Fisher Phillips

A New Wave in Workplace Law

Inside Counsel Conference 2020 February 26–28, 2020

Don’t Get Caught in the Undertow: Ethics for Inside Counsel

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February 28, 2020

Hypothetical

- You have been asked to provide legal advice regarding a non-solicitation and non-disclosure dispute with a former employee and competitor. The manager with the most knowledge of your company's restrictive covenant agreements retired last month. You need to obtain information from the retired manager to provide advice to the company.
- **Are your communications with the retired manager protected by the attorney-client privilege?**

Upjohn Test

- *Upjohn Co. v. United States*, 449 U.S. 383 (1981), adopted the "subject matter test" to determine whether discussions between *current* employees and a corporation's counsel are privileged.
- A communication is privileged if it:
  1. was made to the corporation's counsel, acting as such;
  2. was made at the direction of corporate superiors, for the purpose of securing legal advice from counsel;
  3. concerned matters within the scope of the employee's corporate duties; and
  4. the employee was sufficiently aware that he/she was being questioned so the corporation could obtain legal advice.

Upjohn Test Applies to Former Employees

- Justice Burger's concurring opinion in *Upjohn* stated that the same test should apply to communications with former employees when a "former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment."
- The vast majority of courts have adopted Justice Burger's position. *See, e.g., Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (collecting cases). The only difference is that courts will generally ignore the requirement that the communications were made at the direction of corporate superiors.

What communications with former employees are privileged?

- The focus is not the employment status of the employee, but the content of the communication.
- Communications made for the purpose of learning facts that the former employee "was aware as a result of her employment" are privileged. *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999).
- Communications that go beyond the former employee's conduct or knowledge are not privileged:
  - Discussions about how to answer questions during a deposition;
  - Communications about other witnesses' testimony;
  - Conversations about facts developed during the litigation of which the former employee did not have independent knowledge;
  - Legal counsel's opinion of the case

Hypothetical

You receive a pre-suit demand letter alleging that a former sales representative was terminated for taking FMLA leave. The manager who made the allegedly retaliatory termination decision is no longer employed at the company. The demand letter recites several troubling facts that the lawyer obtained directly from a conversation with the manager.

Was the lawyer permitted to contact the manager to ask her questions about the termination decision?

Model Rule 4.2

- 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, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
- In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Comments to the Rules

- Model Rule 4.2 Comment 7
  - "Consent of the organization's lawyer is not required for communication with a former constituent."
  - But in communicating with a former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* Rule 4.4.
- Florida Rule of Professional Conduct 4-4.2, governing the contact by attorneys with persons represented by counsel, does not prohibit a claimant's attorney from engaging in ex parte communications with former employees of a defendant-employer. *H.B.A. Mgmt., Inc. v. Estate of Schwartz By & Through Schwartz*, 693 So. 2d 541 (Fla. 1997).

The Majority Rule

- The majority rule: *ex parte* communications between plaintiff's counsel and former employees are permissible.

  See, e.g., Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398 (S.D.N.Y. May 2, 2011); *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996).

- But counsel who speak with a former employee have a responsibility not to inquire into areas that may be subject to the attorney-client or work-product privileges, and should be careful not to induce the former employee to divulge any information that might violate the corporation's attorney-client privilege.

  See Smith v. Kalamazoo Opthamology, 322 F. Supp. 2d 883 (W.D. Mich. 2004).

The Minority Rule

- The minority rule: no *ex parte* communications between plaintiff's counsel and a former employee where the former employee's acts or omissions may be imputed to the corporation, or where the former employee possesses confidential or privileged information concerning the disputed matter.
  - *See, e.g., Armsey v. Medshares Mgmt. Serv., Inc*., 184 F.R.D. 569 (W.D. Va. 1998); *Browning v. AT&T Paradyne*, 838 F. Supp. 1564 (M.D. Fla. 1993); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992).
- These decisions occurred before the 2002 Amendments to the Model Rules, which revised Comment 7 to clarify that "consent of the organization's lawyer is not required for communication with a former constituent."

Confidentiality Agreements

- May companies utilize a former employee's confidentiality agreement to restrict *ex parte* communications with opposing counsel?
  - "To the extent that [the confidentiality] agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with public policy in favor of allowing even current employees to assist in securities fraud investigations." *In re JDS Uniphase Corp. Sec. Litig.*, 238 F.Supp.2d 1127 (N.D.Cal.2002).
  - "Absent possible extraordinary circumstances . . . it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law." *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441 (S.D.N.Y. 1995).

Hypothetical

You are leading a compliance investigation to determine whether your company's Vice President bribed a foreign official. As part of the investigation, you review a finance employee's emails and discover emails between the employee and her attorney. The emails contain advice from the attorney about how the employee can report the bribery to the SEC and recover a bounty.

What do you do?

Model Rule 4.4(b)

- A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.
- Does Rule 4.4(b) impose a duty to notify opposing counsel in our hypothetical?
- Were our emails "inadvertently sent"?

ABA Formal Opinion 11-460 (Aug. 2011)

- Rule 4.4(b) does not apply because "a document is not 'inadvertently sent' when it is retrieved by a third person from a public or private place where it is stored or left."
- **But** a legal duty may exist because some courts have taken a different position on the obligations of the attorney who discovers privileged communications located on a workplace computer.
- Where courts recognize a legal duty, "a lawyer may be subject to discipline, not just litigation sanction, for knowingly violating [the duty]."

When have courts recognized a duty to notify?

- Generally, courts have found a communication to be non-privileged—and therefore not creating a legal duty to notify opposing counsel—where the communication is sent through a work email account *and* the employer maintains a policy eliminating the expectation of privacy in work emails.

  See, e.g, Scott v. Beth Israel Medical Center, Inc., 847 N.Y.S.2d 436 (Sup. Ct. 2007); *Kaufman v. SunGard Investment Systems*, 2006 U.S. Dist. LEXIS 28149 (D.N.J. May 9, 2006).

- But communications have been deemed privileged where the employer did not have a computer use policy or didn't communicate it to its employees.

  See TransOcean Capital, Inc. v. Fortin, 2006 Mass. Super. LEXIS 504 (Mass. Super. October 20, 2006); *Mason v. ILS Technologies LLC*, 2008 U.S. Dist. LEXIS 28905 (W.D.N.C Feb. 29, 2008).

Personal Email Accounts

- Does it make a difference if the employee uses a work computer to send an email from a personal web-based account?
- **To some courts, yes, based on a variety of rationales:**
  - *Stengart v. Loving Care Agency, Inc.,* 990 A.2d 650 (N.J. 2010) (communications were privileged because employee had reasonable expectation of privacy in personal web-based emails).
  - *Sims v. Lakeside School*, 2007 WL 2745367 (W.D. Wash. 2007) (employer's policy clearly stated that employee had no reasonable expectation of privacy, but public policy favoring confidentiality of communications trumped policy).
  - *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387 (E.D.N.Y. 2006) (emails through personal account were privileged because messages did not go through employer's server).

Personal Email Accounts

- But to some courts, there is no difference between a work email account and a personal account.
  - *See Long v. Marubeni America Corp.*, 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. Oct. 19, 2006) (employees waived the attorney client and work product privileges by using a company computer system to transmit emails from private password protected email accounts).
- The majority of courts have found that an employee has no reasonable expectation of privacy in workplace e-mails when the employer's policy limits personal use or otherwise restricts employees' use of its system and notifies employees of its policy.
  - *See Bingham v. Baycare Health Sys.*, No. 8:14-CV-73-T-23JSS, 2016 WL 3917513, at *4 (M.D. Fla. July 20, 2016) (collecting cases).

Does a reasonable expectation of privacy exist?

- Courts have adopted a four-factor test to determine whether a reasonable expectation of privacy exists in the context of e-mail transmitted over and maintained on a company server:
  - Whether the corporation maintains a policy banning personal or objectionable use;
  - Whether the company monitors the use of the employee's computer or email;
  - Whether third parties have a right of access to the computer or e-mails; and
  - Whether the corporation notifies the employee, or whether the employee was aware, of the use and monitoring policies.

Practice Pointer

When in doubt, do not substantively review the emails that may be privileged:

- Preserve emails, notify opposing counsel, and strongly consider retaining outside counsel. If an agreement with opposing counsel cannot be reached, seek an order from the Court before you examine the emails.

Or . . .

- Send the emails to the employee's lawyer with a preservation request, destroy all remaining copies, and use formal discovery procedures to obtain the emails.

Hypothetical

You are interviewing an employee witness in furtherance of investigating a harassment complaint. You are concerned that the witness will try to manipulate the investigation by discussing the contents of the interview with other employee witnesses suspected of wrongdoing.

Are you allowed to require the employee witness to keep confidential the information discussed in the course of the investigation?

Confidentiality of Internal Investigations

Why do companies want to maintain confidentiality of employee interviews?

- Protect victims, whistleblowers, and the accused;
- Encourage reporting;
- Prevent witness collusion;
- Prevent witness tampering and destruction of evidence;
- Maintain control over process;
- Protect attorney-client privileged communications;
- Maintain secrecy of sensitive business information

The NLRB's Position

- Section 7 of the NLRA gives employees the right to engage in "protected concerted activities" for their mutual aid and protection.
  - Section 7 rights are afforded to union and non-union employees.
- *Apogee Retail LLC*, 368 NLRB No. 144 (Dec. 16, 2019)
  - Employers are now permitted to require confidentiality from employees involved in open workplace investigations without engaging in a case-by-case balancing of employer and employee interests.
  - *Apogee Retail* overturned *Banner Estrella Medical Center*, which required employers to determine, on a case-by-case basis, whether imposing confidentiality during any particular workplace investigation improperly infringed upon employees' statutory rights under the NLRA to engage in protected concerted activity by discussing the investigation with co-workers.

Apogee Retail LLC, 368 NLRB No. 144 (Dec. 16, 2019)

- Employer policies regarding confidentiality during investigations will only be presumptively lawful **during an open investigation**.
- Rules regarding investigative confidentiality not specifically limited to the duration of the investigation require a case-by-case analysis of the balance of employer and employee interests.
- Employer policies may only require confidentiality from participants in the investigation and may not prohibit any employees from discussing the incidents upon which the investigation is based.
- Key Takeaway: Employers should modify their investigative policies and procedures to clearly require confidentiality only for the duration of an ongoing investigation and to reserve the right to extend the requirement after the investigation is concluded, when legitimate justification exists.

Other potential justifications for confidentiality

- Privacy laws
- Need to preserve attorney-client privilege – *BP Exploration (Alaska), Inc.*, 337 NLRB 887 (2002)
- Danger of theft of trade secrets or misuse of sensitive data
- Risk of insider trading
- EEOC policy guidance requiring employers investigating complaints of harassment to keep the matter confidential to the extent possible

Special Privilege Issues in Employment Law

- Employment statutes afford employers significant affirmative defenses based on acting in good faith, which may mean acting on the advice of counsel.
  - "Good faith" defenses under the FLSA;
  - Title VII's *Farragher-Ellerth* defense;
  - FMLA's "good faith" defense to liquidated damages.
- But the attorney-client privilege cannot be used as a sword and a shield, and offering your "best" evidence to support these defenses may result in a waiver of the attorney-client privilege.

Hypothetical

Your company is defending an FLSA collective action. The company classified the employees at issue as exempt based on the advice of counsel five years ago. You would like to assert a "good faith" defense based on this legal advice to avoid any liability.

Would you waive the attorney-client privilege? What is the scope of the waiver?

Advice of Counsel Defense

- The mere assertion of a good faith defense does not waive the attorney-client privilege; Defendant must specifically invoke the advice of counsel as support for its good faith defense for a waiver to be found.
  - *Haviland v. Catholic Health Initiatives*, 692 F. Supp. 2d 1040 (S.D. Iowa 2010); *Abbe v. City of San Diego*, 2007 U.S. Dist. LEXIS 87501 (S.D. Cal. Nov. 9, 2007).
- Courts focus on whether the Defendant has relied on or intends to rely on communications with their counsel.
  - *Butterworth v. Lab. Corp. of Am. Holdings*, 2010 WL 11470895, at *6 (M.D. Fla. Dec. 2, 2010).

Henry v. Quicken Loans, 263 F.R.D. 458 (E.D. Mich. 2008)

- Employer decided employees were exempt based on DOL regulations and opinion letters, and offered affidavit that it "confirmed" its decision with legal counsel.
- This testimony implicitly revealed the content of those communications and made the legal opinions a factual basis supporting the employer's good faith.
- "[W]hen a party asserts a defense of good faith or reasonableness, and affirmatively offers testimony that the party consulted with their attorney as factual support for the defense, and when the counsel's advice in some way supports the defendant's good faith belief, the defendant has put his counsel's advice 'at issue' and thereby waives the attorney client privilege on the narrow subject matter of those communications.

Scope of Waiver

- **What subject?** Typically, the facts provided to the attorney to provide legal advice, and the attorneys' legal advice, regarding the lawfulness of the employer's decision.
  - A waiver applies to all other communications relating to the "same subject matter." *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007).
- **What counsel?** Waiver may apply to communications on same subject matter with other counsel.
  - *McLaughlin v. Lunde Truck Sales, Inc.*, 714 F. Supp. 916 (N.D. Ill. 1989) (preventing defendant from disclosing only "favorable" opinion from one lawyer without disclosing potentially unfavorable opinions from other lawyers).
- **What employees?** Based on the fact of *Henry*, waiver only applied to communications between decision-maker and counsel.

Faragher-Ellerth Defense

- Affirmative defense against claims of hostile work environment by supervisors:
  - The employee did not suffer tangible adverse employment action (*e.g.*, discharge, demotion);
  - The employer exercised reasonable care to prevent and promptly correct the harassing behavior;
  - The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.
- *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).
- For non-supervisor harassment, the employee must show the employer knew or should have known about the harassment and failed to take prompt and appropriate corrective action.

Faragher-Ellerth Defense

- "[T]he clear majority view is that when a Title VII defendant affirmatively invokes a *Farragher-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. *Angelone v. Xerox Corp.*, No. 09-cv-6019 (W.D.N.Y. Sept. 26, 2011) (collecting cases).
- "[Defendant] 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." *Id*.

Koss v. Palmer Water Department,
2013 WL 5564474 (D. Mass. Oct. 7, 2013)

- The municipality hired an attorney to interview witnesses and perform an independent investigation of an employee's sexual harassment complaint.
- The municipality's regular outside counsel did not speak with witnesses, but "directed and collaborated with" the investigating attorney, and "exercised significant control and influence over him throughout the investigation."
    - The communications between the investigator and regular outside counsel were "part and parcel of the investigation which goes to the heart of Defendants' affirmative defense."

EEOC v. Spitzer,
No. 1:06-CV-2337 (N.D. Ohio 2013)

- The employer asserted the *Faragher-Ellerth* defense and during discovery produced witness statements obtained during its investigation.
- Several days into trial (and six and a half years after the lawsuit was filed), it came out that the employer did not produce an attorney's interview notes used to create the witness statements.
- The judge declared a mistrial, ordered the notes to be produced, and issued a $300,000 sanctions award against the company and its attorneys.
- Another ethics misstep: Four years into the case, the employer had to retain new counsel because its original trial counsel who conducted the initial investigation had to withdraw under the "lawyer as witness" rules.

Best Practices for Preserving Privilege in Harassment Investigations

- Goal: To allow legal counsel to provide legal advice protected from disclosure, while still conducting thorough investigation.
- Define and separate roles between investigator and legal counsel:
  - The investigator gathers facts to enable the company to understand and respond to the employee's complaint;
  - Legal counsel receives those facts to provide **the company** legal advice;
  - Legal counsel does not control or direct the investigation;
  - Legal counsel does not "decide" what remedial steps, if any, should be taken as a result of the investigation findings;
  - Limited communications between the investigator and legal counsel, consistent with their roles, are permissible (*e.g.*, status updates, de-briefings).

Tips for Creating Privileged Communications

- Only communications between you and your client for the purpose of obtaining legal advice are privileged.
- It is good practice to educate your internal clients early and often on how the attorney-client privilege works. Many executives think everything that goes to the lawyer is privileged, and even the most seasoned executives may try to create a privilege where there is none.
- Merely copying an in-house lawyer on a chain of emails without asking for advice doesn't make the correspondence "privileged." Another common misjudgment is that sending an update email or other narrative addressed to in-house counsel and copying several other employees (without asking for legal advice) somehow protects the communication.

Tips for Creating Privileged Communications

- A good habit to get into when you are providing legal advice is to include the following phrase in the subject line or top of the email or letter: "Privileged and Confidential – Providing Legal Advice."
- If your internal clients get into the same habit of using "Seeking Legal Advice" to label their emails, then the question of intent can be easily resolved, and it is a good exercise to help coworkers filter for what is truly privileged and what is not.
- Beware that if it is overdone by including this subject line on every email, it is meaningless and counterproductive.

Work Product

- The work-product doctrine can also apply to in-house work if properly conducted. Work performed by a paralegal or administrative support person at the direction of counsel can be work product and should be labeled as such if appropriate.
- For example, if in-house counsel asked a technician in the IT department to run a report on who accessed a specific company electronic file to defend an allegation of breach of privacy, it would be considered “work product.” If in-house counsel asked the same IT technician to run a similar report as part of routine compliance testing, however, it might not be privileged at all.

Questions?

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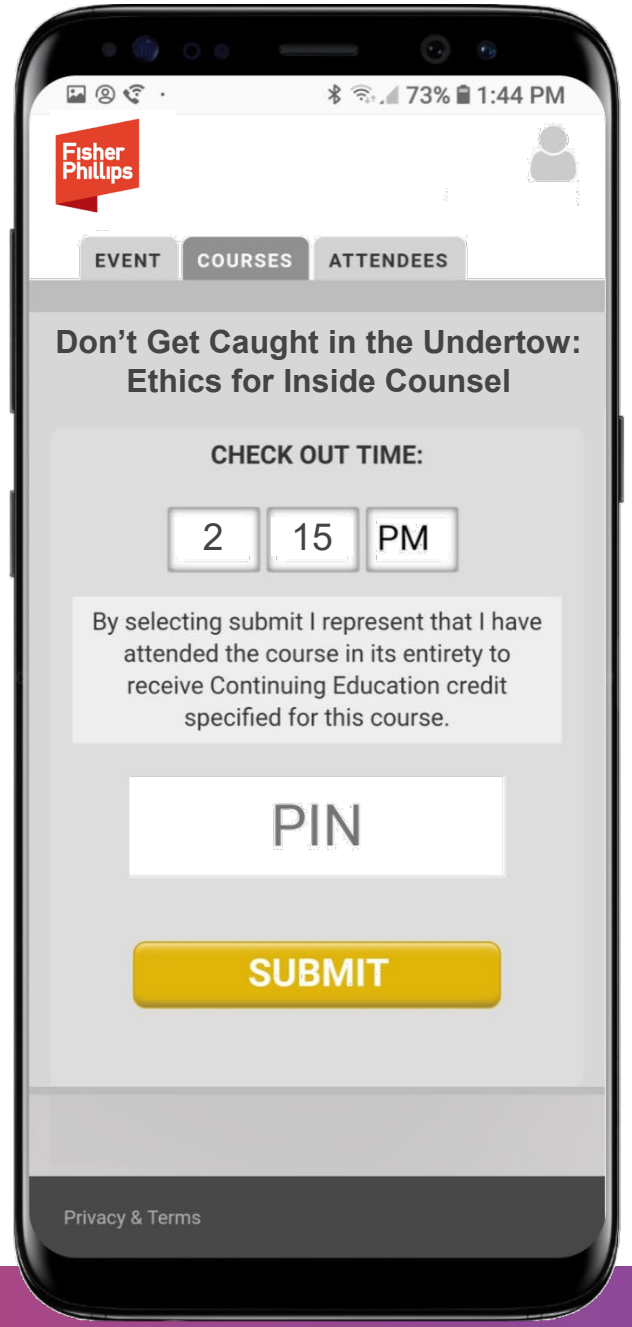

Thank you

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