Ethical Issues for Employment Defense
Lawyers Conducting Internal Investigations

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T. Scott Kelly, Shareholder
Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
I. INTRODUCTION

Due to the proliferation of and expense associated with defending employment discrimination lawsuits, it is imperative that employers take the necessary steps to avoid such litigation, or at least take the steps necessary to enhance the likelihood of successfully defending such litigation, if filed. Effectively conducting internal investigations of employee allegations of discrimination is one such step, and equally important is recognizing the significant ethical issues that arise for the attorneys participating in those investigations. Both in-house and outside counsel are often asked by their clients to oversee, respond to or conduct internal investigations of alleged misconduct that may pose significant civil or criminal liability for the organization, its managers, and employees. Counsel also are often retained to represent individuals who are the subject of an investigation, who may have key documents and information or who may have witnessed the alleged misconduct. Regardless of the role assumed by counsel, various ethical dilemmas often arise during the course of an investigation. This panel will address some of the common ethical dilemmas faced by counsel involved in the investigation process, the relevant ethical rules and guidelines, and provide suggestions for how counsel should conduct themselves during the course of an investigation so as to avoid exceeding the boundaries of their ethical obligations.

II. ETHICAL ISSUES FOR ALL DEFENSE COUNSEL

A. Status of Attorney-Client Privilege

It is important to bear in mind that the attorney-client privilege will not always shield discovery of information and communications between the attorney and client when attorneys participate in or conduct internal investigations. In most situations, however, the attorney-client privilege will protect attorney investigations if the privilege has been claimed and not waived by the client. Generally, courts hold that waiver occurs when the party asserting privilege attempts to rely on privileged information as a claim or defense – a scenario that occurs frequently in the context of asserting a company’s internal investigation as an adequate remedy via its Faragher/Ellerth defense. See Reitz v. City of Mt. Juliet, 680 F. Supp. 2d 888, 895 (M.D. Tenn. 2010) (the city waived its attorney-client privilege in an employee’s retaliation action, with regard to interview memoranda drafted by an attorney hired by the city to investigate an employee’s sexual harassment claim, where the city relied on the memoranda for its Faragher-Ellerth affirmative defense); but see Kaiser Foundation Hospitals v. Superior Court, 66 Cal. App. 4th 1217, 1227-29, 78 Cal. Rptr. 2d 543, 544 (Cal. App. 1. Dist. 1998) (if an employer has produced the substance of relevant in-house investigations performed by non-attorney personnel and seeks only to protect specific communications between those personnel and the employer’s attorneys, the protections afforded by the law for communications by attorneys and their clients are not waived by the employer’s pleading of adequacy of its pre-litigation investigation as a defense to an action for employee discrimination or harassment).
In addition to allowing disclosure of investigatory information prepared by counsel on the basis of waiver, some courts have held that when an attorney is hired by an employer to conduct an investigation relating to allegations of discrimination/harassment, the attorneys’ work is simply not subject to the attorney-client privilege. Payton v. New Jersey Turnpike Authority, 691 A.2d 321, 334 (N.J. 1997) (“If the attorney-client privilege were to apply broadly to any internal investigation of this type undertaken by an attorney, regardless of the pendency of litigation or the provision of legal advice, then all employers would commission attorneys as investigators, thus defeating the paramount public interest in eradicating discrimination . . .”). In Payton, the employer relied on its in-house counsel to perform portions of an internal investigation of sex harassment, including making initial findings as to the merit of the complaint, and issuing a final investigative report on the complaint. 691 A.2d at 325.

After the complaining employee filed a law suit claiming sex harassment in violation of New Jersey’s Law Against Discrimination, she demanded disclosure of the company’s investigatory documents, while the company argued any such disclosure was barred by the attorney-client privilege. Id. at 325-26. The New Jersey Supreme Court speculated that the company had likely waived any such privilege by asserting the affirmative defense of conducting an effective investigation, but ordered the lower court to conduct an in camera review of the investigatory documents to determine the extent to which the information therein was covered by the attorney-client privilege in the first place, as well as the extent to which the company waived the privilege by asserting that its internal investigation effectively addressed the employee’s complaint. Id. at 334. The court cautioned that if the company’s in-house counsel was acting “to provide legal advice or to prepare for litigation, then the privilege applies. However, if the purpose was simply to enforce defendant’s anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.” Id. Considering that making such a distinction is far more easily said that done, asserting the attorney-client privilege for internal investigatory work done by lawyers in certain jurisdictions can be an uphill battle.

Fortunately, a recent California case reaffirmed the deference with which courts have traditionally treated the attorney-client privilege. See Costco Wholesale Corp. v. Superior Court, 219 P.3d 736 (Cal. 2009). In Costco, the employer retained a private law firm to conduct an investigation as to its compliance with California’s wage and hour laws with respect to its designation of managers as exempt employees. Costco, 219 P.3d at 739. The outside lawyer who was assigned with this task interviewed several Costco managers, and concluded her investigation with a 22-page opinion letter to the company with her assessment of its wage and hour compliance. Id. Several years later, a group of employees brought a collective action against the company alleging they were misclassified as exempt and unlawfully denied overtime compensation. Id. In the course of the litigation, the plaintiffs sought to compel discovery of the opinion letter, and the trial court ordered a discovery referee to examine the letter to determine the extent to which it contained privileged information. Id. at 739-40.

The discovery referee concluded that, while the letter did contain substantial communications protected by the attorney-client privilege, it also contained factual information regarding the job responsibilities of employees that was not protected, and redacted the letter accordingly. Id. The referee’s rationale for this decision was that “statements obtained in attorney interviews of corporate employee witnesses generally are not protected by the
corporation’s attorney-client privilege and do not become cloaked with the privilege by reason of having been incorporated into a later communication between the attorney and the client.” *Id.* at 740.

The California Supreme Court disagreed, holding that the privilege attached to the letter “in its entirety, irrespective of (its) content.” *Id.* The court noted that there was undisputed that the attorney was retained specifically for the purpose of providing legal advice, that she provided the company with such advice in a confidential communication, and regardless of whether the letter was actually prepared in anticipation of litigation, “the privilege attaches to any legal advice given in the course of an attorney-client relationship.” *Id.* at 41. While this holding is certain helpful in the assertion of privilege, it is vital to ensure that, in order to retain the privilege, communication between attorney and client must be kept confidential, must be protected from waiver, and must be solicited by the client as a request for legal advice.

**B. Status of Attorney Work-Product Doctrine**

In certain circumstances, the attorney work-product privilege has also failed to protect material in the context of internal investigations. The purpose of the work product doctrine is to protect the fruits of an attorney’s trial preparation from the discovery efforts of the opponent. Therefore, investigations conducted in the “ordinary course of business” will not be subject to this privilege. *Star-Telegram, Inc. v. Schattman*, 784 S.W.2d 109 (Tex. App. 1990) (handwritten notes of an attorney hired to advise a company on employee matters and to investigate a harassment claim before an EEOC complaint was filed, were subject to discovery because they had not been prepared in anticipation of litigation).

As with the attorney-client privilege, even when attorneys do prepare material in preparation for litigation, courts will likely recognize an implied waiver if the employer asserts the investigation as an affirmative defense. *Walker v. County of Contra Costa*, 227 F.R.D. 529, 531 (N.D. Cal. 2005) (employer could not withhold interviews conducted by attorneys where the employer asserted the interviews as an affirmative defense to a race discrimination allegation).

Moreover, even when the work product doctrine might otherwise apply, Rule 26 of the Federal Rules of Civil Procedure allows a party access to work product in limited circumstances. Discovery will be allowed upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *But see Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d 612, 622 (7th Cir. 2010) (even in light of the “substantial need” exception provided by F.R.C.P. 26, “[d]isclosure of witness interviews and related documents, however, is particularly discouraged.”)

In the course of an internal investigation, the attorney may request that a client representative record his or her recollections and thoughts about the circumstances of the case to assist the attorney’s analysis/investigation of a particular matter. So long as the record is clearly made for the purpose of seeking legal advice and assistance, the communications will be protected. *Perkins v. Gregg Co.*, 891 F. Supp. 361, 363-64 (E.D. Tex. 1995); *In re Auclair*, 961 F.2d 65 (5th Cir. 1992); *Snyder v. Value Rent-A-Car*, 736 So. 2d 780 (Fla. Dist. Ct. App. 1999).
The Seventh Circuit Court of Appeals recently provided useful guidance as to the application of the attorney work-product privilege to documents created by attorneys in the course of an internal investigation. See Sandra T.E. v. South Berwyn School Dist. 100, 600 F.3d 612 (7th Cir. 2010). In Sandra T.E., an elementary school teacher was charged with sexually molested several of his minor students, and victims and their families also filed suit against the school district and principal, alleging that the principal was aware of the teacher’s abuse prior to the his being charged, but did take appropriate remedial action. 600 F.3d at 615. The School Board hired a law firm to conduct an internal investigation as to the charges and allegations, and the engagement letter between the parties specified that the firm was hired to “investigate the response of the school administration to allegations of sexual abuse of students,” and “provide legal services in connection with the specific representation.” Id. at 615, 619. The attorneys retained interviewed school employees, social workers, and members of the School Board itself, as well as took notes from these interviews that were later incorporated into written memoranda. Id. at 616. The attorneys also issued to the School Board a written “Executive Summary” of their findings, which was marked “Privileged and Confidential,” “Attorney-Client Communication,” and “Attorney Work-Product.” Id.

In the course of discovery, the victims sought to compel disclosure of the attorneys’ documents prepared in the course of the investigation. Id. at 616-17. The firm produced a great deal of information, but withheld the notes and memoranda from the witness interviews, as well as other internal legal documents prepared in the course of the investigation, partly on the basis of the attorney work-product doctrine. Id. The lower court rejected the firm’s arguments as to the privilege, and ordered the firm to produce the withheld documents on the basis that the attorneys were acting in the role of investigators rather than providing legal advice. Id.

On appeal, the Seventh Circuit Court of Appeals reversed the lower court’s order that the firm produce its internal documents, holding that the “[w]ork product protection applies to attorney-led investigations when the documents at issue can fairly be said to have been prepared or obtained because of the prospect of litigation.” Id. at 622 (internal quotations and citations omitted). Noting that, “[t]here is a distinction between precautionary documents ‘developed in the ordinary course of business’ for the ‘remote prospect of litigation’ and documents prepared because ‘some articulable claim, likely to lead to litigation, [has] arisen,’” the court concluded that, as the School Board requested the investigation after the lawsuit itself was filed, it was clear that the witness interview notes and other memoranda were prepared in “with an eye towards” the litigation at issue. Id., quoting Binks Mfg. Co. v. Nat’l Presto Indus., Inc., 709 F.2d 1109, 1120 (7th Cir. 1983).

In arriving at its decision, the court appeared to be particularly mindful of the engagement letter between the School Board and the law firm it retained to conduct the internal investigation, as it specified that the firm was to provide legal advice as to how the School Board should respond to the abuse allegations. Id. at 620. While observing that “an engagement letter cannot reclassify nonprivileged communications as ‘legal services’ in order to invoke the attorney-client privilege,” the attorneys provided Upjohn warnings1 to witnesses informing them

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1 An Upjohn warning constitutes a “corporate Miranda” warning from corporate counsel to individual employees that counsel represents the company only, rather than the employees, and that their communications should be confidential and are subject to the corporation’s attorney-client privilege. Upjohn Co. v. United States, 449 U.S. 383 (1981).
that they represented only the School Board, rather than the witnesses, and that their interviews were privileged, and also maintained the confidentiality of the content of the interviews, as well as the written Executive Summary, the contents of which were never released to the public. *Id.* Observing these guidelines should be of assistance in effectively asserting the work-product privilege for documents created in the course of an internal investigation.

C. Attorney As A Witness

An attorney that conducts an internal investigation may be in a unique position to testify as to relevant findings of an internal investigation. If an attorney interviews the alleged harasser or harassing, for example, then it should be understood that he or she may later be disqualified as a witness. ABA Model Rule 3.7 specifically prohibits lawyers from acting as advocates at trial at which the lawyer is likely to be a necessary witness. If it is likely for a company to make a decision based on an attorney’s investigation, it is a better practice to allow the client, or an independent party, to conduct the investigation, and limit the attorney’s role to providing legal advice. Many states also have ethical prohibitions against the attorneys as witnesses:

For example:

Louisiana Rule of Professional Conduct, Rule 3.7., Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

The majority of jurisdictions require only disqualification of the lawyer, rather than that of the lawyer’s entire firm, but attorneys may be ethically bound to advise their clients to the disadvantages of retaining them as both investigator and litigation attorney.

II. SPECIAL CONSIDERATIONS FOR IN-HOUSE COUNSEL

In-house lawyers face unique ethical issues in labor and employment law matters. In-house lawyers are also full-time employees of the corporation and thus are likely to encounter

difficult questions of professional independence not faced by outside counsel. Additionally, corporate counsel often confront challenging issues regarding identifying the “client” among the various managers, employees and other factions within the corporation. Unlike outside lawyers, in-house lawyers are more likely to assume multiple roles as business advisor and legal advisor, or both. This blend of managerial and legal responsibilities makes issues of confidentiality and privilege more difficult as a practical matter.

A. Identifying the Corporate/Organizational “Client.”

When representing a corporation in an internal investigation, corporate counsel must first identify the client. ABA Model Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization, as distinct from its directors, officers, employees, shareholders, or other constituents. The Model Rules, however, fail to distinguish the relationship involving a lawyer who represents an organization in the capacity of outside counsel from the relationship between a corporate counsel and the organization he represents as an employee of the organization. This rule is easier to apply in theory than in practice. Sometimes authorized actions can come from several sources, and identifying the authorized representative of the corporation may be difficult. In advising the company, the lawyer must focus on the interests of the entity itself, and refrain from being influenced by the personal interests or desires of individuals within the organization.

When confronted with a problem situation involving an officer or other employee, Model Rule 1.13(b) requires corporate counsel to proceed in the “best interest” of the corporation. To avoid a potential conflict, or at least to minimize a conflict, corporate counsel should take certain general precautionary measures before undertaking joint representation.

B. Clarifying Who the In-House Lawyer Represents.

In representing a corporation and dealing with its employees in the context of an internal investigation, it happens that those employees mistakenly assuming that the in-house lawyer also represents that individual. This is particularly likely to occur in the shadow of the threat of litigation against the company, when managers and employees often feel as though they are on “the same team” with the in-house lawyer, and feel as though their individual interests are equally as represented by that person as are the interests of the corporation.

When conducting an internal investigation, in-house counsel may find himself or herself in the very type of joint representation that may give rise to a conflict of interest. Before corporate counsel determines whether joint representation is viable, counsel must carefully analyze the facts giving rise to the investigation or legal matter at issue. As part of his or her analysis, corporate counsel must consider both the evidence and legal strategy. In an EEOC Charge investigation, for example, the interests of the corporation may be better served by taking the position that the supervisor defendant was acting outside the scope of his employment in which case outside counsel would be desirable, if not imperative. Counsel must also consider whether the individual employee defendant may have possible cross claims for indemnification or contribution by the corporation.
ABA Model Rule 1.13(d) provides that when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the employees with whom the lawyer is working, the lawyer must explain the identity of the client he or she represents. This is of particular importance when the employee may have a claim against the company, or when the company may have a claim against the employee. In disclaiming representation, the lawyer should explain the conflict of interest presented by the potential adversity, that the lawyer cannot represent the employee, and that the employee’s statements may not be kept in strict confidence with respect to the corporation and may not be privileged. Even when there is not likely a conflict of interest, however, the best practice is for lawyers to give a corporate “Miranda” warning to the individual employees, wherein the lawyer explains that the interview is being conducted on behalf of the corporation, and that he or she specifically is not the legal representative of the individual, and obtain a written acknowledgment of understanding from the employee.

C. Joint Representation of the Corporation and its Employees.

Rule 1.13(e) provides that an in-house lawyer may also represent any of its directors, officers, employees, members, shareholders, or other constituents, provided the provisions of dual representation of followed. Prior to undertaking joint representation, counsel should request that the parties sign a conflict waiver indicating that: (1) counsel has fully disclosed the risks and advantages of joint representation; (2) the parties understand the risks and advantages; (3) the parties agree to joint representation and waive any conflict that presently exists; (4) should any future conflict arise, the individual consents to the attorney’s continued representation of the company; (5) such continued representation may be affected by using appropriate screening mechanisms; (6) the employee understands the attorney will not exploit any confidences to the client’s detriment; and (7) the clients retain the right at their discretion to request the withdrawal of the attorney representing them in the matter.

The determining issue in a conflict analysis is whether there is a divergence of interests between or among the employer and the employee or whether there exists an inherent potential for conflict. Under federal law, as a general rule, employers are held liable for the discriminatory acts of their supervisory employees provided that the acts relate to the terms and conditions of employment. See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). Should a conflict arise after commencement of joint representation, the situation can become more delicate. In the first instance when such a conflict appears possible, corporate counsel would be wise to explain that that the individual employee may need to obtain independent counsel.

D. In-House Counsel Business Advice.

The roles of in-house counsel are often a blend of that of business advisor, corporate employee, and lawyer. This duality presents the risk that communications with an in-house lawyer may not be protected by the attorney-client privilege or the work product privilege. In general, in order to be privileged, it must be demonstrated that the communication was given in a professional legal capacity for the purpose of giving legal services rather than providing general business advice.
Corporate counsel’s dual role as both a business and legal advisor can have a significant detrimental effect on the organization attempting to assert the attorney-client privilege. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court addressed whether the attorney-client privilege was applicable to certain communications between employees of a corporation and the corporate counsel. The Court rejected the “control group test,” which protected communications between attorneys and those corporate officers playing a significant role in directing the corporation’s operations, but not that between attorneys and middle and lower-level employees. The Court did rule, however, that the attorney-client privilege should extend to certain communications between employees and the corporate counsel, where the communications were made by the employees to corporate counsel at the direction of management and for the purpose of securing legal advice from counsel.

The Court reasoned that this information, which was not available from upper management, was needed in order for corporate counsel to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The Court also stressed the need for “full and frank communications” between clients and their attorneys, as well as that protecting such communications was consistent with the underlying purposes of the attorney-client privilege.

Courts will analyze the in-house attorney’s role in the particular situation to determine the application of the privilege and are inclined to look at the capacity in which counsel participates in corporate affairs. The majority of courts resolve the application of the privilege by corporate counsel by making a factual determination as to whether the individual was acting merely as a business person or an attorney. Thus, information can be shielded from disclosure with a clear showing that business information was transmitted to counsel for the purpose of obtaining legal advice or representation.

III. CONCLUSION

For all defense counsel conducting internal investigations, the following steps should be followed to ensure the investigation and any documents generated in the course of it, remain privileged: (1) obtain from the client a written request for legal advice in advance of the investigation; (2) send a confirmation in writing that the purpose is to render legal advice and/or to render services in anticipation of litigation; (3) admonish witnesses that interviews are subject to the attorney-client privilege, which the witnesses may not waive, and that the attorney represents the corporation, rather than individual employees; (4) separate discoverable documents from privileged documents; (5) label privileged documents as “privileged attorney-client communication” and/or “attorney work-product,” as well as “prepared in anticipated of litigation” when appropriate.