



Center of the Circle: Lawyer-Directed Investigations

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Lawyers are increasingly involved in conducting internal investigations for corporate clients or acting as investigators themselves. This article examines attorney-client privilege in lawyer-directed investigations and the unique issues surrounding investigations in the employment arena.



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Attorney-Client Privilege

The Oregon and United States Supreme Courts have long recognized that internal investigations directed by corporate counsel generally fall within the attorney-client privilege and the work product rule. *State ex rel OHSU v.*

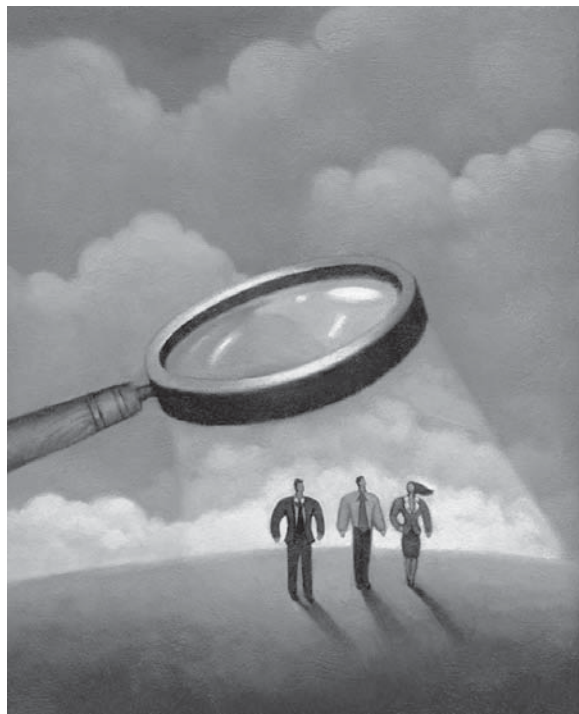
Haas, 325 Or 492, 942 P2d 261 (1997), for example, applied these principles to an investigation of alleged employment discrimination. *Upjohn Co. v. U.S.*, 449 US 383 (1981), did the same for an internal investigation of asserted bribes to foreign officials. The Washington and California Supreme Courts recently reached similar conclusions in, respectively, *Soter v. Cowles Pub. Co.*, 174 P3d 60 (Wash 2007), involving an accident investigation, and *Costco Wholesale Corp. v. Superior*

Court, 219 P3d 736 (Cal 2009), involving an investigation of employee classifications and resulting overtime claims.

The protection afforded has generally extended to both the legal advice rendered and the notes of interviews conducted during the investigation. The protection has also generally extended to both the lawyers involved and those assisting the lawyers with the investigation, such as private investigators and auditors. The Oregon Court of Appeals in *Klamath County School Dist. v. Teamey*, 207 Or App 250, 261, 140 P3d 1152, rev denied, 342 Or 46 (2006), summarized the requisites for protection and, in doing so, relied on the Oregon Supreme Court's decision in *Haas*. The court of appeals stressed four key factors. First, the client's purpose in contacting the lawyer must be to seek legal advice. Second, to the extent that non-lawyers are involved in the investigation, it must be to assist the lawyer in rendering the legal advice concerned. Third, the investigation must have been carried out to "facilitate" the rendition of legal advice. Fourth, the lawyer must have used the results of the investigation in providing the legal advice involved.

There are three important caveats:

First, the attorney-client privilege protects communications and the work



product rule protects a lawyer's impressions, but neither prevent discovery of underlying facts. In other words, although a lawyer's summary of an investigation communicated confidentially to a client would normally be privileged, it would not prevent a party opponent from taking the deposition of employees whom the lawyer (or someone working with the lawyer) had interviewed in the course of the investigation. As the U.S. Supreme Court put it in *Upjohn*: "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney[.]" 449 US at 395.

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Second, the lawyer's role must ultimately be to provide legal advice to the client rather than merely to serve as an investigator. A recent decision from the federal court in Seattle underscores this point. In *Bronsink v. Allied Property and Cas. Ins.*, No. 09-751-MJP, 2010 WL 786016 (WD Wash March 4, 2010) (unpublished), the court found insufficient evidence that a lawyer-investigator was actually involved in providing legal advice to the client, and, therefore, granted a motion to compel production of the lawyer-investigator's file. As the Oregon Court of Appeals noted in *Teamey*, the same applies to non-lawyer investigators who are assisting corporate counsel.

Third, the resulting legal advice must remain confidential. In *In re Kidder Peabody Securities Litigation*, 168 FRD 459 (SDNY 1996), the court ordered the production of interview notes and summaries where a law firm's investigative report had been released by the client to the public to reassure shareholders and investors following discovery of suspected significant financial fraud by one of the company's securities traders. The court in *Haas* dealt with this point at length and concluded that a lawyer's report remained confidential—and, therefore privileged—when results of the lawyer's investigation of asserted discriminatory practices were only shared with faculty of the department concerned and not outside the university.

Both the rules and their exceptions suggest several practical steps in structuring an investigation to maximize the probability that, if challenged, the results will remain privileged. First, document at the outset that the investigation is being conducted to provide legal advice to the client through the lawyer (or law firm) doing the investigation. This will confirm two key requisites discussed earlier for the investigation to fall within privilege

and work product. Second, provide the results of the investigation to those responsible for managing the legal affairs of the client, such as internal corporate counsel. This will underscore the confidential nature of the investigation and that the end product is legal, rather than business, advice. Third, if any of the investigation's conclusions will be released publicly or otherwise used to justify the client's actions, separate the factual findings from the legal analysis. The "separation" may be physical in the sense of dividing a report into two sections (or two reports), with the factual findings made public and the legal analysis remaining confidential, or, depending on the size and scope of the matter at issue, may involve one firm doing the factual investigation and a separate firm providing the confidential legal advice. This will lower the risk of "partial waiver" under OEC 511 (or its federal counterpart).

Attorney-Client Privilege in Employment Investigations

The attorney-client privilege poses some unique challenges in investigations of employment claims. While the employer may want to preserve the privilege during the course of the investigation, the employer must be mindful of the possibility that the investigation results may need to be disclosed during the course of future litigation.

When responding to a harassment or discrimination claim, a careful decision must be made regarding who will conduct the investigation: the employer at the direction of legal counsel, or an attorney. Regardless of who conducts the investigation, if the employer wishes to later use attorney-client privilege or work product to protect the investigation results, the employer must be able to establish that the investigation constituted legal work and was not a part of the employer's

routine business operations. The attorney's role must be clarified at the start of the litigation. Will the attorney be conducting the investigation in preparation for litigation and for purposes of analyzing the legal risks being faced by the employer? Or, alternatively, will the attorney be acting as a decision-maker and using the investigation to enforce the employer's policies?

For privilege to apply to the investigation, the attorney must act as a legal advisor, not as a business decision-maker. To best preserve privilege and work product in an employment investigation, employment decisions should be made by the employer, not the attorneys providing legal advice. Therefore, a non-attorney decision-maker should be designated at the commencement of the investigation to protect privilege and work product in the event of future litigation.

If the investigation is being conducted by human resources at the direction of an attorney, appropriate safeguards must be established before the investigation is commenced to preserve the attorney-client privilege. Even though the employer may later decide to waive the privilege, the ability to make that choice may not exist if privilege was not established at the start of the investigation or if it was later waived.

The following practical guidelines may assist in preserving privilege and avoiding a waiver of privilege, during the process of investigating an employment claim:

- Before an employment investigation commences, the attorney's role should be confirmed in writing: will the attorney be personally conducting the investigation or guiding the employer through the course of the investigation?

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- Investigation documents and emails should be labeled "privileged and confidential," "attorney-client communications" or "work product."
- Confidential individual e-mails should not be forwarded or widely disseminated as part of an e-mail string, as this may result in a waiver of attorney-client privilege. Emails should be labeled "Attorney-Client Privileged – DO NOT FORWARD."
- When privileged communications reference data, the data should be available from an alternative source so that the privileged communication is not the only source of the underlying factual data.

Employers should be counseled at the start of the investigation that privilege may need to be waived as to some or all of the investigation in the event of future litigation. Employers may risk a waiver of privilege if they rely on an internal investigation to defend against claims such as hostile work environment or sexual harassment. However, privilege may be upheld where employers rely on the remedial action taken or the fact that an investigation occurred, rather than on the substance of the investigation.

During the course of litigation, counsel should be mindful of the risks associated with producing an investigation deemed privileged or containing work product prior to a court ordering that the investigation be produced. If the investigation is produced before the

court issues an order compelling production, the employer may risk a waiver of privilege as to all communications relating to the investigation as occurred in the case of *Fullerton v. Prudential Ins. Co.*, 194 FRD 100, 102 -103 (SDNY 2000). In *Fullerton*, the court found that "Prudential acted at its peril when it acted unilaterally rather than waiting for a final ruling. By producing privileged documents concerning its investigation of Jane Doe's claims, it has waived its attorney-client privilege as to all other communications on the same subject." *Id.* (citing *In re Kidder Peabody Securities Litigation*, 168 FRD 459, 468 (SDNY 1996)). The court further noted that "[g]enerally, the work product privilege is waived when protected materials are disclosed

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in a manner which is either inconsistent with maintaining secrecy against opponents or substantially increases the opportunity for a potential adversary to obtain the protected information." *Id.* (citing 8 Wright, Miller & Marcus, *Federal Practice & Procedure* § 2024 (2d ed. 1994). Nonetheless, "[c]ourts will, consistent with Fed.R.Civ.P. 26(b)(3), preserve the work-product privilege, as they do the attorney-client privilege, where disclosure was compelled." *Id.*

Avoiding "Unintended" Clients

The professional rules (RPC 1.13(a)), associated ethics opinions (OSB Formal Ethics Op. 2005-85 (2005)) and case law (*In re Campbell*, 345 Or 670, 681, 202 P3d 871 (2009)), stress that in representing an organization the lawyer's (or law firm's) client is the entity itself. At the same time, simultaneous representation of an organization and one of its constituents is not prohibited—provided that there are no conflicts. RPC 1.13(g) states this accompanying facet: "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [the multiple current client rule]." For example, a lawyer representing a corporation could normally handle a personal matter, such as a will or a land use application, for the corporation's president.

When doing an internal investigation, however, it is important to remind participants that you are corporate counsel, not "their" personal lawyer. The reasons are twofold. First, we have a professional obligation under RPC 1.13(f) to "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." Second, if we inadvertently turn an employee being investigated into a client, then we aren't

going to be able to handle any adverse action our corporate client may wish to take against the employee.

It is important to remember that, as the Oregon Supreme Court noted in *In re Mettler*, 305 Or 12, 18, 748 P2d 1010 (1988), "[a] formal agreement to pay a fee is not a prerequisite to the [attorney-client] relationship." Rather, under *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990), an attorney-client relationship may be implied if (a) the client subjectively believes that the lawyer is representing the client and (b) the client's subjective belief is objectively reasonable under the circumstances.

In *Home Care Industries, Inc. v. Murray*, 154 F Supp 2d 861 (D NJ 2001), corporate counsel was disqualified from

handling a lawsuit arising from the termination of the company's CEO because the CEO argued successfully that the firm had led him to believe it also represented him personally. By contrast, in *United States v. Aramony*, 88 F3d 1369 (4th Cir 1996), the Fourth Circuit held that a former CEO had no reasonable expectation that his statements to private investigators hired by the organization's general counsel were privileged following reports of his financial improprieties in *The Washington Post*.

A prudent practice in conducting or supervising an investigation, therefore, is to remind interviewees that investigators are working for the company (and, preferably, to have an acknowledgement or a witness) so that the line of demarcation is clear. ☛

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