



Department of

**Human Resources**

# Ethical Considerations Involving Workplace Investigations

# Topics to be covered:

- Privilege Issues
- Conducting Investigations: Client Employees
- Completing the Investigation, etc.
- Best Practice Tips

Every organization should be prepared to conduct a prompt and thorough investigation of all employee complaints, accidents, allegations of misconduct and other indications of a law or policy.

# Who should handle workplace investigations?

- Internal employees, i.e. human resources personnel
- Independent contractors, i.e. outside human resources consultants
- Licensed private investigators
- In-house legal counsel
- Outside legal counsel

# What are some ethical considerations?

- Establishing the role the attorney will play in the investigation and in the subsequent decision-making process
- Determining the attorney's role when dealing with client employees
- Clarifying the attorney's role in preserving the confidentiality of information obtained during an investigation
- Understanding what triggers the disclosure of privileged communications or documents



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# Privilege Issues

# Role of the Attorney

The ethical considerations apply when the attorney is conducting an internal investigation in an attorney role, as legal counselor, rather than as a policy-maker, decision-maker, or human resources specialist.

The more the attorney is functioning as a legal advisor, the more likely the attorney's notes, memoranda, and communications will be treated as confidential.

# What is the attorney client privilege?

- The privilege protects **confidential communications** made by **clients** to their attorneys **in order to obtain legal assistance or advice**.
- Thus, the attorney should be serving in the capacity of legal advisor.

# Who does the lawyer represent?

- A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. TN RULES OF PROFESSIONAL CONDUCT RULE 1.13(a).
- When interviewing employees, while representing an organization, “a lawyer has a duty to explain the identity of the client when it is apparent that the organizations interests are adverse to those of the constituents with whom the lawyer is dealing.”  
TN RULES OF PROFESSIONAL CONDUCT RULE 1.13(e).

# The privilege applies when...

- The communication involves information needed for the attorney to provide the organization with legal representation;
- The communication relates to a matter within the employee's scope of employment;
- The employee was aware at the time the communication was made that the information was being given to the attorney so the attorney could provide the organization with legal services or advice; and
- The organization intended the employee's communications to remain confidential.

# Attorney Client Privilege

- It does not automatically attach simply because an attorney is involved in an investigation.
- This can be difficult because legal advice given in an organizational setting is often intimately intertwined with and difficult to distinguish from business advice.
- The focus should be on whether the communication is designed to meet problems which can fairly be characterized as predominately legal.

# Case Example

- *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D.N.J. 1996)
- Facts – Employer hired outside counsel to investigate a pending sexual discrimination claim. The employer used the materials prepared by the outside counsel to prepare a position statement, get a defense strategy, and to create a new sexual harassment policy.
- Court's holding – Outside counsel was acting as an attorney for the purposes of the attorney-client privilege.

# Court's reasoning...

The privilege exists to protect not only the giving of professional advice to those who act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.

# Maintaining the Attorney Client Privilege

- Maintain your role as counsel
- Advise clients that your communications are subject to the privilege and that they should maintain confidentiality
- As the attorney, information you receive should be held in confidence and not revealed to non-clients

# Work Product Doctrine

- Protects documents prepared by a lawyer in anticipation of litigation. Distinct and broader than the attorney client privilege.
- Like the attorney-client privilege, the work product doctrine is subject to waiver and does not protect factual information obtained in preparation of lawsuit.

# Elements – Work Product

- Documents and tangible things
- Prepared in anticipation of litigation or trial
- Prepared by or for a party or that party's representative

# Waiver of the Privileges

- This issue arises when counsel for the employer seeks to introduce evidence at trial that s/he has developed in the course of investigation as the basis of the employer's affirmative defense, or otherwise in response to a claim.
- Some courts have held an employer waives the privilege when it contends that its response to allegations are reasonable based on an investigation.

# Case example

- *Reitz v. City of Mt. Juliet*, 680 F. Supp.2d 888 (M.D. TN 2010)
- Facts – Former employee brought action against city alleging violations of Title VII. Employee moved to compel discovery of memoranda interviews conducted by outside counsel that city hired to conduct an internal investigation into the sexual harassment allegations.
- Court holding – City waived the attorney client privilege and work product protections.

# Court's rationale...

The defendant cannot use the [attorney's] report as a sword by premising its *Faragher-Ellerth* defense on the report, then later shield discovery of documents underlying the report by asserting privilege or work-product protection.

# Inadvertent Disclosure

- The attorney client privilege and work product doctrine may be waived under certain circumstances, including through inadvertent disclosure.
- When inadvertent disclosure is claimed, the producing party has the burden to prove that the disclosure was truly inadvertent. Courts will consider:
  - The reasonableness of the precautions taken in view of the extent of the document production
  - The number of inadvertent disclosures
  - The magnitude of the disclosure
  - Any measures taken to mitigate the damage of the disclosures
  - The overriding interests of justice

# Rules of Evidence 502

- Inadvertent disclosure of privileged information or work product does not operate as a waiver if:
  - The disclosure is inadvertent
  - The holder of the privilege or work product protection took reasonable steps to prevent disclosure, and
  - The holder promptly took reasonable steps to rectify the error.

# Tips to Preserve the Privilege

- Evaluate each allegation of misconduct on a case-by-case basis and determine who will investigate the allegations.
- Involve the attorney early when allegations are made.
- Formally document that an investigation is being initiated to gather facts for the attorney to give legal advice.
- Document any threats of litigation.
- Advise all witnesses that the investigation is confidential and being done at the direction of legal counsel in order to gather facts necessary for the company attorney to provide legal advice.

# Tips to Preserve the Privilege

- Mark documents created during course of investigation as attorney-client privileged and attorney work product.
- Segregate the investigation materials from the attorney's advice and other privileged communications.
- Maintain the investigation files in a confidential manner.
- Do not discuss the investigation except with those who have a legitimate need to know.

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# Conducting Investigations: Client Employees

# Lawyer serving at as investigator

A lawyer serving as an investigator should inform employees/possible witnesses that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party investigator and a lawyer's role as one who represents a client.

# Dealing with employees

- The attorney's duty of loyalty during an investigation rests with the organizational client.
- The attorney should explain
  - How confidentiality will be handled
  - That interviews are intended to assist in providing legal advice to the organization (including instances when employee statements may be disclosed to others)

# Persons represented by counsel

- Rules of Professional Conduct 4.2 provides,

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

- However, this Rule does not prohibit communication with a represented person concerning matters outside of the representation.

# Representatives presence during interviews

- Employees have a right to have a representative present.
- The representative should not respond on behalf of the witness.
- The representative may be asked to leave if they become disruptive.

# Former Employees

- Pursuant to RPC 4.2, consent is not required for communication with a former employee.

# RPC 4.3 - Dealing with an Unrepresented Person

- 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.
- If a witness ask if s/he should consult a lawyer, do not discourage him/her from doing so. Tell the witness it is their right to speak with counsel if they choose.

# Rule 4.4 – Respect for the Rights of Third Persons

- In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

# Conducting Interviews

- Interviews during a workplace investigation are not interrogations.
- Ask open ended questions.
  - Follow the who, what when, where, why and how approach.
  - Ask a yes or no question only if necessary.
- Be an active listener rather than a badgering questioner.
  - Listen with your ears, your eyes, even your heart.

# Other Interview Techniques

- Tell the witness the process
- Let them know you may have to follow up with them
- Discuss confidentiality and retaliation

# Issues to avoid

- Do not give legal advice to any witness
- Do not give the the impression that you are acting in the employee's interests.

# The Goal...

*Gather as much pertinent information as possible to allow the employer to make an informed employment decision.*



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**Completing the  
Investigation, etc.**

# Litigation Holds

- Create a litigation hold memorandum, detailing
  - The claims or potential claims involved in litigation
  - The data requested or likely to be requested in discovery requests
  - The types of data that must be retained
- The litigation hold should also explain the obligation of each employee to preserve and maintain relevant data.

# Plan to gather and preserve data/evidence

- Make notes of documents to be obtained
- Develop a collection process
  - Follow up on requests for documents immediately and periodically
- Segregate and secure appropriate backup or archival data

# Preparing the Investigation Report

- Be concise – use as few words as necessary to convey the story
- Be accurate – the written report should clearly record or reference all pertinent interviews and observations. Do not insert personal opinions or views. Use quotes, if necessary.

Once the investigation is completed and the recommendations have been made, decisions on what action to take following an investigation should be made and carried out by the client, not the attorney handling the investigation.



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**Best Practice Tips!**

# Remember!

- Have a plan, personnel and strategies in place in advance
- Ensure your complaint process provides a prompt, thorough, and impartial investigation
- Take immediate and appropriate corrective action when it is determined that harassment occurred

# Don't forget!

- During the investigation, maintain confidentiality and remind witnesses of retaliation
  - Helps to avoid retaliation later
  - Prevents waiver of privilege by employees
  - keeps control of the information
- Designate documents generated in the investigation as “work product”
  - Separate them from non-privileged documents

# And last, but not least...

Once the investigation is over, keep documents secured and remind employees to only speak with counsel if related issues appear in the future.

# Any Questions?

