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

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Introduction

This topic will cover advanced ethics issues frequently faced by corporate counsel, such as the scope and waiver of a company's attorney-client privilege during internal investigations, pitfalls that can result in privilege waivers, and how legal advice may enable a company to assert an "advice of counsel" defense during litigation. Specifically, the session will provide an overview of the privilege in the corporate context, the use of confidentiality agreements impacting the privilege, inadvertent discovery of employees' privileged communications, the implications of asserting the advice of counsel defense, and waiving the privilege in internal investigations.

Attorney-Client Privilege in the Corporate Context

The most common issue faced by corporate counsel is whether their communications with current or former employees are covered under the attorney-client privilege. While this can be an easy question to overlook at the time—especially if you are investigating a pending claim or lawsuit—if the conversations are not privileged, they must be disclosed in litigation and can create significant issues.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the U.S. Supreme Court adopted the "subject matter test" to determine whether discussions between *current* employees and a corporation's counsel are privileged. A communication between current employees and corporate counsel will only be privileged if:

- The corporation's counsel was acting in his or her official capacity;
- The communication was made at the direction of corporate superiors, for the purpose of securing legal advice from counsel;
- The discussion concerned matters within the scope of the employee's corporate duties; and
- The employee was sufficiently aware that he/she was being questioned so the corporation could obtain legal advice.¹

¹ *Upjohn*, 449 U.S. 383.

The vast majority of courts apply a similar test for former employees when they speak at the direction of management with an attorney regarding conduct or proposed conduct within the scope of employment.² The only difference is that courts will generally ignore the requirement that the communications were made at the direction of corporate superiors. In determining 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.³

But communications that go beyond the former employee’s conduct or knowledge are not privileged. This includes 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, communications about the company’s position, and legal counsel’s opinion of the case.

Communications with a Represented Party

The issue becomes more complicated when the current or former employee with whom you need to speak is the actual plaintiff, especially when all of your employees are “represented” through a collective or representative action. To start with the basics, Model Rule 4.2 states that 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. This means that a current employee cannot have communications regarding the subject matter of his lawsuit with corporate counsel or at the direction of corporate counsel without first obtaining approval of his counsel.

Furthermore, a company must be especially careful when communicating with their employees in light of a pending class action. Employers will often want to reach out to employees to either rally support, gain class action waivers, or obtain beneficial declarations. However, doing so can create liability for the company and/or negate any work done, unless the company discloses the nature of the pending litigation and the fact that by communicating with the company employees could be acting against their own interests. While these disclosures can be uncomfortable, they are necessary to avoid potential ethical pitfalls. You want your employees to give their informed consent.

For a represented company, Rule 4.2 also prohibits a plaintiff’s counsel’s communications with a constituent of the organization who (1) supervises, directs, or regularly consults with the organization’s lawyer concerning the matter; or (2) has authority to obligate the organization with

² See *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (Berger J., concurring); see also *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (collecting cases).

³ *Peralta*, 190 F.R.D. 38.

respect to the matter or whose acts or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Generally speaking, an attorney is not required to obtain consent of corporate counsel to speak with a *former* constituent of the organization, so long as the lawyer does not use methods of obtaining evidence that violate the organization's legal rights.⁴ The majority of courts hold that *ex parte* communications between plaintiff's counsel and former employees are permissible.⁵ 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.⁶

A minority of courts have prohibited *ex parte* communications between plaintiff's counsel and a former employee where the former employee's acts or omission may be imputed to the corporation, or where the former employee possesses confidential or privileged information concerning the disputed matter.⁷ However, these decisions occurred before the 2002 Amendments to the Model Rules, which revised Comment 7 to Rule 4.2 to clarify that "consent of the organization's lawyer is not required for communication with a former constituent."

Application of Attorney-Client Privilege to an Employee's Workplace E-Mails

Consider this 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 email account 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 are your ethical obligations?

Model Rule 4.4(b) provides that a lawyer who receives a document relating to the representation of a lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. In our hypothetical, 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."⁸ However, a legal duty may exist because some courts have taken a different

⁴ See Model Rule 4.2, Comment 7; Model Rule 4.4; see also *H.B.A. Mgmt., Inc. v. Estate of Schwartz By & Through Schwartz*, 693 So. 2d 541 (Fla. 1997) (holding that Fla. R. Prof. Conduct 4-4.2, which governs 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).

⁵ See, e.g., *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011); *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996).

⁶ See *Smith v. Kalamzoo Ophthalmology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004).

⁷ 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).

⁸ ABA Formal Opinion 11-460 (Aug. 2011).

position on the obligations of an 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.⁹

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.¹⁰ But communications have been deemed privileged where the employer did not have a computer use policy or did not communicate it to its employees.¹¹ To some courts, it makes a difference if the employee uses a work computer to send an email from a personal web-based account.¹²

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.¹³ 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: (1) whether the corporation maintains a policy banning personal or objectionable use; (2) whether the company monitors the use of the employee's computer or email; (3) whether third parties have a right of access to the computer or e-mails; and (4) whether the corporation notifies the employee, or whether the employee was aware, of the use and monitoring policies.¹⁴

To protect your ability as a company to examine documents on your company's computers you should tell employees that they will be monitored, how they will be monitored, and what is to be monitored, in writing and as clear and extensive as possible. Reinforce the issue that there is no expectation of privacy on the employee's part during their work. Make clear that the company owns the computer, email, phone system, etc., and that the company will monitor communications.

However, if you inadvertently discover communications that may be privileged and there is a question as to whether a duty to notify opposing counsel exists, the safest option is to avoid substantively

⁹ *Id.*

¹⁰ See, e.g., *Scott v. Beth Israel Med. Center, Inc.*, 847 N.Y.S. 2d 436 (Sup. Ct. 2007); *Kauffman v. SunGuard Investment Systems*, 2006 U.S. Dist. LEXIS 28905 (W.D.N.C. 2008).

¹¹ See *TransOcean Capital, Inc. v. Fortin*, 2006 Mass. Super. LEXIS 504 (Mass. Super. 2006); *Mason v. ILS Technologies LLC*, 2008 U.S. Dist. LEXIS 28905 (W.D.N.C. 2008).

¹² See, e.g., *Stengarf 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).

¹³ *Bingham v. Baycare Health Sys.*, No. 8:14-CV-73-T-23JSS, 2016 WL 3917513 (M.D. Fla. 2016).

¹⁴ *Id.* at *2.

reviewing the emails. Instead, preserve the emails and notify opposing counsel. If an agreement with opposing counsel cannot be reached, seek an order from the Court before you examine the emails. Alternatively, 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.

Investigative Confidentiality

There are many reasons companies want to maintain the confidentiality of employee interviews during internal investigations. Indeed, maintaining confidentiality is crucial to creating an environment that encourages employees to report promptly violations of an employer's code of business conduct, such as conflicts of interest, theft, discrimination, and harassment. Prompt reporting is often vital to successful investigation and remediation of these complaints, and can be critical to an employer's defense in the event of litigation.

In December 2019, the National Labor Relations Board (NLRB) held that under the National Labor Relations Act (NLRA) employers may maintain and enforce rules requiring confidentiality for the duration of a workplace investigation.¹⁵ The NLRB also held that, if the employer's confidentiality rule extends beyond the duration of the investigation, the employer must show a substantial business justification for that extension.¹⁶ And 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.¹⁷

The NLRB in *Apogee Retail* noted that confidentiality is so valued in the investigative process that it, the Equal Employment Opportunity Commission (EEOC), and the Occupational Safety and Health Administration (OSHA) take steps to preserve confidentiality during their investigations.¹⁸ Indeed, the EEOC states in its enforcement guidance that employers should assure employees who participate in employer harassment investigations that confidentiality will be protected to the extent possible.

Apogee Retail overturned *Banner Estrella Medical Center*¹⁹, a 2015 case which required employers to determine, on a case-by-case basis, whether imposing confidentiality during any particular workplace investigation improperly infringed upon employees' rights under the NLRA to engage in protected concerted activity by discussing the investigation with co-workers. If an employer could show that corruption of an investigation was likely to occur, only then could an employer lawfully require employee confidentiality; *Apogee* changes this entirely.

¹⁵ *Apogee Retail LLC*, 368 NLRB No. 144 (Dec. 16, 2019).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 362 NLRB 1108 (2015).

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. 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.

“Advice of Counsel” Defense/Waiver of Privilege

Employment statutes—including the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act—afford employers significant affirmative defenses based on acting in good faith, which may mean acting on the advice of counsel. However, the attorney-client privilege cannot be used as both a sword and a shield, and offering your “best evidence” to support these defenses may result in a waiver of the attorney-client privilege.

The mere assertion of a good faith defense does not waive the attorney-client privilege. A defendant must specifically invoke the advice of counsel as support for its good faith defense for a waiver to be found.²⁰ In determining whether the attorney-client privilege is waived, courts focus on whether the defendant has relied on or intends to rely on communications with counsel to justify any conduct on its part.²¹

For example, in *Henry v. Quicken Loans*²², the employer testified that it “confirmed” its decision with legal counsel that its employees were exempt based on DOL regulations and opinion letters. The court held that the defendant waived the attorney-client privilege on the “narrow subject matter of those communications” because the employer’s testimony implicitly revealed the contents of the communications with its counsel and made the legal opinions a factual basis supporting the employer’s good faith affirmative defense.²³

A waiver applies to all other communications relating to the “same subject matter.”²⁴ Typically, this includes the facts provided to the attorney to provide legal advice, and the attorney’s legal advice, regarding the lawfulness of the employer’s decision. Additionally, waiver may apply to communications on the same subject matter with other counsel.²⁵ The overarching theme is fairness.

²⁰ *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).

²¹ See *Butterworth v. Lab. Corp. of Am. Holdings*, 2010 WL 11470895, at *6 (M.D. Fla. Dec. 2, 2010).

²² 263 F.R.D. 458 (E.D. Mich. 2008).

²³ *Id.*

²⁴ *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007).

²⁵ *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).

A defendant should not be able to limit discovery to favorable opinions and withhold unfavorable opinions that undermine the good faith defense.²⁶

The advice of counsel defense may also be invoked in the context of workplace harassment claims. The *Faragher-Ellerth*²⁷ affirmative defense is a valuable tool that can help employers avoid liability for claims of hostile work environment under Title VII. The *Faragher-Ellerth* defense is available when the employee did not suffer a tangible adverse employment action and when the employer can prove that it exercised reasonable care to prevent and promptly correct the harassing behavior and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Attorneys should be cautioned, however, that invoking this affirmative defense can result in a waiver of attorney-client privilege. The 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.²⁸

In *Koss v. Palmer Water Department*²⁹, 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."³⁰ The court found 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," and therefore subject to disclosure.³¹

The goal is to allow legal counsel to provide legal advice protected from disclosure, while still conducting thorough investigations. It is important to define and separate roles between the investigator and legal counsel. The investigator should gather 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, nor does legal counsel "decide" what remedial steps, if any, should be taken as a result of the investigation finding.

²⁶ See *id.*

²⁷ The U.S. Supreme Court first articulated the defense in the companion cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

²⁸ *Angelone v. Xerox Corp.*, No. 09-cv-6019 (W.D.N.Y. Sept. 26, 2011) (collecting cases).

²⁹ 2013 WL 5564474 (D. Mass. Oct. 7, 2013).

³⁰ *Id.*

³¹ *Id.*