Issues in Internal Investigations of Executives

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Introduction

Companies face increasing pressure, both internal and external, to investigate allegations of workplace misconduct by executives. Executive investigations have gotten enhanced attention in the wake of several high-profile stories of misconduct and the #MeToo movement. Employees may complain of discrimination, sexual harassment and assault, retaliation, financial improprieties, misconduct by management and members of the Board of Directors, and simply boorish behavior. At the same time, government agencies, including the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ), may aggressively scrutinize companies' actions. Executives are often at the center of these investigations, either when they lodge complaints or are the subject of complaints. Their reputations and careers may be at stake, and the outcome of any subsequent litigation could hinge on how well employers conduct internal investigations.

Under Faragher v. City of Boca Raton, employers must investigate and promptly remediate claims of sexual harassment to avoid

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4. See, e.g., Chai R. Feldblum & Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, EQUAL EMP. OPPORTUNITY COMM’N (June 2016), https:// www.eeoc.gov/eeoc/task_force/harassment/report.cfm (workplaces, including executives and administrative support staff, have increased likelihood of encountering a harassment claim).

corporate liability for employees’ harassing conduct. But the increased need for internal investigations comes from many sources. The Sarbanes-Oxley Act (SOX) and the Dodd-Frank Act created and expanded whistleblower protections that shield employees who complain about particular corporate frauds, securities violations, and financial improprieties. The Supreme Court broadened SOX protections to cover employees of non-publicly traded companies. The SEC Office of the Whistleblower has aggressively pursued securities violations and given substantial awards to whistleblowers. Meanwhile, federal prosecutors and the Department of Health and Human Services Office of Inspector General have ramped up investigations and prosecutions of fraudulent billing by health care providers and other federal contractors in qui tam suits under the False Claims Act.

Companies can hire outside expert investigators to conduct investigations. If litigation results from the subject of the investigation, companies and executives can retain experts to testify about whether the investigation was properly conducted. Opinions differ about whether these experts have true expertise and whether there is an objective standard for judging the propriety of investigations. Companies may seek additional expertise from outside counsel, forensic accountants, forensic technology experts, and data analysts. For companies and executives involved in investigations, the potential financial, business, and reputational costs loom large.

When executives are either witnesses in or targets of investigations, they need advice from counsel on some critical issues: how they should respond to companies’ demands for information; what aspects of the investigation they will attempt to control through negotiation; and

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6. *Id.* at 807.
what legal, professional, and career risks they face and how to navigate them, as their careers and reputations may hang in the balance.\(^\text{13}\)

Part I of this Article analyzes crucial issues of privilege that affect how investigations proceed. These include attorney-client privilege, DOJ and SEC instructions to federal prosecutors concerning investigations of corporate misconduct and privilege waivers, “Upjohn warnings” by corporate counsel to potential employee witnesses, work-product protection, and corporate waivers of privilege when relying on an investigation’s propriety to defend a discrimination claim. Part II discusses how investigations can backfire against companies. Part III provides practical pointers to executives’ counsel about protecting clients during investigations.

I. Privilege Issues

Executives who are witnesses in, or targets of, investigations need to understand their potential protections for statements made to company investigators. Executives often believe they can refuse to cooperate with investigations or, without penalty, invoke Fifth Amendment rights when interviewed.\(^\text{14}\) Unfortunately, most executives’ employment contracts, and most company policies, require employees to cooperate with internal investigations and permit employers to discipline or terminate employees for noncooperation.\(^\text{15}\) While noncooperation might be a rational choice for some executives, it could cost them their jobs.\(^\text{16}\) Counsel for such clients should therefore consider how best to negotiate the terms of executives’ participation in investigations.

Executives often wrongly assume that their statements to investigators are confidential and can be disclosed only with their consent. They may assume that the company’s lawyer is simultaneously representing them or will somehow seek to protect them. If litigation ensues, issues usually arise concerning discoverability of investigations based on the attorney-client privilege and work-product protection.

A. Attorney-Client Privilege

1. Extent of the Privilege in Internal Investigations

The attorney-client privilege protects communications between clients and their attorneys that are intended to be, and actually are, kept confidential for the purpose of obtaining or providing legal assistance.\(^\text{17}\) Privilege encourages full and frank communication between

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13. See Model Rules of Prof’l Conduct r. 2.1 (Am. Bar Ass’n 2014) (lawyer shall give “candid advice” and “may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation”).
15. See, e.g., id. at 73.
16. See id.
17. See Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice, 697 F.3d 184, 207 (2d Cir. 2012).
attorneys and clients. Parties asserting the privilege have to prove requirements for its application have been met, and courts construe ambiguities against them.

If the client is a corporation, analyzing applicability of the protection starts with the Supreme Court’s opinion in *Upjohn Co. v. United States.* Upjohn’s general counsel had learned that a foreign subsidiary made questionable payments to foreign government officials. The general counsel sent questionnaires about the payments to, and interviewed, the subsidiary’s managers. When the Internal Revenue Service (IRS) issued an administrative subpoena for the questionnaires and interview notes, Upjohn resisted, and the IRS sought enforcement. The Supreme Court held that communications between managers and in-house counsel were protected by the attorney-client privilege because the employees provided the information to counsel so that the company could obtain legal advice.

Under *Upjohn,* the fact that employees provide information to company lawyers during investigations does not necessarily insulate employees’ statements from disclosure. Similarly, investigative reports prepared by or for the company’s counsel are not automatically protected. The critical question is whether obtaining or providing legal advice was one of the internal investigation’s significant purposes. If so, the privilege applies, even if the investigation had other purposes. Courts have also required that the primary or dominant purpose of the communication be to seek legal advice.

Courts most readily apply the privilege to corporate investigations that were clearly conducted in connection with a formal legal proceeding. In *Farzan v. Wells Fargo Bank,* for example, the plaintiff sought to depose a non-attorney “Equal Employment Opportunity Consultant” who investigated the plaintiff’s discrimination claims at the direction

18. *See Upjohn Co. v. United States,* 449 U.S. 383, 390 (1981) (“[Attorney-client privilege] exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer . . . .”).
19. *See In re Grand Jury Proceedings,* 802 F.3d 57, 65 (1st Cir. 2015); *Shaffer v. Am. Med. Ass’n,* 662 F.3d 439, 446 (7th Cir. 2011).
21. *Id.* at 386–87.
22. *Id.* at 387.
23. *Id.* at 388.
24. *Id.* at 394.
25. *Cf. id.* at 384 (employee communications were protected because made at direction of corporate superiors to secure legal advice).
28. *Id.*
29. *See Alomari v. Ohio Dep’t of Pub. Safety,* 626 F. App’x 558, 570 (6th Cir. 2015); *Pritchard v. Cty. of Erie,* 473 F.3d 413, 420 (2d Cir. 2007).
of in-house counsel. The court held that the attorney-client privilege applied because the consultant “conducted the internal investigation on behalf of Wells Fargo’s in-house counsel for the purpose of representing Wells Fargo in its proceedings before the [Equal Employment Opportunity Commission].”

In evaluating these issues, courts consider these factors:

- A primary purpose of the communication must be obtaining legal advice.
- Communications seeking business, as opposed to legal, advice will not be shielded by the privilege.
- In-house counsel are protected by the privilege. But because in-house counsel regularly serve in both legal and business capacities, courts examine the nature of the communications before applying the privilege.
- Internal investigations conducted by non-attorneys acting as agents for company attorneys are privileged to the same extent as if the investigators were attorneys.
- The privilege does not apply to communications with clients in furtherance of committing a fraud or other criminal act.

2. Cooperating with Prosecutors, Implications of the Yates Memo, and Dealing with the SEC

For executives who are witnesses in, or targets of, investigations, the company’s claim of attorney-client privilege over executives’ statements to investigators is particularly important. Corporations often have an interest in providing government investigators with

31. Id.
32. Id. at *2.
33. See In re Kellogg Brown & Root, 756 F.3d 754, 758–59 (D.C. Cir. 2014) (documents created in investigation of fraudulent billing not privileged because federal regulations and company’s compliance code required investigation); see also Alomari, 626 F. App’x at 570–71.
34. See Mac-Ray Corp. v. Ricotta, No. 03-CV-524S(F), 2004 WL 1368857, at *6–7 (W.D.N.Y. June 16, 2004) (e-mail from human resources to in-house counsel reciting facts of employee’s resignation not protected because not seeking legal advice). But see FTC v. Boehringer Ingelheim Pharm., Inc., 180 F. Supp. 3d 1, 33 (D.D.C. 2016) (spreadsheets prepared by company employees at request of in-house counsel for use in negotiating settlement were privileged, although they referred “to both legal and business matters”).
35. See In re Kellogg, 756 F.3d at 758.
37. See In re Kellogg, 756 F.3d at 758.
38. See In re Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011).
information and in waiving the privilege to obtain “cooperation” credit under federal prosecution guidelines.39

Since September 2015, DOJ has required federal prosecutors investigating corporate misconduct to focus on individual wrongdoing, rather than entering into plea agreements with corporations that dismiss charges against individuals.40 Sally Yates, former Deputy Attorney General, wrote this DOJ directive, known commonly as the “Yates Memo.”41 The Yates Memo increases the pressure on companies to provide information about executives accused of criminal acts rather than shield or seek protection for them. It has six basic directives:

- For corporations to receive “cooperation credit” (a reduction in corporate sentencing), they must identify everyone involved in the misconduct, regardless of position, and provide the DOJ all relevant facts.42
- Both criminal and civil prosecutors should focus on individual wrongdoing from the beginning of an investigation.43
- Unless there are extraordinary circumstances, no settlement with a company should include dismissal of charges against individuals.44
- Every resolution of a case against a company should include a plan for handling possible individual misconduct.45
- Prosecutors with the DOJ Civil Division should focus on prosecuting individuals, even if those individuals cannot pay civil fines.46
- Criminal and civil prosecutors should regularly communicate with each other concerning investigations.47

The Yates Memo gives companies strong incentives to thoroughly investigate allegations of misconduct and provide prosecutors with the results. Counsel representing clients whose alleged misconduct may have criminal implications should consult with a white-collar criminal defense attorney experienced in dealing with the local U.S. Attorney’s

40. Id.
41. Id.
42. Id. at 2.
43. Id.
44. Id.
45. Id. at 2–3.
46. Id. at 3.
47. Id. at 2.
office. Counsel should also be mindful of attorney-client privilege issues throughout investigations.

The SEC’s current guidelines also incentivize companies to cooperate and disclose information to the agency. The SEC uses four broad factors to evaluate a company’s eligibility for cooperation credit. Cooperation credit may result in no enforcement action or reduced charges and sanctions, depending upon:

- The extent to which the company “self-policing” before misconduct was discovered;
- The extent to which the company reported misconduct when upon discovery, it thoroughly reviewed the circumstances, and disclosed them to the public, regulatory agencies, and self-regulatory agencies;
- The company’s remedial actions, such as dismissing or disciplining wrongdoers, improving internal controls, and “appropriately compensating those adversely affected;” and
- The company’s “cooperation with law enforcement authorities, including providing [SEC] staff with all information relevant to the underlying violations and the company’s remedial efforts.”

Similarly, when representing a person subject to possible SEC prosecution, counsel may be able to work with the SEC to reduce or eliminate the client’s potential liability. The SEC evaluates a person’s cooperation by considering:

- The value and nature of the person’s cooperation with the agency;
- The importance of the underlying issues, including the danger to investors;
- The societal interest in holding cooperating persons fully accountable for their misconduct; and
- The person’s “personal and professional profile,” including “history of lawfulness,” the degree to which the person has accepted responsibility for the misconduct, and the degree to which the

49. Id. at 98.
50. Id. Examples of self-policing include maintaining effective compliance procedures and “an appropriate tone at the top.” Id.
51. Id. at 98–99.
52. Id. at 99.
53. Id.
54. Id. at 95.
55. Id. at 96–97.
56. Id. at 97.
person will have an opportunity to commit future violations of the federal securities laws.  

3. Ethical Obligations of Corporate Counsel and 
Upjohn  
Warnings

Executives in internal investigations should expect to be given an “Upjohn warning” by the investigator. An Upjohn warning, named for the Supreme Court’s decision in Upjohn Co. v. United States, satisfies the lawyer’s ethical obligations to make the lawyer’s role clear to the witness. ABA Model Rule of Professional Conduct 1.13(f) states: “In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, 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.” Comment 10 to Rule 1.13 notes that if the company’s interests become adverse to those of a witness, the lawyer should advise the witness that the lawyer cannot represent the witness and that the witness may want to retain counsel.

Central to Upjohn warnings is Comment 10’s caution: “Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.” Similarly, ABA Model Rule 4.3 requires that, in dealing with an unrepresented person, the company’s lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

The exact wording of an Upjohn warning was not mandated by the Supreme Court’s decision, but it is an outgrowth of the Court’s interpretation of the attorney-client privilege. In a typical Upjohn warning, investigating counsel will tell the witness that the lawyer represents

57. Id. at 98.
58. See Upjohn Warnings, supra note 1, at 2–3.
60. Model Rules, supra note 13, r. 1.13(f).
61. Id. at cmt. 10.
62. Id.
63. Model Rules, supra note 13, r. 4.3.
64. See Upjohn Co. v. United States, 449 U.S. 383, 390 (1981) (“[Attorney-client privilege] exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer . . . .”).
the company and not the witness; that the lawyer is interviewing the witness to obtain facts for the purpose of giving legal advice to the company; that the witness’s statements to the investigator are protected by the attorney-client privilege, but that the privilege belongs to the company; that the company may choose to waive the privilege and disclose the witness’s statements to a third party, including government authorities, without advising the witness; and that, to maintain the privilege for the company, the witness is expected to keep interview contents confidential.65

Two developments have increased pressure on companies to broaden Upjohn warnings. First, the Yates Memo and SEC cooperation guidelines penalize companies for not fully disclosing information to prosecutors.66 Second is the Ninth Circuit’s decision in United States v. Ruehle.67 Ruehle, the CEO of Broadcom, was indicted for participating in a scheme to backdate stock options.68 He sought to suppress, as attorney-client privileged, statements he had made to the company’s outside counsel during a related investigation.69 The company’s lawyers testified that they had given Ruehle Upjohn warnings, but he testified that he did not remember them.70 The Ninth Circuit held that the statements were not privileged because they were not made in confidence, but rather for disclosure to outside auditors.71 However, the Ninth Circuit noted that the district court did not credit the investigating attorneys’ testimony that they had given Ruehle an Upjohn warning because they took no notes and did not memorialize the conversation.72 Ruehle reminds investigators to provide witnesses with written Upjohn warnings and obtain signed acknowledgments that witnesses received, read, and understood them.

B. Work-Product Protection

Even if documents generated during investigations are not attorney-client privileged, the employer may not have to disclose them if they are protected as counsel’s work product. Work-product protection restricts access to materials “prepared in anticipation of litigation or for trial by or for another party or its representative.”73 The protection is designed to give lawyers a zone of privacy to formulate and prepare legal strategies without intrusion from opposing counsel.74

65. See Upjohn Warnings, supra note 1, at 2–4.
66. See supra text accompanying notes 39–53.
67. 583 F.3d 600 (9th Cir. 2009).
68. Id. at 602.
69. Id.
70. Id. at 605.
71. Id. at 609.
72. Id. at 604 n.3.
There are two categories of work product: (1) ordinary “fact” work product; and (2) “core” work product.\(^75\) To obtain disclosure of ordinary “fact” work product, a party must show it has a substantial need for the information and cannot obtain the substantial equivalent of the information without undue hardship.\(^76\) “Core” work product consists of an attorney’s mental impressions, conclusions, opinions, or legal theories and is “virtually sacrosanct.”\(^77\) It remains protected unless the requesting party can demonstrate a “highly persuasive showing of need.”\(^78\) Work product protection can extend even to materials generated before the events giving rise to litigation if the documents were created with an eye toward expected litigation.\(^79\)

In \textit{Farzan v. Wells Fargo Bank},\(^80\) for example, the plaintiff sought to depose a non-attorney outside consultant who investigated his discrimination claims at the direction of in-house counsel.\(^81\) The court held that all information obtained in the preliminary investigation was work product because, before the plaintiff filed his Equal Employment Opportunity Commission (EEOC) charge, he told his supervisor that he would “consider taking legal actions” against the employer if he were not given a job as a full-time employee.\(^82\)

C. \textbf{Waiver of Attorney-Client Privilege and Work-Product Protection}

In discrimination cases, executives’ statements to internal investigators may lose the protection of the company’s privilege if the company raises the defense that it took prompt and appropriate action to investigate and correct discriminatory conduct.\(^83\) This strategy is known as a \textit{Faragher-Ellerth} defense.\(^84\) As one district court explained:

\(^{1418344}\), at *1 (D.D.C. Apr. 5, 2010) (company attorney’s notes of interviews with witnesses during investigation of alleged sexual harassment by an employee were protected, but not witness statements that recited facts).

\(^75\). \textit{See In re Cendant Corp. Sec. Litig.}, 343 F.3d 658, 663 (3d Cir. 2003) (differentiating between two different types of attorney work product).


\(^77\). \textit{McGrath}, 204 F.R.D. at 243–44.

\(^78\). \textit{Id.; see also Appleton Papers}, 702 F.3d at 1023–24.

\(^79\). \textit{McGrath}, 204 F.R.D. at 244.


\(^81\). \textit{Id. at *1}.

\(^82\). \textit{Id. at *2}.


\(^84\). \textit{See id. at *2; see also Burlington Indus., Inc. v. Ellerth}, 524 U.S. 742, 765 (1998) (To avoid vicarious liability for hostile work environment, employer may affirmatively defend that it: “(a) . . . exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”); \textit{Faragher v. City of Boca Raton}, 524 U.S. 775, 807 (1998) (same).
[W]hen 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.85

In Angelone v. Xerox Corp.,86 for example, the employer used members of its general counsel’s office to investigate an employee’s claims of sexual harassment.87 The general counsel concluded that company policies were violated and recommended remedial measures.88 In later litigation, the employer raised as affirmative defenses that it exercised reasonable care to correct any harassment, and that the plaintiff unreasonably failed to take advantage of the employer’s corrective opportunities.89 The plaintiff sought all documents related to the investigation.90 The employer contended that the attorney-client privilege and work-product protection precluded discovery.91

On the plaintiff’s motion to compel, the court held that the employer waived both protections by asserting a Faragher-Ellerth defense.92 The court ordered production of any document or communication that Xerox “considered, prepared, reviewed, or relied on” in creating or issuing its investigative report.93 However, the court found Xerox had not waived protections for numerous other documents that the court believed were unrelated to the Faragher-Ellerth defense.94 The court ordered that if Xerox referenced any such documents in that context it would have to produce them immediately.95

In Koumoulis v. Independent Financial Marketing Group, Inc.,96 plaintiffs alleged a hostile work environment and discrimination based on religion, national origin, race, color, disability, and age.97 One plaintiff had made several internal discrimination and retaliation

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86. Angelone, 2011 WL 4473534.

87. Id. at *1.

88. Id.

89. Id.

90. Id. at *2.

91. Id.

92. Id. at *3 (“Xerox can not rely on the thoroughness and competency of its investigation and corrective actions and then try and shield discovery of documents underlying the investigation by asserting the attorney-client privilege or work product protections.”).

93. Id. at *3.

94. Id.

95. Id. at *3.


97. Id. at 33.
complaints. The company’s investigation concluded the claims were unfounded, and the company fired him. Defendants pled a Faragher-Ellerth affirmative defense. When plaintiffs sought documents related to the investigation, the employer asserted attorney-client and work-product protections.

The court found that neither applied. It rejected the attorney-client privilege claim because the employer’s outside counsel did not primarily act as a consultant on legal issues, but rather helped supervise and direct the internal investigation as an adjunct member of the human resources team. Further, even if attorney-client privilege applied, defendants waived it for “any documents relating to the reasonableness of defendants’ efforts to correct the allegedly discriminatory behavior and the reasonableness of its investigative policies and practices by asserting a Faragher/Ellerth defense.” Concerning work product, the court found the documents were created “simply in the course of a human resources investigation” and that advice concerning anticipated litigation “was occasionally included as an aside.”

II. How Investigations Can Backfire

There are some investigations that are likely to backfire on an employer. This section addresses the pitfalls company counsel should be careful to avoid.

A. Biased Investigators

Investigations tinged with bias against alleged wrongdoers may give rise to independent discrimination claims. In Sassaman v. Gamache, the plaintiff was fired after being accused of sexually harassing another employee. He sued under Title VII, alleging that defendants pressured him to resign based on a sex stereotype of men’s purported propensity to harass female colleagues. The plaintiff testified in his deposition that the investigator said “you probably did what [the female colleague] said you did because you’re male and nobody

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98. Id.
99. Id. at 34.
100. Id. at 33.
101. Id.
102. Id. at 44.
103. Id.
106. 566 F.3d 307 (2d Cir. 2009).
107. Id. at 311.
108. Id. at 312.
would believe you anyway," and "I really don’t have any choice. [The female colleague] knows a lot of attorneys; I’m afraid she’ll sue me."109

Reversing the district court’s grant of summary judgment, the Second Circuit held that “fear of a lawsuit does not justify an employer’s reliance on sex stereotypes to resolve allegations of sexual harassment, discriminating against the accused employee in the process.”110 The court found that the investigator’s discriminatory remarks could reasonably be construed to explain why defendants forced plaintiff to resign.111 Furthermore, making only minimal efforts to verify the female colleague’s accusations could be evidence of discriminatory intent.112

B. Investigators Involved in the Alleged Misconduct

In McLaughlin v. National Grid USA,114 one investigator of the plaintiff’s failure-to-promote claim was also involved in a challenged hiring decision.115 Another investigator told the plaintiff at the end of the inquiry that “[e]very time black people don’t get the position that they think they deserve, the first thing they cry is discrimination.”116 The court held these facts were evidence of discriminatory intent and a possibly invalid, non-independent investigation and denied defendant’s summary judgment motion.117

C. Failure to Investigate as Retaliation

In most cases, an employer’s failure to investigate a discrimination claim will not itself be considered an adverse employment action taken in retaliation for filing the claim.118 In Fincher v. Depository Trust & Clearing Corp.,119 the Second Circuit found that employees whose claims are not investigated are in the same position they would have been if they had not filed any claim.120 It reasoned that the employer’s failure to investigate could not create any threat of future harm.121

109. Id. at 311.
110. Id.
111. Id. at 313.
112. Id. at 314.
113. Id.
115. Id. at *1.
116. Id. at *4.
117. Id. at *14.
118. Daniels v. United Parcel Serv., 701 F.3d 620, 640 (10th Cir. 2012) (“Adopting a contrary rule and finding a failure to investigate establishes a prima facie case of retaliation would open employers to retaliation claims even where they failed to investigate because of a good faith belief the complaint was meritless.”); see also Scoppettone v. Mamma Lombardi’s Pizzico, Inc., 523 F. App’x 73 (2d Cir. 2013); Fincher v. Depository Tr. & Clearing Corp., 604 F.3d 712 (2d Cir. 2010).
119. Fincher, 604 F.3d at 712.
120. Id. at 721.
121. Id.
Nevertheless, if the failure to investigate is in retaliation for a separate, protected act by the employee, the failure to investigate can itself give rise to a discrimination claim.122

D. Retaliation Against Investigation Participants

Title VII prohibits employer retaliation against an employee “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation . . . under this subchapter.”123 Employee participants in internal discrimination investigations may be found to have “opposed” discrimination depending on the nature of their participation.124 However, to be protected under Title VII’s “participation” clause, employees must participate in investigations conducted in connection with formal EEOC charges.125 Employers therefore should be cautious before taking an adverse action against an employee who participated in a discrimination investigation.

III. Practical Pointers for Executives’ Counsel

Counsel for executives obviously have a different role in investigations than company attorneys. This section provides some guidelines for counsel representing executives in internal investigations.

A. Understand What Is at Stake

Executives’ counsel first need to determine why their client is being investigated. Executives’ counsel should contact the company’s counsel to develop professional rapport. Counsel then must ascertain whether the executive client is a target of the investigation or simply a witness. Counsel should learn as much as possible about the issues and who will be present during interviews.

B. What Obligations Does the Company Have to Executives?

Senior executives are normally covered by companies’ indemnification policies, either through employment contracts, company bylaws, or relevant state statutes. Counsel should review these potential indemnification sources carefully because they may not be as favorable as counsel would prefer. Some require reimbursement of an executive’s attorney fees only after the executive has been formally charged with a legal violation or has been subpoenaed. Some advance legal fees to the executive, but generally mandate that the executive repay them if the executive admits to, or is found guilty of, a crime.

122. Id. at 722.
C. Be Present

In investigations by company attorneys, executives should be able to have their own counsel attend, because it is unethical under most states’ rules for an attorney to contact a party without the party’s consent, if the attorney knows the person is represented by counsel.126 Investigating counsel may assert they are not functioning as lawyers, but in a human resources role. Executives’ counsel should scrutinize the underlying circumstances to be able to challenge this claim where it may be inconsistent with the facts.

If an attorney is not conducting the investigation, employees in most states do not possess the right to have an attorney present.127 Counsel may certainly push to be present regardless, and, in many cases, the employer will agree. If the company will not permit the lawyer to attend, counsel should carefully advise the executive about the implications of refusing to be interviewed, because many employers have policies providing for discipline or termination of employees who refuse to cooperate with an investigation.

D. If Executives’ Counsel Will Not Be Present, They Must Counsel Executives Appropriately

If the executive’s counsel will not be present at a company interview (either because the company’s counsel is not conducting it or the executive’s lawyer has a strategic reason not to participate), counsel should advise the executive about privilege issues and ensure the client understands the implications of the anticipated Upjohn warnings—that the interviewing lawyer is representing only the company; that while the client’s answers may be protected by attorney-client privilege, the privilege is the company’s and may be waived by the company; and that the client’s statements may be disclosed to the government or in litigation.128

E. Review Documents

Many companies provide documents to executives’ attorneys before an executive is interviewed. Lawyers for executives must review these documents with their clients to decide if there are others they should request. Counsel should alert clients to any inconsistencies between documents and statements the client made previously or between documents the client prepared. If apparent discrepancies exist, counsel should discuss with the client any possible explanations for them.

126. MODEL RULES, supra note 13, r. 4.2.
F. Be Careful About Public Disclosure Requirements

If the client is an officer or director of a publicly traded company and is under threat of termination, the employer must file Form 8-K with the SEC within four business days of a change in status. The employer may use the threat of the filing to pressure an executive to resign to avoid an embarrassing public disclosure of a termination for cause. Lawyers should talk with these clients to determine if this issue is critical for them. Counsel should also consider whether the client could invoke a “Good Reason” resignation clause in the client’s employment contract to avoid an adverse disclosure.

Similarly, if the client is a financial services employee who is a registered representative, the employer must file Form U5 with the Financial Industry Regulatory Authority (FINRA) describing a termination of employment within thirty days of the employee’s departure. If the employer files a U5 that contains damaging information about the circumstances of the termination, the executive’s career may be stalled or ended. If termination seems likely, counsel should seek to negotiate the language of the company’s disclosure.

G. Counsel the Executive on Both Substance and Style

Lawyers should counsel executives that an investigation is not an occasion to argue, be bellicose, jump to legal conclusions, or pontificate. Many instructions given prior to depositions are useful here:

- Pause and think before answering a question.
- Do not generalize, estimate, assume facts, or offer specific dates unless you are completely sure of yourself.
- Do not quote others unless certain they can be quoted accurately.
- Do not argue with the interviewer.
- If you do not understand a question, ask for clarification.
- Do not answer questions that call for legal conclusions—just state facts.
- If given a document, read it over before answering questions about it.

129. See SEC Form 8-K Instructions, § 5.02(b) (Apr. 2017), https://www.sec.gov/about/forms/form8-k.pdf.

130. Laura D. Richman, Reporting Consequences and Other Considerations for Changes in Directors or Executive Officers of a US Public Company 3–4, MAYER BROWN (June 9, 2015), https://m.mayerbrown.com/files/Publication/07ba14b6-65c1-4cb6-b06b-05098c8fc905/Presentation/PublicationAttachment/01d3bcf6-e542-4967-b666-1fea3f8c3b79/150609-UPDATE-CS.pdf.

• Do not answer questions to which you do not know the answer.
• Do not try to please the investigator.

Executives should be counseled to be extremely cautious if they are asked to sign a statement the investigator prepares. It may not contain the executive’s complete answers or reflect critical factual nuances, and it is likely to distort what the executive said.

If the company insists upon a written statement, the executive can first request time at home to draft one. If there are relevant documents that the investigator has omitted, the executive should note those documents in the written statement.

If the company insists on the executive signing a statement that the investigator prepared, the executive may want to ask to review it at home so that the executive can propose changes. However, the executive should keep in mind that the company may seek to characterize the executive’s refusal to go along with the company’s demand as a failure to cooperate and a terminable offense.

Conclusion

How an investigation is handled, and how lawyers represent their clients during it, will have a major impact on both the company and the executive. The investigation will influence the employer’s potential defenses, strategies used in negotiating with the executive or prosecutors, and possible outcomes. For the executive, the investigation may determine whether the executive will be terminated, the circumstances of any departure, and future career prospects. Counsel for both sides must be mindful of the legal, financial, and professional ramifications and nuances involved. Attorneys must be focused, strategic, aggressive when appropriate, and careful when required to shepherd their clients safely to a positive resolution.