Balancing Dual Roles—Counselor and Detective

Lawyer-Directed Investigations

By Mark J. Fucile

Corporate clients increasingly ask lawyers to conduct investigations for them. Two concerns become central in lawyer-directed investigations: protecting privilege and avoiding "unintended" clients.

Protecting Privilege

Courts have long recognized that internal investigations directed by corporate counsel fall within the attorney-client privilege and the work product rule. In *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), for example, the U.S. Supreme Court applied both to an investigation of possible foreign bribery supervised by internal counsel. Similarly, the California Supreme Court recently applied the same logic to an investigation of employee classifications and attendant exposure to overtime claims conducted by outside counsel in *Costco Wholesale Corp. v. Superior Court*, 219 P.3d 736 (Cal. 2009).

Privilege, however, is neither automatic nor without limits in this context. To claim privilege, the purpose of an investigation must be to provide legal advice to the corporate client. In *Bronsink v. Allied Property and Cas. Ins.*, No. 09-751 MJP, 2010 WL 786016 at *2 (W.D. Wash. Mar. 4, 2010) (unpublished), for example, the court ordered production of a lawyer-investigator's file after concluding that he was an investigator only and was not also providing legal advice to the client. Similarly, in *Holt v. KMI-Continental*, 95 F.3d 123, 134 (2d Cir. 1996), the court concluded that a report analyzing employee retention was not protected because it provided primarily business rather than legal advice. On the limits of privilege, a client may waive privilege if the legal content of an investigation does not remain confidential. In *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 461–75 (S.D.N.Y. 1996), for example, the court ordered production of interview notes and summaries after a law firm's investigative report had been released by the client to the media in an effort to allay concern over the impact of asserted improper securities trading. Similarly, in *U.S. v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009), the court found that privilege did not apply when a company intentionally gave the results of an investigation on executive stock option practices to its outside auditors.

Counsel conducting or supervising an investigation can take several practical steps to preserve privilege. First, document at the outset that counsel is conducting an investigation to provide legal advice to the client. Second, channel the results through internal corporate counsel. Third, if a client will release an investigation's conclusions to the public, separate the factual findings from the legal analysis and keep the latter confidential.

Avoiding "Unintended" Clients

ABA Model Rule of Professional Conduct 1.13(a) makes clear that lawyers representing a corporation represent the entity itself even though they take their direction through the corporation's authorized management. At the same time, Model Rule 1.13(g) notes that corporate counsel can represent other corporate constituents as long as the dual representation doesn't create a conflict. This can be an especially sensitive area during internal investigations.

Model Rule 1.13(f) counsels that when dealing with corporate constituents a lawyer must "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." Prudent lawyers involved in internal investigations should remind employees that they interview that they represent the corporation and not the individual. Without that "corporate *Miranda* warning," an employee who discloses information adverse to himself or herself may claim later that the employee believed that an interviewing lawyer also represented the employee personally. In that instance, an employee may attempt to prevent the release of the information by claiming a joint privilege or by seeking disqualification of corporate counsel handling the investigation. *See, e.g., U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2010) (concerning claiming joint privilege); *Home Care Industries, Inc. v. Murray*, 154 F. Supp. 2d 861 (D. N.J. 2001) (regarding disqualification of corporate counsel).

Many federal courts use a five-part test articulated in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986), to determine whether a corporate employee can claim a personal, attorney-client privilege with corporate counsel:

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> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

The "*Bevill* test" shares many similarities with state counterparts determining whether an attorney-client relationship exists. *See, e.g., Bohn v. Cody*, 832 P.2d 71, 75 (Wash. 1992).