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When The Attorney Is The Investigator

Law360, New York (November 09, 2011, 7:35 PM ET) -- Companies often ask attorneys to perform investigations into sensitive or higher profile employee issues. Often, there may be an assumption that some privilege will attach as long as the person performing the investigation is an attorney. However, attorneys perform many different functions for businesses, and they can perform many different functions within fact investigations as well. Some functions are privileged, and some are not.

In most cases, the contours of the applicable attorney-client and work product privileges can be drawn with some level of precision if the company's goals are outlined clearly and the attorney's role is engineered carefully before the investigation starts.

Let's say the company receives a complaint that involves allegations against one of its executives. Maybe the complaint includes allegations of sexual harassment or accounting improprieties that implicate U.S. Securities and Exchange Commission rules. A thorough investigation is needed. Should an attorney perform the investigation? What are the implications for the attorney-client and work product privileges when the attorney is the investigator?

Consider three different approaches that companies have utilized for attorney investigations: (i) strictly privileged approach, in which the attorney maintains the privilege for all aspects of the investigation, including all notes and reports; (ii) in a hybrid approach, in which two attorneys are utilized — an investigating attorney and a counseling attorney ; and (iii) an unprivileged approach in which the attorney is designated as an extension of the human resources department and no notes or reports of the attorney are kept privileged. All three approaches may be appropriate, depending upon the context. All three approaches have their limitations as well.

Maintain Privilege for All Aspects of Investigation

It may be appropriate in some cases for privilege to be preserved for an entire investigation, start to finish. This approach might be warranted if there is a concern about the potential misclassification of a group of workers under the Fair Labor Standards Act, and an attorney is engaged to weigh the associated legal risks. Here, the attorney's job is to ascertain whether meaningful legal risks exist, and whether further investigation and action will be warranted. The attorney then conducts the investigation by speaking with managers (who are agents of the company to whom the attorney-client privilege attaches).

The attorney may be able to report on the problem with a privileged memorandum that analyzes the legal risks and suggests further action. The attorney notes, legal analysis and attorney conclusions can all remain privileged. (Of course, if there was a misclassification which the company does not ever bother to correct, the fact of the investigation would likely be considered nonprivileged, and could potentially be used to show that the company's knew about the problem, that its continued violation was "willful," and that increased damages are warranted.) An all-privileged investigation may be useful for purposes of gaining preliminary reconnaissance of a suspected problem, especially at a stage when no-discoverable report is needed.

Note that the attorney's job is limited to analyzing legal questions and assessing legal risk. If the attorney steps over this line and becomes a decision maker, then it seems that the attorney is acting less as a lawyer (a counselor who advises on legal risk) and more as a client (an executive who charts the course that the business will take). For this reason, attorneys who wish to preserve privilege should avoid being placed in a position of making or even "approving" substantive business decisions. Instead, the attorney's job is to evaluate risks, even if that means advising on whether such risks are reasonable or unreasonable in light of the facts presented.

Hybrid Approach: Investigating Attorney and Counseling Attorney

Oftentimes, attorneys reflexively try to maintain the attorney-client privilege whenever they can. However, this approach is not feasible when the company needs to develop and produce a discoverable (i.e., nonprivileged) report at the conclusion of the investigation. For example, if there is an allegation of sexual harassment, the company needs to develop a discoverable report that it can produce to the EEOC or opposing counsel which shows that the company took the complaint seriously, that it investigated the allegations thoroughly, that it reached thoughtful and reasonable conclusions, and that it took appropriate measures in response.

Developing a discoverable end-product that shows the prompt and thorough diligence of the company is one of the key byproducts associated with the investigation. (A top-secret privileged report would not further these ends because it cannot be shared with third parties — like the EEOC or a jury — without waiving the privilege.)

Some companies attempt to perform the investigation by utilizing two attorneys: an investigating attorney who performs the interviews and a counseling attorney who weighs the legal risks based upon the reported facts. The investigating attorney and the counseling attorney may be in-house lawyers, external lawyers, or one of each. Under this scenario, the investigating attorney performs the interviews and reports the results back to the counseling attorney.

(There's an argument that the work product privilege may apply to the investigation notes — or parts thereof — if investigation is in anticipation of litigation and if the notes contain impressions and legal analysis by the investigating attorney). Under this approach, the interviews with the investigating attorney would likely be discoverable. Thus, the investigating attorney and the interviewed witnesses could likely be deposed regarding the facts discussed during the investigation interviews.

After the counseling attorney has evaluated the legal risks and advised the business of such risks, and after the business has made its decision about how to proceed, the investigating attorney may participate in the drafting of the final investigation report, which is not privileged. This report shows what the company ultimately decided and the key facts upon which it made its decision. Disclosure of the final report is unlikely to waive any privileges because it is not drafted as an attorney-client communication or work product. It is also not drafted by the counseling attorney who performed the legal analysis and weighed the legal risks.

Unprivileged Investigation By Attorneys

In some instances, there is not any substantial need to maintain attorney-client or work product privileges. For example, suppose that three employees were involved in an incident that damaged a production machine and suppose that all three of the employees are disclaiming knowledge about the incident. Perhaps the company just wants a sharp interviewer to perform a tough "cross-examination" on these three employees in order to discover, as best as possible, what really happened during the incident.

The attorney may be utilized in this case as an extension of the human resources department. The attorney is not really acting as an attorney: there is no meaningful legal analysis or weighing of legal risk. Whatever the result is, the company may not really care whether any privilege attaches or whether any privilege is waived. Under this scenario, all notes and reports of the investigating attorney are designed to be discoverable.

Attorneys are asked to wear different hats when they perform investigations. Whether they are acting as legal counselors, analyzing and weighing risk, or reviewing facts and making business judgments, attorneys would do well to remain mindful of which hat they are wearing, and which role they are playing in the investigation. Careful attention to these roles will increase the chances that the privilege will apply in the way that was intended.

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