential information, and provide various triggers for such disclosure. Thus, in handling an internal investigation, counsel should consider up front whether ordinarily privileged communications or documents are likely to be disclosed at some later point and to advise his client of this possibility.

The discussion below addresses how these ethical principles play out in EEO internal investigations. The discussion then addresses the types of circumstances that would constitute an implied authorization to disclose otherwise confidential information, along with some tips on

13 Id. at R. 2.1 cmt. 5.
how practitioners can expect the EEOC to respond when investigative materials are withheld during an investigation or subsequent enforcement action.

Planning and conducting an EEO investigation

An attorney can have a variety of responsibilities and tasks in handling an internal EEO investigation for an organizational client. In some cases, his first task will be to advise the client to conduct an internal investigation. For example, this advice would be called for if a client contacted the attorney to ask what to do about an employee’s sexual harassment complaint. As the investigation gets underway, the attorney may find himself in a variety of other roles, ranging from hands-on planner and employee interviewer to passive advisor to HR on specific questions. The more the attorney is functioning as a legal advisor, the more likely it is that the attorney’s notes and memoranda and communications with (or at the behest of) the attorney will be treated as confidential. Thus, if the attorney is providing legal advice on issues such as which employees may have legally relevant information, what questions are legally relevant, and analysis and recommendations based on the information obtained, his communications with the client will surely be confidential. If, on the other hand, the attorney’s role is merely conducting employee interviews, or the attorney is a decision-maker on what action to take based on the investigative findings, or the investigation is undertaken pursuant to some general business purpose rather than in response to a specific complaint, it is less likely that the attorney would be functioning as a legal advisor as opposed to an HR or business advisor.

Where there is both a business and a legal purpose for the communication, courts sometimes require that the proponent of the privilege demonstrate that the communication was made in confidence for the “primary purpose of obtaining legal advice” and that “legal advice

14 See, e.g., Crawford v. Metropolitan Gov’t of Nashville & Davidson Co., Tenn., 555 U.S. 271, 278 (2009) (noting that “[e]mployers are … subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability.”).

15 One commentator frames the issue as follows: “Whether the privilege will apply in investigatory situations depends on whether an attorney is evaluating risk and acting as a legal advisor or investigating to determine what occurred and to take action. In other words, is the attorney investigating in preparation for litigation or to analyze legal risk, or is the attorney enforcing the company’s human resources policies or acting as a decision-maker?” Preserving the Attorney-Client Privilege in the Employment Environment, John F. Birmingham, Jr. & Jennifer L. Neumann, Mich. Bar. J. 36, 38 (Jan. 2010).

16 See, e.g., Freiermuth v. PPG Inds., Inc., 218 F.R.D. 694, 700 (N.D. Ala. 2003) (communications made for the purpose of assessing whether employer was complying with its EEO policy and accurately applying its reduction-in-force policy are “prepared in the regular and ordinary course of business.”).
must predominate for the communication to be protected."\textsuperscript{17} Thus, the first question an attorney should consider when embarking on an internal investigation is whether his role is truly as a legal advisor. Indeed, this question should inform the attorney’s decision on what his role in the investigation should be.\textsuperscript{18}

An attorney’s decision to have a hands-on role, by conducting the interviews himself in addition to assessing the risk and providing advice, is often an effective and efficient means of information gathering and analyzing. However, it also raises some potential ethical problems. For example, the client’s employees may be confused about the attorney’s role and believe wrongly that he represents them. The attorney’s duty of loyalty, of course, rests with the organizational client, and he will need to take steps to explain this point clearly to all employees interviewed and to explain that his client’s interests are not necessarily the same as the employees’ interests. In addition, he will need to explain the attorney client privilege (including what it means, that the organization holds the privilege, and that the interview is intended to assist the attorney in providing legal advice to the organization) and the circumstances under which the employee’s statements may be disclosed to others.\textsuperscript{19} These warnings fulfill the ethical obligation not to mislead an employee with interests adverse to those of the corporation, which probably is unknown at the commencement of the interview. They also assist in maintaining the organization’s right to assert the attorney client privilege over such communications.

\textsuperscript{17} White v. Graceland Coll. Cen. for Prof. Dev. & Lifelong Learning Inc., 586 F. Supp. 2d 1250, 1269 (D. Kan. 2008); accord Visa USA, Inc. v. First Data Corp., No. C-02-1786, 2004 WL 1878209, at *8 (N.D. Cal. Aug. 23, 2004). Courts may scrutinize assertions of privilege even more closely where the investigating attorney is in house counsel to the client, since the legal and business duties of in-house counsel are often difficult to distinguish. See, e.g., In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 797 (E.D. La. 2007) (noting difficulty in applying attorney-client privilege in the corporate context to “communications between in-house corporate counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises for which they work …[and] participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.”); TVT Records v. Island Def Jam Music Group, 214 F.R.D. 143, 144 (S.D.N.Y. 2003) (same).

\textsuperscript{18} One commentator notes that some companies handle the internal investigation of a harassment complaint using two attorneys, “an investigating attorney who performs the interviews and a counseling attorney who weighs the legal risks based upon the reported facts.” The commentator concludes that “[u]nder this approach, the interviews with the investigating attorney would likely be discoverable.” When The Attorney Is The Investigator, Law360, Nov. 9, 2011.

\textsuperscript{19} See Upjohn, 449 U.S. at 391, 394 (stating that the attorney client privilege exists to protect “not only the giving of professional advice … but also the giving of information to the lawyer to enable him to give sound and informed advice” and therefore covers communications made by “employees beyond the control group” and may include “[m]iddle-level and indeed lower-level-employees …,” and finding that privilege applied to communications made by defendant’s employees “to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.”).
An attorney’s hands-on involvement in the investigation will likely turn the attorney into a fact witness. This raises the question of whether the attorney’s notes of the interviews will have to be disclosed in any future litigation (including notes reflecting mental impressions of the witness’ statements), and virtually guarantees that the attorney will be deposed in a future harassment lawsuit. As discussed in greater detail below, in a harassment suit, assertions of privilege will not fare well. Even if there is any viable privilege argument, the client may have to waive any privilege over investigative materials generated by the attorney to raise a defense to vicarious liability. In this situation, the attorney will be a prime fact witness in the defense of the case, and thus he should carefully consider if this is an acceptable or desired outcome.

Attorneys should also consider whether their direct involvement in an employee interview is the best vehicle for obtaining the facts necessary to offer sound legal advice. While it is certainly in the client’s best interest to have a skilled interviewer conduct employee interviews, subjecting employees to questioning by an attorney can be intimidating. These interviews may result in less effective information gathering since the attorney’s presence may decrease the candor of the employee and increase the fear of future retaliation. Attorneys should also consider, given the dynamic in the client’s workplace, whether their direct involvement will be more likely to generate additional EEO complaints. For example, an interviewer’s questioning can result in claims that the investigation itself was a discriminatory term or condition of employment.20 If the interviewer is an attorney, he will want to take pains to ensure that there is no validity to such an allegation.

Regardless of whether an attorney participates in witness interviews, an attorney should take steps to ensure that the investigation is not used as a basis for future retaliation against employee witnesses and does not create the perception of retaliation. In a string of recent decisions, the Supreme Court has reaffirmed its broad interpretation of Title VII’s retaliation provision.21 Those decisions have interpreted Title VII’s anti-retaliation provision to cover former employees, an employee’s responses to an employer’s internal EEO investigation,

20 See, e.g., Belton v. City of Charlotte, 175 Fed. Appx. 641, 660 (4th Cir. 2006) (“An employer’s failure to investigate a charge of discrimination affects the conditions of employment by communicating one message to the victim and yet another to the perpetrator of discrimination.”); Bernstein v. Oak Park-River Forest High Sch., 191 F.3d 455 (table), 1999 WL 594920, at *4 (7th Cir. Aug. 6, 1999) (denying motion to dismiss employee’s claim that her employer engaged in discrimination by inadequately investigating her complaints because of her religion).

21 Title VII is a reference to Title VII of the Civil Rights Act of 1964. Its retaliation provision is found at 42 U.S.C. §2000e-3(a).
materially adverse actions occurring outside the workplace, and third-party complaints. Since the employee’s statements will be considered protected activity, and other employees who did not participate in the investigation may have standing to raise a retaliation complaint, and a wide range of materially adverse actions short of discharge are actionable, an attorney will want to take precautions to avoid any factual basis for a future retaliation claim. At a minimum, the attorney should advise each employee during the interview that there will no be retaliation and assure confidentiality to the extent possible (e.g., that information will not be shared with the employee’s supervisor or the alleged discriminating official). In addition, the attorney should advise his client not to take any kind of adverse action against the complainant without solid evidence to support it, especially soon after the interview, and to be careful about taking adverse action against any employee who participates in the investigation on grounds that he lied during the investigation.

Finally, an attorney should take care that an internal investigation is conducted in such a manner that it ferrets out the relevant facts, is prompt and fair, and results in concrete and analytically sound recommendations for the client. However an attorney decides to proceed, there should be clarity up front. What is the purpose of the investigation? What are the deliverables, and when will they be delivered? Who will do what? Who represents whom? What types of documents should and should not be created, and what should the contents of the documents be? What materials will be treated as confidential and what will not? Once the investigation is complete and the attorney’s recommendations have been made, decisions on what actions to take following investigation should be made and carried out by the client, not the attorney.

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22 See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that Title VII covers retaliation against former employees); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006) (holding that the “scope of [Title VII’s] antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm” and includes actions which “a reasonable employee would have found … materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”); Crawford, 555 U.S. at 277-78 (holding that Title VII’s opposition clause protects an employee’s report of discriminatory conduct in response to an employer’s question “just as surely as by provoking the discussion ...”); Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 870 (2011) (holding that an individual may bring a retaliation claim under Title VII even if he did not engage in protected activity, so long as he is within the “zone of interests protected by Title VII,” and finding that the plaintiff was within the zone of interests since he was the employer’s employee, and injuring him was allegedly the employer’s intended means of harming another employee who was his fiancée). See also Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335-36 (2011) (holding that the FLSA retaliation provision, which covers employees who have “filed a complaint,” includes oral as well as written complaints; this ruling also covers retaliation complaints under the Equal Pay Act, which shares the same retaliation provision as the FLSA, 29 U.S.C. §216(c)).
Disclosing EEO investigation materials

Once the internal investigation is concluded, and perhaps after the client has effectuated any resulting decisions, disclosures of investigative materials may have to be made. The first entity to whom disclosures are likely to be made is the EEOC. The prudent attorney will have anticipated this outcome before the investigation even began. In some situations, the client will expressly authorize the disclosure of investigation materials, especially if they are helpful to its cause. In other situations, a client impliedly authorizes disclosure in order to carry out the representation. The remainder of this article explains the circumstances under which a client may impliedly authorize disclosure of internal investigation materials to the EEOC.

When the EEOC is acting as an impartial investigator of a charge of discrimination, it may ask for records of an employer’s internal investigation of a discrimination complaint. At this stage, the EEOC will carefully consider an employer’s assertion of privilege over internal investigations, and if necessary, will resort to issuing a subpoena and enforcing the subpoena if the EEOC believes the employer has not met its burden to establish all elements of the privilege or has waived the privilege. In EEOC v. City of Madison, the defendant resisted disclosing its internal sexual harassment investigation records to the EEOC investigator, claiming that the city attorney’s office had control over the investigation and that the investigation materials were covered by the attorney work product privilege. In the ensuing subpoena enforcement action, the court was “persuaded that the EEOC’s broad investigatory powers … require the work-product doctrine be applied ever so carefully with an eye toward not limiting that broad investigatory power granted the EEOC by Congress.” The Court further noted that “a decision to limit the EEOC’s access to relevant evidence should be rare and made with caution.” The Court rejected the defendant’s claim that its internal investigation of workplace harassment was prepared in anticipation of litigation, based on evidence that the investigation was not only in response to the specific allegations of the charging party but also for the ordinary business purpose of ensuring a harassment-free workplace. The court stated that the “remote prospect of

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23 2007 WL 5414902.
24 Id. at *2.
25 Id.
future litigation” was not enough to bring the materials under the privilege.26 The court also noted that the city attorney’s office did not itself perform the investigation but merely was the source of advice during the investigation. “Attorneys are almost always consulted on a business’ in house investigations and, in fact, it is at the core of an attorney’s job to generally advise clients about conducting such investigations. If such involvement by an attorney placed an in house investigation under the work-product doctrine then every private employer’s in house investigation would fall outside the scope of the EEOC’s broad investigatory power.”27

The short lesson here is: 1) an attorney’s role in giving advice to a client on how to go about conducting an internal investigation does not render the investigative materials confidential, and 2) courts will closely scrutinize claims of work product privilege for investigation materials prepared in response to an EEOC charge. In an abundance of caution, attorneys should assume that most internal investigative materials will be disclosed to the EEOC investigator if a charge is filed. Attorneys may choose to obtain written consent of their clients to avoid questions of whether the disclosure of potentially confidential material is impliedly authorized. Where there is a legitimate dispute with the EEOC about whether certain materials are confidential and the dispute cannot be resolved by the parties, it may be necessary for a court to resolve the dispute in a subpoena enforcement action.

During litigation of an enforcement action, the EEOC typically requests that the defendant produce all records relating to the internal investigation of an EEO charge or internal complaint. The question of disclosure frequently comes down to two questions. First, if an attorney was involved in the conduct of the investigation, was the attorney acting as a legal advisor or merely assisting with business functions? Second, did the client impliedly authorize

26 Id. Other courts have similarly found that investigation materials are not prepared in anticipation when the investigation is the employer’s usual response to EEO complaints and the investigation takes place before a charge is filed. See, e.g., EEOC v. Commonwealth Edison, 119 F.R.D. 394 (N.D. Ill. 1988) (rejecting assertion of attorney work product privilege over employer’s EEO administrator’s memoranda where there was no evidence that defendant anticipated litigation at any time during his internal investigation, and noting that the EEO administrator had investigated 100 other internal investigations and expected very few if any to result in litigation); Miller v. Federal Express Corp., 186 F.R.D. 376, 388 (W.D. Tenn. 1999) (“Documents pre-dating plaintiff’s filing of her external EEOC complaint are not entitled to work-product protection because they were prepared as a matter of routine internal investigation by defendant to adjust employee relations.”).

27 2007 WL 5414902, at *3. The court also rejected outright the defendant’s assertion of a “self-critical analysis privilege” because the Seventh Circuit had not recognized the privilege and the Supreme Court cautioned in Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990), not to recognize “any special privileges” to EEOC subpoenas. EEOC v. City of Madison, 2007 WL 5414902, at *1. The self-critical analysis privilege is not well recognized in the context of EEO litigation, and the EEOC does not recognize such a privilege at the subpoena stage or in enforcement suits.
disclosure in litigation by failing to treat the investigative information confidentially or placing the investigation at issue in litigation?

The litigation of a motion to compel discovery in EEOC v. Outback Steakhouse of Florida, Inc. \(^{28}\) illustrates how courts analyze the assertion of privilege and confidentiality of internal investigation materials in the context of a sexual harassment case. In that case, the EEOC alleged sex discrimination in promotions, sexual harassment, and retaliation. The EEOC propounded interrogatories asking that the defendants identify all formal and informal complaints of sex discrimination and sexual harassment and all complaints of unfair treatment by female employees during a certain time period. In addition, the interrogatories asked that the defendants provide detailed information regarding each complaint, including the action taken in response to the investigation. The EEOC also made parallel document requests.\(^{29}\) In response to the defendants’ claims of privilege, the EEOC argued that the defendants’ investigations into complaints of sex discrimination and sexual harassment were non-privileged and that, even if they were, Defendants waived this protection by asserting an affirmative defense to vicarious liability.\(^{30}\)

Relying on the Supreme Court’s decision in Upjohn Co. v. United States,\(^{31}\) the Court first noted that neither the work product doctrine nor the attorney-client privilege protects underlying facts contained within privileged communications or documents.\(^{32}\) The Court then stated that the defendants’ privilege log was so vague that the Court could not assess whether any privilege applied to any of the materials.\(^{33}\) The Court thus ordered the defendants to submit a new privilege log indicating whether particular documents were prepared in anticipation of litigation.

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\(^{28}\) 251 F.R.D. 603 (D. Colo. 2008).

\(^{29}\) Id. at 608-09.

\(^{30}\) Id. at 609. An employer may raise an affirmative defense to a claim of supervisory harassment where the harassment did not culminate in an adverse employment action and where the employer can prove “two necessary elements: (a) that it exercised reasonable care to prevent and correct promptly any [discriminatory] or sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.” Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Inds. v. Ellerth, 524 U.S. 742 (1998). This defense is commonly known as the “Faragher/Ellerth” defense.


\(^{32}\) See Outback Steakhouse of Fla., Inc., 251 F.R.D. at 610.

\(^{33}\) Id. at 610-11.
(which the Court defined as: in response to a specific threat of litigation, in response to a communication from an attorney, prepared by an attorney, prepared by an agent acting on behalf of an attorney, prepared for the purpose of seeking legal advice, or prepared under the direction of the defendants’ officers who have a substantial role in directing actions in response to legal advice). 34 Turning to the EEOC’s waiver argument, the Court ruled that, “to the extent that Defendants have asserted the Faragher/Ellerth affirmative defense, they have waived the protections of the attorney-client privilege and work product doctrine regarding investigations into complaints made by female employees.” 35 Notably, the waiver applied to all responsive documents, and was not restricted to purely factual material. Thus, the notes of any investigating attorney were required to be produced regardless of whether they contained mental impressions. 36

In an earlier case, EEOC v. Woodmen of the World, 37 the Court permitted the defendant to withhold a limited amount of investigative material relating to direct communications with the defendant’s counsel. In that case, the EEOC alleged that the defendant subjected the charging party to sexual harassment and then demoted her when she attempted to fire one of the harassers who was the subject of her internal complaint. The EEOC had possession of most of the contents of the defendant’s internal investigative file, but specifically sought documents relating to conversations between the defendant’s investigator (an HR employee) and its counsel. The EEOC argued that the documents were not privileged because counsel was giving business (rather than legal) advice and because counsel was acting as a decision-maker (rather than an advisor) by participating in the final decision-making conference and drafting the investigative conclusions. The EEOC further argued that the defendant waived any privilege by placing the

34 Id. at 611.
35 Id. at 612.
36 The EEOC achieved a similar result in EEOC v. Rose Casual Dining, L.P., No. 02-7485, 2004 WL 231287 (E.D. Pa. 2007). In that case, the EEOC sought production of certain witness statements written at the request of the defendant’s counsel during an internal investigation, but without assistance or communication from counsel. The Court determined that the defendant had conducted two different investigations, the first in response to the plaintiff’s internal complaint of sexual harassment and the second after the plaintiff’s discharge and in response to the plaintiff’s threat to sue. The Court ordered disclosure of the witness statements from the first investigation, finding that the defendant had waived any claim of privilege by raising the reasonableness of its investigation as an affirmative defense. Id. at *3.
internal investigation at issue when it asserted a *Faragher/Ellerth* defense. The Court concluded that these communications were made for the purpose of seeking legal advice and were subject to attorney client privilege. Addressing the EEOC’s waiver argument, the Court determined that the defendant’s assertion of a *Faragher/Ellerth* defense did not constitute a waiver of privilege. In so ruling, the Court accepted the defendant’s argument that there was no waiver because it had not relied on “the adequacy of the investigation as an affirmative defense” and specifically “does not rely on the fact that its internal investigation found insufficient evidence of sex discrimination ... Instead, [Defendant] asserts that adequate procedures for addressing internal complaints of discrimination existed, that [Charging Party] was made fully aware of such procedures, and that during the approximately four years of alleged discrimination, she failed to avail herself of these procedures.” Without much explanation, the Court agreed with the defendant, finding that “on balance, fundamental fairness does not require disclosure of the subject documents” since the EEOC already had access to “the true and material facts at issue …” through its possession of the investigative file.

This ruling seems wrong on several counts. First, the defendant’s argument that it was not relying on the adequacy of its internal investigation as a defense is squarely at odds with its averment in its answer that it “exercised reasonable care to prevent and correct promptly any alleged sexually harassing behavior.” Second, the ruling fails to recognize that an employer must prove both elements of the affirmative defense. It is not enough to show that the employee failed to avail herself of the employer’s procedures; the employer must also show that it exercised reasonable care to correct promptly any sexually harassing behavior. Last, the Court failed to address (or even mention) the EEOC’s argument that defendant’s counsel was acting as a decision-maker rather than a legal advisor. The Court acknowledged the EEOC’s argument that, after deciding that the charging party’s complaint was valid based on its internal

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38 *Id.* at *4.
39 *Id.* at *5.
40 *Id.* at *6.
41 *Id.*
42 *Id.*
43 *Id.* (emphasis added).
investigation and after the charging party tried to demote the harassers, the defendant’s response was to demote the charging party instead.\(^4\) However, the Court ignored the EEOC’s evidence that the defendant’s counsel actively participated in the decision-making process leading to these actions.\(^5\) Contrary to the Court’s ruling, the defendant placed the adequacy of its investigation at issue by asserting a defense that it promptly corrected alleged sexual harassment, and any legitimate privilege argument disappeared when its counsel became enmeshed in the decision-making process. The salient point here is not so much to criticize the court’s ruling as to illustrate what could have happened. Although the defendant in this case managed to avoid disclosure of several attorney communications, this result was far from assured because of the way the attorney handled the investigation and defended against the claim. This case also illustrates the reason for the ethical guideline cautioning against crossing the line from advisor to decision-maker.

Several other recent district court opinions (in non-EEOC suits) indicate that courts will closely scrutinize claims of privilege over internal investigation materials in harassment cases and will generally find that the assertion of the \textit{Faragher/Ellerth} defense is an implied waiver of privilege for all investigative materials. In \textit{Angelone v. Xerox},\(^6\) the defendant’s in-house counsel was on a team that conducted and reviewed an internal investigation of a sexual harassment complaint. The Court stated that “the clear majority view is that when a Title VII defendant affirmatively invokes a Faragher-Ellerth defense that is premised, in whole or in part, on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation.”\(^7\) It made no difference to the Court whether the documents contained fact, opinion, or both. Similarly, in \textit{Musa-Muaremi v. Florists’ Transworld Delivery, Inc.},\(^8\) the sexual harassment plaintiff sought internal investigative materials, and the Court found no privilege and an implied waiver of any

\(^{4}\) See Id.


\(^{7}\) Id. at *2.

\(^{8}\) 270 F.R.D. 312 (N.D. Ill. 2010).
arguable privilege. In that case, two attorneys participated in the internal investigation of the plaintiff’s sexual harassment complaint. Rejecting all assertions of privilege, the Court ruled that the documents the attorneys worked on contained no legal advice but only “editorial word-smithing,” and thus did not constitute confidential attorney-client communications. The Court further ruled that the documents were not covered under the attorney work product privilege, since the internal investigation was a routine response to an employee complaint, which occurred near the time of the complaint and prior to the filing of an EEOC charge. Thus, the documents were not created in anticipation of litigation. The Court then ruled that the defendant’s invocation of the Faragher/Ellerth defense waived any privilege, where the defendant claimed that it appropriately responded to the plaintiff’s complaint. Importantly, the Court rejected the defendant’s argument that there was no waiver since it did not intend to “affirmatively rely” on the documents at issue. The Court emphasized that this argument “misses the point” -- the plaintiff was entitled to all documents relating to the investigation of her complaint and the remedial response, “not only those that [the defendant] thinks support its cause.”

One recent decision took a similar approach, but shielded attorney opinion material from disclosure. In Reitz v. City of Mt. Juliet, the defendant relied on an internal investigation to defend against a sexual harassment claim. The Court ruled that the defendant waived privilege over investigative materials prepared by its attorney, but only with respect to factual materials. The defendant was permitted to redact portions of counsel’s witness interviews that reflected his opinions and mental impressions. The Court concluded that the attorney’s opinions had no bearing on the validity of the plaintiff’s claims and were therefore not discoverable. Notably, the Court’s ruling was on relevancy grounds; the Court did not protect the opinion material from disclosure on grounds that the defendant had not impliedly waived privilege over the material.

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49 Id. at 316.
50 Id. at 317.
51 Id. at 317-19.
52 Id. at 319.
53 680 F. Supp.2d 888 (M.D. Tenn. 2010).
54 Id. at 895.
So much litigation has focused on internal investigations of discrimination and harassment complaints, it is easy to forget that there are other types of EEO-related investigations that attorneys advise on or carry out. For example, many employers conduct internal audits of their demographic profiles and personnel systems for various EEO related reasons, such as identifying barriers to the employment of protected groups, developing ways to increase employee diversity, developing and complying with affirmative action plans, and determining if screening devices or other employment practices have a disparate impact on protected groups.\(^55\) In EEOC v. General Telephone Co. of the Northwest, Inc.\(^56\) the defendant had conducted an internal analysis of EEO practices and sought to prove the absence of an intent to discriminate against the charging party by introducing evidence of its EEO and affirmative action efforts.\(^57\) The district court permitted the defendant to introduce evidence of its EEO efforts while exempting from discovery relevant self-critical materials, and the EEOC appealed. The Ninth Circuit agreed with the EEOC, and held that “when an employer voluntarily uses evidence of its equal opportunity efforts to prove nondiscrimination, it ‘opens the door’ and waives whatever qualified [self-critical analysis] privilege may have existed.”\(^58\) Based on this rationale, an employer’s decision to voluntarily place its EEO or affirmative action efforts at

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55 Under Title VII of the Civil Rights Act, federal agencies must have “an affirmative action program of equal employment opportunity.” 42 U.S.C. §2000e-16(b)(1). Agencies are required to conduct “self-assessments” to “eliminate barriers that impede free and open competition in the workplace and prevent individuals of any racial or national origin group or either sex from realizing their full potential,” by “compar[ing] their internal participation rates with corresponding participation rates in the relevant civilian labor force,” and “evaluat[ing] and eliminat[ing]” any such barriers. EEOC Management Directive 715. Under E.O. 11246, certain federal contractors are required to develop a written affirmative action programs for each of its establishments. As part of developing these programs, contractors must conduct a “job group analysis” within its establishments, “determine the availability” of qualified minorities or women for employment in particular job groups using external statistical data, and set “placement goals” based on a comparison of incumbency to availability. 41 C.F.R. §60-2.12-16. In addition, they must create “corporate management compliance programs” to ascertain if individuals are “encountering artificial barriers to advancement into mid-level and senior corporate management …” Id. at §60-2.30. Except as provided under E.O. 12246, private employers are not required to have affirmative action programs (see 42 U.S.C. §2000e-2(j)) but are permitted to have such programs provided they are “in accordance with the law.” Sec. 116 of Civil Rights Act of 1991, 42 U.S.C. §1981 note.

56 885 F.2d 575 (9th Cir. 1989).

57 Id. at 578.

58 Id.; accord Coates v. Johnson & Johnson, 756 F.2d 524, 552 (7th Cir. 1985) (“[A]n employer should not be able to offer its affirmative action policy before the trier of fact as a manifestation of nondiscrimination and at the same time be able to hide self-critical evaluations that may undercut the employer’s portrayal of its efforts.”).
issue in litigation would likewise be an implied waiver of attorney work product and attorney client privilege.

Several lessons can be derived from these cases. In any EEOC enforcement suit, defendants should anticipate that the EEOC will seek the disclosure of all materials related to internal investigations of discrimination complaints. As demonstrated by the decisions above, if a defendant indicates that the investigation was conducted by or at the behest of an attorney and asserts privilege over the investigative materials, the EEOC will typically probe the factual underpinning of privilege claims to determine whether the attorney was acting in a legal advisor role and whether the internal investigation was conducted in anticipation of litigation. In addition, the EEOC will argue that any privilege is impliedly waived when the defendant places its internal investigation at issue, which generally means any time a Faragher/Ellerth defense is raised or where the employer otherwise places the investigation at issue. The EEOC may also argue that all internal investigation materials, regardless of whether the defendant plans to “affirmatively use” them in its defense or whether they contain an attorney’s mental impressions, can be impliedly waived and must be disclosed if relevant. The decisions above show that a court will closely scrutinize claims of privilege over internal investigations, and will generally find that most (if not all) such materials must be disclosed when a defendant places its internal investigation at issue. Attorneys should bear these lessons in mind in advising their clients on conducting internal investigations.

Conclusion

Every aspect of an internal EEO investigation poses a range of ethical questions. These questions will arise at all points from the moment an organizational client first calls an attorney to report a potential workplace problem until the moment the client must implement any decisions resulting from the investigation. The prudent attorney will take care to consider all of the ethical issues discussed in this article in advising on the planning and conduct of an internal EEO investigation. Moreover, in planning and conducting the investigation, the prudent attorney will carefully consider the circumstances under which the investigative materials may later be disclosed to the EEOC and other parties.
About the Author

Christopher Lage has served as an Assistant General Counsel at the U.S. Equal Employment Opportunity Commission in Washington, DC, since 2002. The EEOC’s Office of General Counsel brings lawsuits in the federal courts to enforce the federal employment discrimination laws. Mr. Lage oversees a unit of attorneys who review proposed litigation that involves systemic discrimination, developing areas of law, the expenditure of significant resources, or potential public controversy. Mr. Lage performs a variety of additional duties including litigation support on systemic cases, training, budget and strategic planning, and trends analysis. Previously, Mr. Lage worked as a trial attorney in the EEOC’s San Antonio, Texas office as well as its internal litigation division in headquarters. He received a J.D. from the George Washington University in Washington, DC, and a B.A. from the University of North Carolina at Chapel Hill.