



Ethical Issues & Best Practices for Workplace Investigations

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Agenda

- Best practices for ethical workplace investigations
- Preliminary ethical considerations
- Can you speak directly to the litigating former employee?
- What if the litigant is a current employee?
- Protecting the attorney–client and work product evidentiary privileges
- What if you are investigating your own boss?



Best Practices for Ethical Investigation

Best Practices for an Ethical Investigation

- Identify the client & move quickly
- Evaluate the complaint
- Consider potential conflicts of interest
- Plan investigation with confidentiality in mind
 - Define the scope
 - Select the means
- Conduct the investigation
- Document the investigation
- Make determination



Preliminary Ethical Considerations

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- **Identifying the Client**
 - ABA Model Rule 1.13 (organization as client)
 - ABA Model Rule 4.3 (dealing with unrepresented)



Preliminary Ethical Considerations

Conflicts of Interest

- ABA Model Rule 1.7 (Conflicts - Current Clients)
 - Counsel reasonably believes he or she can provide competent and diligent representation to each client;
 - No laws will be broken;
 - The lawyer will not assert a claim by one client against the other in the same proceeding;
 - Each client gives informed, written consent
- Consider outside investigator



Duty of Confidentiality: Attorney-Client Privilege & Work Product

ABA Model Rule 1.6 (Confidentiality)

- (a) Lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)
- (b) Lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm..."
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

- **Investigations by In-House Counsel**

- Attorney client privilege protects **legal** advice only
- Attorney represents the company
- Privilege belongs to the company



Duty of Confidentiality: Attorney-Client Privilege & Work Product

Recall: Who is the Client? (ABA Model Rule 1.13)

Upjohn warning to employees:

1. Counsel represents the company and not the employee;
2. Counsel is there to investigate a particular issue and report findings to the company;
3. The communications are privileged, but the privilege belongs to the company, which at any time may elect to waive the privilege and disclose the contents of the interview to a third party, including government enforcement authorities; and
4. The interview is confidential and disclosure of the contents of the interview may waive the privilege the company is attempting to maintain.

Duty of Confidentiality: Attorney-Client Privilege & Work Product

- **Managerial Employees**
 - Communication is likely privileged
- **Entry Level/Hourly Employees**
 - Communication may not be privileged
 - Consider NLRA Section 7 Rights



Investigations by Outside Counsel

- Easier to maintain attorney-client privilege & comply with ABA Model Rule 1.6
- Consider *Faragher/Ellerth* defense



External Investigations

- Disclosure to third parties waives privilege
- Disclosure to government agency likely waives privilege



Internal Investigations

Recall ABA Model Rule 1.6 – Duty of Confidentiality

To preserve privilege:

- 1) Understand their work is being conducted at the direction of counsel as part of the investigation and in order for counsel to provide legal representation to the company;
- 2) Mark all documents created as part of the audit as being done at the direction of counsel and protected by the attorney work-product doctrine; and
- 3) Should not disclose any confidential information relating to the audit without the consent of counsel.



Duty of Confidentiality – How Far Does it Extend?

- Do not promise confidentiality
 - Privilege may not apply
 - Disclosure may be required by law
 - Attorney’s knowledge is imputed to company
- Take caution in requiring confidentiality from employees after investigation concludes
 - *Apogee Retail* overturned *Banner Health System* so investigative confidentiality rules limited to duration of investigation are presumptively lawful under NLRA.



Employee Privacy

- ABA Model Rule 4.4 – Respect for Rights of Third Persons
 - (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
 - (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
- Emails, Social Media & Video Surveillance



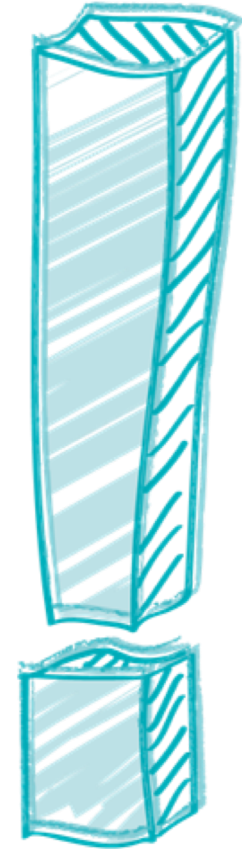
Union Representation

Weingarten Rights

- Employees have the right to union representation during investigatory interviews
- Management not obligated to inform employee of rights
- It is the employee's responsibility to know and request union representation

If employee makes request for union representative to be present, the investigator has three options:

- Stop questioning until the representative arrives;
- Call off the interview; or
- Tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to a union representative.



Ethical Considerations When Interviewing Employees

Interviews

- Inform employee of purpose
- Articulate *Upjohn* Warnings
- Do not promise confidentiality, but recall your duty of client confidentiality (ABA Model Rule 1.6)
- Expectation of cooperation
- Protection from retaliation



Attorney Representation

- ABA Model Rule 1.13 – Organization as client
- ABA Model Rule 4.3 - Unrepresented persons
- No duty to disclose right to an attorney
- No obligation to wait on attorney
- Consider indemnity issues



Investigating Former Employees



- Attorney communication with former employee on a matter within the scope of the former employee's employment is likely privileged. (ABA Model Rule 1.6).
- Take special care to avoid disclosure to third parties
- Human Resources can assist in communication with employee that has retained counsel

Reaching Conclusions

Evaluate the Evidence

- Was the witness credible?
- What motivation might witness have to be less than truthful?
- Does the accused demonstrate a pattern of misconduct?
- Did the accused deny the charges or admit that he/she made a mistake?
- How does the timeliness or untimeliness of the complaint relate to the event?
- Is there direct/eyewitness or only circumstantial evidence?



Reach a Conclusion

- Does the company have a policy against the behavior?
- Did the accused/wrongdoer know about the policy?
- Does the accused/wrongdoer admit or deny the misconduct?
- Was any law violated? (avoid making conclusion if answer not obvious)
- How strong is the evidence? Likely that misconduct occurred?
- Has the investigation been thorough? Has the accused/wrongdoer committed violations in the past?



Determining Discipline

Determining appropriate discipline:

- Seriousness of the misconduct.
- Employee's position (supervisors and managers can be held to a higher standard of conduct).
- Employee's employment history and length of service.
- Whether employee has been disciplined for similar behavior before.
- How has employer treated other employees who have committed similar offenses.

Communicating the Results

To The Accused & The Reporting Party

To the accused:

- Communicate results of investigation
- Give employee specific factual basis for the determination
- Avoid legal terms to describe the conduct

To the reporting employee:

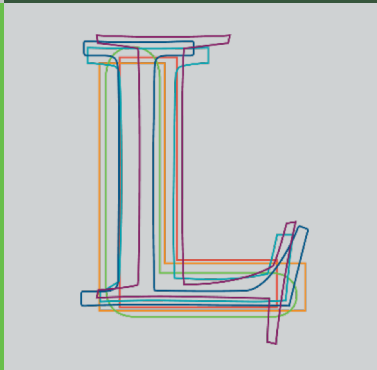
- Always follow up with employee
 - Demonstrate company took actions to investigate
- Consider privacy rights before disclosing details



Government Officials

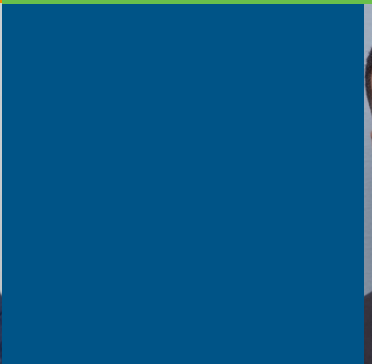
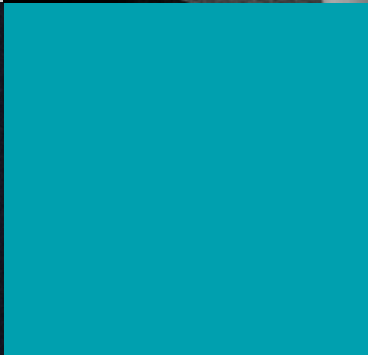
- May be legally required to report results to the government or a court
- Might ABA Model Rule 3.3 (Candor Toward the Tribunal) apply?
- May decide to seek prosecution for the misconduct
- Disclosure likely waives work product and attorney client privilege

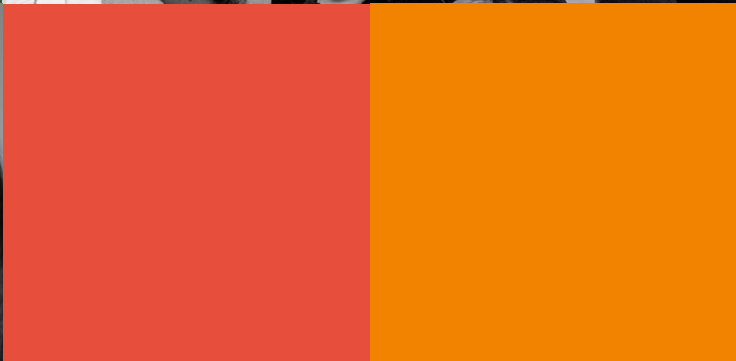
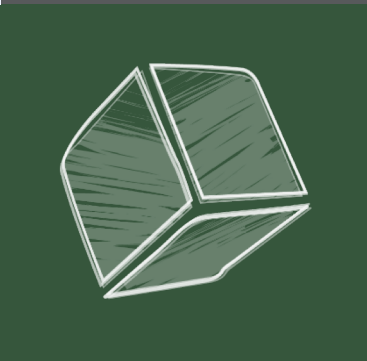




Questions?

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