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Workplace Investigations 301:

Privilege, Determinations & Reporting

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Today's Presenters



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What We Will Cover

1. Privilege issues
2. Considerations for reaching a determination
3. Documenting your conclusions



Attorney-Client and Work-Product Privileges in Workplace Investigations



Privilege

Before beginning an investigation, make sure you know the purpose and your goals.

Investigations can be done for several purposes, including:

- Legal decision-making
- Compliance with policy
- Preparing for litigation
- Making business decisions

Only some of these purposes would be privileged.



Privilege

Types of Investigations:

- Privileged
- Non-privileged
- Something else



Privilege

- **Two main privileges for workplace investigations:**
 - The attorney-client privilege; and
 - The attorney work-product privilege.



Privilege

- **Attorney-Client Privilege:**
 1. Confidential communications;
 2. Between client and legal advisor;
 3. For the purpose of seeking or providing legal advice.



Privilege

“Confidential Communications”

- **Confidential**
 - Limit involvement of non-attorneys to only those who “need to know”
 - Explain confidentiality to witnesses and the need to avoid disclosing the substance of the interview to others
 - Give witnesses appropriate Upjohn warning
- **Communications**
 - The privilege protects only communications and does not protect the underlying facts



Privilege

“Between Client and Legal Advisor”

- Communications between company counsel and employees are generally privileged so long as the communications are for the purpose of securing legal advice and pertain to matters within the scope of the employee’s duties.
- The applicability of the privilege to communications with former employees is murkier



Privilege

“For the purpose of seeking or providing legal advice”

- Investigations done for the purpose of gathering facts or making business decisions will generally not be privileged
- Draft investigation plan at the outset of the investigation stating that the investigation is being done to provide legal advice to the company
- Carefully label and preface communications to make the privileged purpose clear



Privilege

Summary of Best Practices:

- Prepare an engagement memo/investigation plan which states that the purpose of the investigation is to provide legal advice
- Carefully label privileged communications
- Give witnesses Upjohn warnings
- Limit disclosure of privileged communications to only those who need to know
- Avoid combining business and legal advice.



Privilege

Waiver

- **Even where all requirements for the privilege are met, the privilege can still be waived. For example:**
 - Waiver through disclosure of information to individuals who do not “need to know”
 - Waiver through partial disclosures during litigation (e.g., disclosing the investigation report, or failing to object if the investigator is deposed and is questioned about privileged communications)
 - Waiver through assertion of particular defenses during litigation, such as the *Faragher-Ellerth* defense



Privilege

Considerations for non-privileged investigations:

- **You may be asked for legal advice even if you are in a solely fact-finding role**
- **If the investigation will be non-privileged, make sure that:**
 - The investigator's report is limited to the facts and does not contain any legal advice;
 - The investigator avoids including any privileged information in the report; and
 - The investigator is not involved in any privileged communications regarding the investigation.



Privilege

Work-Product Privilege

- Protects documents and tangible things prepared in anticipation of litigation by or at the direction of counsel
- Not as strong as the attorney-client privilege, but broader in scope



Privilege

Key is “in anticipation of litigation”

- Reports and materials prepared in the ordinary course of business are not privileged
- “In anticipation of litigation” is a murky standard. Check the law of the jurisdiction you are in
- In many jurisdictions, a lawsuit or claim does not yet need to have been filed, but there must be a reasonable likelihood of litigation.



Privilege

- **Best Practices:**
 - Prepare an investigation memo/plan at the outset of the investigation which documents a concern about potential litigation
 - Expressly state in the investigation report that the report contains the attorney's mental impressions, thoughts, and opinions
 - Put in place a litigation hold if you plan to assert this privilege.



Best Practices for Reaching Determinations



Best Practices for Reaching Determinations

REACHING DETERMINATIONS IS A DELICATE BALANCING ACT

- A good investigator will always remain focused on reaching determinations to ensure that the investigative process is designed and implemented in such a way as to reach determinations on the key issues.
- However, a good investigator will also never reach premature determinations that impact the manner in which the investigative process is designed and implemented.



Best Practices for Reaching Determinations

Framing the Issues

- What is the alleged conduct?
- What policy(ies) should be considered?
- What law should be considered?

Determination of Key Issues

- Do the issues require reframing?
- Are interim determinations needed?
- Are prior investigations an issue?



Best Practices for Reaching Determinations

COMMUNICATION IS KEY

- If the investigation is independent, a good investigator will follow the evidence where it leads while consistently communicating with the client contact regarding the scope of the investigation and issues to address.
- If the investigation is protected by attorney-client privilege and work product immunity, a good investigator will consider all possible theories based on the available evidence while providing legal advice for purposes of litigation.



Best Practices for Reaching Determinations

Key Players

- Accuser(s), target(s), witness(es)
- Current/former employees
- Others

Key Documents

- Personnel records, policies
- Communications, such as emails, etc.
- Additional documents from interviews

Investigation Process

- In-person or virtual
- Order/timing of interviews
- Meetings with client contact overseeing the investigation



Best Practices for Reaching Determinations

APPLICABLE STANDARD

- More likely than not: This is the standard typically.
- Conceivable or inconceivable: Some underlying determinations may not allow for more likely than not statement and are better suited to a statement such as this.
- Very likely or most likely: Some underlying determinations may be so clear that a strong statement such as this is possible.



Best Practices for Reaching Determinations

INVESTIGATOR'S TOOLS

- Admissions and Denials
- Credibility of Interviewees
- Corroboration of Evidence
- Documentation of Events



Best Practices for Reaching Determinations

UNRESOLVED ISSUES

- Whether or not something happened may not be an answerable question, but it also may not be the only possible or important question under certain circumstances.
- Are there alternative determinations to reach?



Best Practices for Reaching Determinations

ALTERNATIVE DETERMINATIONS

- How is office morale?
- What is the office culture?
- Are employees reporting a consistent experience?
- Are certain employees viewed as a problem?
- Are employees offering possible remedies?
- Any impediments to the investigation?



Best Practices for Documenting Conclusions



Documenting Conclusions

Options:

- No report / Oral report
- Summary report
- Detailed Report
- 2 or more of the above

Considerations:

- Who will receive it?
- How might it be used?

Recommendation: discuss with client early and often



Documenting Conclusions

Oral Report

- Highly sensitive matter
- Privilege considerations
 - Preliminary findings needed quickly

Summary Report

- Limited investigation was needed
- Two versions needed for privilege considerations

Detailed Report

- Substantial investigation conducted
- Report may support future defense



Investigative Report

A good written investigative report provides a clear description of:

- Complainant and responding party(ies)
- Applicable policy(ies)
- Process followed – including witnesses interviewed, documents and other evidence reviewed, and dates of each procedural step
- Allegations made
- Facts obtained
- Conclusions reached based on those facts – taking into account burden of proof and bias issues as appropriate
- *If assigned:* Recommendations for resolving the complaint



Investigative Report

A good written investigative report will not:

- Fail to identify what was investigated and why (allegations, policies)
- Include legal conclusions
- Reach conclusions without reference to specific evidence gathered in the investigation
- Fail to reach a conclusion unless absolutely unavoidable



Investigative Report

Recap of general sections of an investigative report

- What is the issue under investigation
- What were you engaged to do
 - Applicable policy/ies
- What were the mechanics
 - Whom did you speak to; if not, why not
 - What documents gathered
 - Other information (video, records, etc.)
- Facts gathered
- Analysis



Investigative Report

Facts

- Background facts
- Facts on which the parties agree
- Disputed facts
- Basis for determination as to facts
 - Consistency
 - Corroborating information (or lack thereof)
 - Reliability
 - Bias
 - Logic



Investigative Report

Facts

- Non-argumentative
- Thorough . . . but only what is necessary
- Include inculpatory and exculpatory

Make sure:

- You have information on all the aspects that are needed to determine whether the policy was violated
 - *Ex:* Policy prohibits sex discrimination if conduct is objectively and subjectively offensive, based on sex, and severe or pervasive – make sure you have identified facts that relate to both subjectivity and objectivity



Investigative Report

Analysis – of which facts were established or not

- Always keep the standard of proof in mind

Analysis – of whether the policy/ies was/were violated

- Be sure to address each element of the policy and applicable definitions
- *Ex:* Under prior policy, even if you determine that conduct is subjectively and objectively offensive, you must still determine whether it is severe or pervasive



Detailed Report Sections



Introductory Sections

- Summary of Complaint
- Investigative Steps
- Brief Summary of Conclusion



Analysis Section

- Background/Facts
- Summary of Interviews
- Description of Other Evidence
- Analysis of Relevant Evidence



Conclusions

- Findings
- [Recommendations]
- [Additional Observations]



Final Thoughts

Privilege

- Reminder: avoid including privileged information if the report will not be privileged; or add reminder about privilege if needed

Determinations

- Even he said / she said situations may be able to be resolved
- Even if the finding is “violation not supported by preponderance of the evidence,” the Company may still want to take action



Any Questions?





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Thank You

For further questions or comments visit our
website or contact one of our attorneys.