How to Maximize Attorney Client Privilege Protection in HR Investigations

By Linda Uszo
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In recent months, a person cannot open a newspaper or turn on the radio without hearing about companies conducting internal investigations into employee wrong-doing. From backdating stock options to breaches of company confidentiality obligations, internal investigations are now common in corporate America. Litigation almost inevitably results, and lawyers and clients are sometimes surprised to learn that communications concerning an investigation that were thought to be privileged were not, or that somewhere along the way, the privilege was waived. To minimize unpleasant surprises, it is helpful to analyze the scope of the privilege in light of the typical stages of an investigation. Because sexual harassment appears to be the most common subject of an investigation, and because these particular types of internal inquiries have received considerable scrutiny in the courts, the discussion below addresses the attorney-client privilege in the context of a sexual harassment investigation.

The Context
The Human Resources manager (“HR”) receives a written complaint from Employee A that a coworker, Employee B, has sexually harassed her. HR notifies General Counsel (“GC”) who instructs HR to gather all information available to HR and to meet with her. At the meeting HR, GC, and a partner of an outside firm (“Partner”) are in attendance. Preliminary matters are discussed, GC confirms the legal obligations of the corporation (“Company”) with Partner³, and then instructs HR to oversee the investigation which will be conducted by Partner. Partner carries out the investigation (keeping contemporaneous notes of interviews) and periodically discusses details and facts with HR and occasionally with GC. Partner drafts a final report summarizing the facts learned and draws conclusions. The report is sent to HR and GC. GC, HR, and several managers meet and decide what action to take. The conclusions and action taken are communicated to Employee A and Employee B. Employee A is dissatisfied, exhausts her administrative remedies and sues Employee B and the Company. Her lawyer (“Lawyer”) issues discovery requests seeking all documents relating to the investigation from Partner and Company, and seeks to depose Partner, HR, and GC. Can it be that Company is now obliged to produce communications between Company and Partner, the investigation report, and communications with Partner or other outside counsel in which the Company discussed what to do following conclusion of the investigation? Can it be that Partner is now obliged to produce his interview notes and communications with the Company and that Partner much also testify under oath at a deposition?

California’s Definition of the Privilege
The attorney-client privilege is set forth in California Evidence section 952, and protects as privileged information communicated between a client and lawyer in the course of an attorney-client relationship where the communication was intended to be confidential.³ Where other persons are present, their presence must be necessary for the transmission of the information or for accomplishment of the purpose of the representation. An example of a third party whose presence (or participation in some fashion) may be considered necessary in the above scenario would include HR, who is responsible for implementing and enforcing company policies which prohibit sexual harassment. Conducting meetings and communicating with a lawyer in connection with seeking legal advice where others not necessary to the advice or representation are included in the communications may result in a waiver of the attorney client privilege. Communications which are not made in the context of an attorney-client relationship (such as consulting an attorney for business strategy advice) are not covered by the privilege.

Some common sense principles to remember in analyzing the scope of the privilege in any situation are:
1. Facts, as such, are not privileged, even if provided to an attorney. Certainly, the content of the discussion between the client and attorney are generally covered by the privilege.

2. Attorneys, when acting in a non-legal capacity, are not being consulted in the course of an attorney-client relationship. Therefore, communications made in that context are not privileged. This is often the most challenging issue for in house counsel, who often will not know whether the communications may require him or her to act in their capacity as an attorney, or in the capacity of a senior official of the company.

3. When lawyers are consulted in “mixed” situations (e.g., to assist with business strategy and to render legal advice), the privilege may be threatened. The more intertwined the role of business advisor is with the role of legal advisor, such that communications cannot be separated, the more likely a court will find the privilege does not apply or has been waived.

4. Reports of incidents which give rise to potential legal liability may or may not be privileged. If the report is generated in the ordinary course of business and is required by company policy or by law regardless of any potential threat of litigation, it is unlikely the report will be privileged. This is true even if the report is transmitted to in house counsel. In contrast, reports generated in response to incidents solely in anticipation of litigation, are not used for other purposes (such as providing statistics), are not copied or distributed in the ordinary course of business to others, and are kept separately from other files with access restricted generally to in house counsel and their staff, may indeed be privileged.

5. Emails between two or more co-workers (especially broadcast emails “to all personnel” or similarly broad constituencies) in which communications with legal counsel and the advice therefrom are discussed may result in a waiver of the privilege. Even though all recipients may have some level of legitimate interest in the communications, unless their participation is “necessary”, disclosure to those recipients may result in waiver of the privilege.

6. Merely copying counsel on emails or other communications does not automatically render the communication privileged. The communications must be made among those whose participation is necessary and the purpose must be to seek legal advice.

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**Applying the Privilege Principles to the Investigation Process**

To further understand applicability of the privilege to particular communications in the course of an investigation, it is helpful to focus separately on each stage of a typical internal inquiry.

**Initial Complaint**

The complaint itself is a form of report containing facts and allegations. Even if transmitted to GC instead of HR, it is a non-privileged document. The GC does not represent Employee A, and Employee A is not transmitting the report to GC in the furtherance of an attorney-client relationship.

Similarly, the immediate, pre-existing information which HR may gather prior to meeting with GC and Partner, such as Employee A and Employee B’s personnel files, copies of policies, emails from Employee A and Employee B’s managers stating they do not have any reports of incidents from Employee A or involving Employee B, are likely not privileged. There can be instances in which discussions between non-lawyers are privileged. Those instances are few and narrow. In order for such communications to be privileged, they must be made specifically and solely for the purpose of preparing to meet with an attorney to seek legal advice. For example, discussions between two lay persons in need of legal advice regarding a situation in which they plan the questions that need to be asked of the lawyer, outline the information that should be gathered, and similar interchange directly relating to the consultation may be privileged.

**Initial Meeting Among HR, GC, and Partner**

As is often the case, initial meetings in which outside counsel is consulted may serve dual purposes. The Company will typically relate a summary of the complaint, basic factual information known, and request information from Partner about the Company’s legal duties, risks, and strategies in handling the situation. Partner will render such advice, and GC will turn to instructing HR to oversee the investigation, and directing Partner to conduct the investigation. GC, HR, and Partner all will likely take notes at this meeting. Further, attention during the meeting may bounce back and forth between nuts and bolts of the investigation and issues involving legal advice.

Notes of and testimony about meetings of this sort pose particularly sensitive issues for the Company in asserting attor-
rely-client privilege against Lawyer’s discovery requests in the subsequent litigation. That is because a lawyer engaged and serving as an investigator is not acting in a legal capacity. Partner, in discussing nuts and bolts of the investigation and conducting the investigation is assuming a non-legal role of fact investigator. This same role could be performed by any lay person, including HR. The fact that a lawyer has been asked to conduct the investigation does not render the investigation privileged.

As a result, discussions (and notes taken about the discussions) concerning procedural details of the investigation (such as who will be interviewed, in what order and how to contact those being interviewed) are not privileged. The more intertwined and inseparable the discussions about the nuts and bolts of the investigation with the legal advice sought about Company legal obligations with respect to the investigation (such as whether the Company has a legal duty to investigate, what the law requires to satisfy that duty, and possible legal outcomes), the more likely Lawyer will be able to convince a court that the overall meeting was not privileged.

GC, HR, and Partner can reduce this risk by clearly segregating topics addressed during the meeting. This takes advanced planning, much of which is the responsibility of GC. Best practices suggest that the GC expressly designate, for example, the first segment of the meeting as an attorney client privileged interchange in which the Company is seeking legal advice concerning its obligations to conduct an investigation, and how to comply with those duties. Participants are, in this example, appropriately limited only to GC, HR, and Partner. Others who might have an interest (such as Employee B’s manager), but whose presence is not necessary for the rendering of this advice, should not be present in the meeting. Notes taken by GC, HR, and Partner should clearly state at the top that the notes are privileged and that the discussion is for the purpose of seeking/rendering legal advice.

Once the first portion of the meeting is concluded, GC should indicate that a new segment is starting and the new purpose is to discuss the conduct of the investigation. Notes taken should indicate the end of the privileged, legal advice segment. Notes of the second segment should begin on a new sheet of paper, and should indicate that the discussion has turned to mechanics of the investigation. All present should be circumspect about their notes, limiting these writings to what is necessary and refraining from linking any discussion concerning legal advice to the notes concerning procedural details of the investigation.

**The Investigation**

During the investigation, Partner may need to discuss certain facts with HR to identify additional witnesses, to arrange interviews, and to discuss the Company’s various applicable policies. These conversations generally will not be privileged. HR may also wish to ask legal questions and obtain information about legal issues pertaining to the investigation or harassment in general from Partner. Again, the more such questions and resulting interchange are interspersed with factual discussions, the more problematic it becomes to protect what is said (and notes resulting therefrom) as privileged. One way to minimize this risk is to suggest to HR that he pose legal questions to GC, who, in turn, may ask Partner the questions and obtain advice in a separate discussion expressly designated as privileged. GC may then relate the advice received to HR in yet another separate discussion, the purpose of which is solely legal in nature.

This suggestion may seem inefficient or overly burdensome. It is not the only way to address the issue. It merely illustrates that with advanced thought and care, legal communications safely can be segregated from the fact investigation. Segregation can be accomplished directly in the communications between HR and Partner by clearly delineating a segment of the communication as an attorney-client privileged communication in which advice is sought. There is always risk, however, that a court will determine the communication was so intertwined with factual matters that it is not privileged. To the extent that either HR or Partner take notes during their discussion, it is best to physically separate memorializations of legal discussions by keeping them on papers separate from notes about the factual investigation.

Interviews of Company personnel by Partner are not privileged discussions. They are confidential in that applicable sexual harassment law requires the Company to protect information concerning the investigation due, in large part, to the rights of privacy of the individuals involved and potential for humiliation and embarrassment. The interviews, however, are not privileged under the attorney-client privilege.
Similarly, Partner’s notes taken during interviews are not privileged. Although both state and federal law generally protect an attorney’s thought processes, opinions, and legal analyses as work product, the work product doctrine does not provide absolute protection. Thus, Partner’s notes during an interview to the effect that he thinks the person being interviewed is lying, or that under law the information provided by the interviewee is not relevant, may not be subject to work-product protection. It is important, therefore, that Partner confine his comments about an interviewee solely to objective observation. For example, it may be appropriate to note something to the effect that the witness shifted repeatedly in his or her chair, was shaking, would not make eye contact, nodded his or her head, or the like. Because there is a natural tendency to extrapolate from those observations, such notes must be taken, and viewed, with extreme care.

**Concluding the Investigation and Taking Action**

Once fact-gathering is completed, Partner drafts a report and provides it to HR and GC. The report contains a summary of the facts learned in the investigation and may draw some conclusions. Whether the conclusions are stated in the report by Partner, or whether determined in a discussion among GC, HR, and Partner (or another outside law firm), neither the report nor the conclusions are privileged. The conclusions represent a determination of whether or not unlawful sexual harassment occurred, or whether Employee B engaged in any conduct which violated Company policy. Once conclusions are drawn, the Company must determine what, if any action to take to stop the harassment, and to deter risk of future harassment. Action taken, similarly, is not privileged information. In fact, under applicable law, both the conclusions drawn and the action taken must be communicated both to Employee A and Employee B.

As is often the case, GC wishes to secure legal advice from competent and experienced outside employment counsel to assist in determining conclusions and the action to take in light of legal ramifications. At this stage, the Company is seeking legal advice on how to proceed now that the investigation has been completed. There is a tendency to seek that advice and assistance from Partner, who by now is intimately familiar with the facts, personalities, and politics involved. Partner is also familiar with the Company’s policies, and perhaps some of the challenges the Company may face in implementing any number of remedies.

However, best practice suggests that Partner be someone who is independent, without a pre-existing or long-standing relationship with the Company (and not be from the same firm as the firm that regularly renders employment advice to the Company). The rationale is that using the same lawyers or law firm to conduct an investigation and to render legal advice, particularly where there is a pre-existing and significant relationship, may taint the objectivity of the fact gathering process. The firm has an interest in continuing a relationship with the Company. Accordingly, the firm may wish to avoid or minimize situations which may suggest that the Company failed to act appropriately, or that advice previously provided which may have a bearing on the outcome of the investigation was flawed. Employee A’s astute Lawyer will seize the opportunity to suggest to a jury that the investigation was suspect or biased because the fact-gatherer was not truly an objective outsider.

Choice of separate, independent counsel to conduct the investigation also aids the Company to maintain separation between legal advice and fact investigation. To the extent GC and HR have legal questions, those questions can be posed to outside advice counsel instead of Partner. This procedure minimizes the risk that discussions seeking legal advice may be deemed not privileged upon challenge by Lawyer.

**Conclusion**

Understanding what communications are or may be privileged in the context of an HR investigation minimizes confusion, and enables all parties concerned to work more effectively with in house counsel and outside counsel. The lessons learned are broadly applicable to all types of investigation undertaken in the workplace, and invaluable in protecting privileged communications.

1. It is often desirable that Partner not be from the same law firm that has an established relationship with Company in rendering employment advice to the Company, for reasons which will be explained further below.
2. Federal law defines the privilege similarly: legal advice of any kind sought from an attorney in his or her capacity as an attorney and communicated in confidence.
3. Note that the information itself (such as the facts) likely will not be privileged.