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Protect the Privilege: Considerations in Employment Investigations

Employers can take many steps to help maximize the likelihood that attorney-client privileged information and work product will be protected in the context of employment-related investigations.

In the recent case of *City of Petaluma v. Superior Court (Andrea Waters)*,¹ the California Court of Appeal held that the attorney-client privilege and work product doctrine protected outside legal counsel's post-termination factual investigation from disclosure in litigation. The court further held that the employer did not waive the privilege by asserting the "avoidable consequences" defense—claiming that the plaintiff failed to take reasonable steps or use available opportunities to avoid harm—where the investigation occurred after the termination of the employment relationship.

In *City of Petaluma*, a city employee resigned and filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC). The city attorney retained outside counsel to investigate the charge and assist in preparing for the anticipated lawsuit. The retainer agreement specified that outside counsel would draw on her years of employment law expertise to conduct an impartial fact investigation. However, although the retainer agreement expressly created an attorney-client relationship, it provided that outside counsel would **not** render any legal advice.

The plaintiff argued, and the lower court agreed, that the investigation was not privileged because outside counsel was asked not to provide legal advice. The Court of Appeal disagreed. It held that, "[t]he plain terms of [Evidence Code § 951] support the conclusion that an attorney-client relationship may exist when an attorney provides legal services without also providing advice. The rendering of legal advice is not required for the privilege to apply." The court reasoned that the investigation at issue here entailed the provision of legal services as outside counsel drew on her expertise to identify relevant facts.

As to the plaintiff's assertion that any privilege was waived, the court drew a sharp distinction between investigations conducted **during** a claimant's employment and those that are conducted thereafter. The court reasoned that the avoidable consequences defense often puts at issue the adequacy of an investigation conducted during the employment relationship. Here, though, the employer was not relying (and could not rely) on the post-termination investigation in support of its defense. As a result, the city had not waived the privilege.

Employers should consider the following factors in conducting workplace investigations:

- **Retainer Agreements.** Ensure that retainer agreements with outside counsel are clear as to the creation of the attorney-client relationship, the basis for the engagement (e.g., the attorney's vast experience and expertise in employment law), and the nature and scope of the representation (e.g., investigating the facts and using the attorney's expertise to render a professional evaluation of the evidence). While not dispositive from a legal standpoint, it is helpful to

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specifically state that the investigation and related findings will be subject to the attorney-client privilege and work product doctrine to the fullest extent permitted by law.

- **Mark Documents Appropriately.** Clearly mark as confidential documents intended to be covered by the attorney-client privilege and work product protection.
- **Minimize Dissemination.** Limit distribution of protected information, whether verbal or written, to those with a need to know, and take all reasonable efforts to ensure continued confidentiality.
- **Consider Double-Tracking Investigations.** Consider dual-tracking investigations, such as having Human Resources conduct the investigation along with in-house or outside legal counsel, or having both in-house and outside legal counsel perform the investigation. This permits the creation of one set of investigation notes and findings that can potentially be used to support defenses if a claim is asserted, with another that can more readily be protected by the attorney-client privilege and work product doctrine. Rather than acting merely as a scribe in witness interviews, legal counsel conducting the privileged investigation should weave into the notes their impressions, conclusions, opinions and legal theories. For instance, notes can reflect such things as assessment of witness credibility, discrepancies in various witnesses' stories, factors supporting or undermining potential claims and defenses, and follow-up areas of inquiry, which can aid in asserting an absolute privilege against disclosure.
- **Assess Defenses Carefully.** In assessing potential defenses to legal claims, consider their potential effect on the attorney-client privilege and work product protection of the investigation notes and findings. Some defenses are virtually guaranteed to result in waiver by, for instance, placing the adequacy of the investigation at issue.

Employers must be thoughtful and forward-thinking in conducting employment investigations. With appropriate foresight, the attorney-client privilege and work product protection can be preserved.

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¹(2016) 248 Cal. App. 4th 1023.