



Interesting Times in Glass Houses: Internal Investigations for the Media Employer

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It is a bit like undressing in a glass house. That is how one could describe conducting an internal investigation on an employment issue for a media company. The media looks for interesting content for its publications and broadcast on an hourly deadline. What if one of the most interesting stories of the day is happening in the same newsroom or broadcast booth where that search for content is ongoing? This paper is a collaborative effort of several authors, all attorneys who represent media companies, to address both the basic steps and guidelines for internal employment issue investigations but with the goal to do so with an eye to the special issues faced by a media industry employer. There are points that are basic to the conduct of any internal investigation with the goal of reaching an appropriate result and to have a defensible investigation should an attack be made on either the result or the process in litigation or the court of public opinion. If a media company touts its belief in transparency and at times relishes reporting on the employment woes of its competitors, how does that mode of doing business play with the goals of conducting an internal investigation without exposing the company to harm legally or by public outcry? What we will find here is there are often no clear answers. However, there are the basic tenants of how to conduct an internal investigation and of how to be a journalist. We lay these out as best we can with the hope that with this guidance, media employers can weigh the basics and make appropriate decisions in what can often be interesting times.

I. Intake

A. How should a media employer initially receive and handle reports of wrongdoing alleged against one of its employees?

To begin, we first want at least the opportunity for the media employer to be able to handle an employment matter as an internal matter even if in the end, it may not be possible to keep it so. To have that option, the media employer needs to provide its employees an adequate mechanism to raise issues internally. Frustrated journalist will turn to their blogs. Before that happens, media employers should have a policy in place that sets forth the employer's expectations with respect to conduct in the workplace, and outlines complaint reporting procedures in the event someone believes the policy was violated. This is true whether the complaint is coming from another employee, an intern or a member of the public including vendors, sources, and freelancers.

With respect to receiving reports of misconduct from employees, it is critical that employees have multiple avenues through which they can report a complaint. A policy that only allows for complaints to be reported to a journalist's editor is not sufficient, as there could be situations where the journalists would not feel comfortable going to their editor. That is particularly true where the allegations involve misconduct on the part of the editor. For example, it is best practice for employees to be able to make a complaint to their supervisor, any member of the Human Resources Department, any other supervisor or member of management, and, in many organizations, an ombudsperson or a complaint hotline or email box.

Once the employer receives a report of wrongdoing, even if vague, it should be taken seriously and fully investigated in a timely manner. Spiking a news story because it is vague or appears to be untrue is one thing; spiking a complaint because of such apparent

weaknesses is something much more risky to do. The same holds true if the complaint concerns events that happened years ago. Even if the conclusion is that the events raised are time barred by the applicable statute of limitations, the potential publicity blow to a company who fails to address these issues can still be significant. Prompt and thorough action is not only necessary from a legal standpoint, but also to promote a productive and safe work environment. It also increases the likelihood that the employee who made the complaint does not become frustrated and turn to either a blog post or one of the employer's media competitors to have the employee's concern addressed. How a particular investigation is handled will depend on the allegations and the individuals involved. In some cases, it may be appropriate for the Human Resources Department to conduct interviews, make findings, and implement corrective action, if warranted. In other cases, like those involving an officer of the employer, outside counsel may be brought in to conduct an investigation. Determining who will conduct the investigation – Human Resources, compliance, in-house counsel, outside counsel, or an outside investigator – is a critical threshold question. When considering who should handle an investigation, privilege is top of mind. If an attorney is not involved, the investigation and information may not be privileged. Even if an attorney is involved, the attorney must provide legal advice in order to maintain the privilege. Privilege issues are discussed in more detail in Section III, below.

During any investigation, the employer will need to decide whether any interim measures are necessary or appropriate while an investigation is ongoing. For example, where an allegation against another employee involves sexual harassment or workplace violence, suspension (with or without pay) pending the conclusion of the investigation may be necessary. If the allegations are of egregious behavior, the media employer may find it has no choice but to suspend the employee who is the subject of the complaint. If that employee happens to be of a high profile within the company, it may be impossible to keep the fact that this employee is no longer appearing in a byline or before the camera out of coverage by other media companies. Reputations that have taken years to build can be destroyed in hours. The speed and coverage of social media can effectively dictate decisions here. Yet, the decisions makers of a media company have to decide what is best for the entire company even if it means some pain will be incurred in getting to that correct outcome.

While it is often best for an internal investigation to be conducted confidentially, it must be recognized that for media employers, that may not be possible. Once the fact that an employment issue has arisen at a media employer and that an investigation is ongoing has become public, the pressure to handle the investigation and any corrective action quickly can become intense. Given the difficulty of maintaining confidentiality around a complaint and investigation for media employers, when receiving a complaint and in investigating a complaint, a media employer should not make any guarantees of confidentiality to employees.

Harassment complaints at media and entertainment companies are frequently the subject of extensive press coverage. As a result, media employers need to develop a press strategy early on in an investigation. While the "no comment" approach is no longer viable, employers should avoid over sharing information related to the investigation or taking a position that supports an executive or on-air talent before the investigation is completed. Additionally, because employees will be closely watching their employer's statements to the press, a media

employer should avoid making any statements to the press that could be read as chilling internal complaints. Rather, media employers should restate their commitment to providing a workplace that is free of harassment and encourage employees to avail themselves of the policies that are in place.

B. Who should conduct the investigation?

Who conducts a particular investigation will depend on the allegations and the individuals involved. Determining who will conduct the investigation – Human Resources, compliance, in-house counsel, outside counsel, or an outside investigator – is a critical threshold question. In some cases, it may be appropriate for the Human Resources Department to conduct interviews, make findings, and implement corrective action, if warranted. However, if the individual making the complaint or the target of the complaint is in a position of authority over the Human Resources Department, the better call may be to have either in-house legal, a committee of the Board, or a third party conduct the investigation. The ability of the company to defend the investigation and its outcome not only directly impacts how the company will be perceived by employees and possibly the public, but may also directly impact the legal defenses the company may have in the matter or in future similar matters.

In other cases, like those involving an officer of the employer, outside investigators including legal counsel may be brought in to conduct an investigation. The type of issue may also drive the decision to use outside investigators particularly if the issues or employees are extremely sensitive or it is determined that litigation will likely ensue in the future related to the issue being investigated. Another consideration will be whether the internal resources that the company might rely on for the investigation such as the Human Relations Department, general counsel, or audit committee of the board already have a history with the issue being investigated that could create an appearance of a lack of objectivity.

When considering who should handle an investigation, whether the investigation and its result can be or should be privileged needs to be considered. If an attorney is not involved, the investigation and information is likely not privileged. Privilege issues are discussed in more detail in Section III below.

C. What are the special challenges of investigations based on hotline and other anonymous reporting systems?

While anonymous reporting offers employees the opportunity to maintain their confidentiality while raising a concern to the employer, there are challenges associated with handling anonymous complaints. If an employer offers the option for anonymous reporting, it should emphasize the importance of including as much detail and information as possible in the complaint, because without enough information, the employer may be limited in its ability to address the complaint. For example, if a report is received that does not name any of the individuals involved, it could be challenging, depending on the size of the employer, to investigate.

Some online systems allow the employer to interact with the anonymous reporter, which may allow for follow-up questions and the ability to receive the requisite level of detail. If that is

not an option and the complaint does not provide details sufficient to conduct a meaningful investigation, the employer may consider other options to try to determine if there is more to the complaint than was given originally. For example, HR representatives could informally discuss current satisfaction with the job and managers with some employees. Training topics that would address the complaint might be refreshed with the employees.

If the employer receives enough detail to look into the complaint, then it should treat the investigation in the same way it would if someone identified him or herself in the complaint process. If the report does not provide enough information to conduct an investigation, there may be other options for the employer to try and address concerns. Take, for example, an employer that receives an anonymous complaint that there is a culture of harassment in the workplace. In this case, it may not be possible to conduct an investigation without more information about what type of harassment is involved or even what department or location, if it is a large organization. However, the employer could send out a message to employees which reminds employees of the employer's harassment policies and reporting procedures and its commitment to a workplace free from such conduct. The message could also emphasize that the employer does not tolerate any retaliation for reporting wrongdoing or cooperating in an investigation, and that anyone who engages in retaliation could be subject to discipline, up to and including, termination from employment.

Employers should pay attention to whether there is a trend or uptick in anonymous reporting. For example, if an employer receives numerous reports of the same type of conduct, this may indicate a more systemic problem. The various reports may also enable the employer to put together clues or information that give direction to an otherwise difficult investigation.

II. Investigation Steps

A. What are the steps to retrieve and retain documentary evidence including electronic information?

In the digital age, most of the information relevant to any investigation will reside on an electronic device – emails, text messages, voicemails, photos, etc. Employers should have clear policies in place about electronic communications in the workplace and use of the employer's information systems. In particular, the employer should ensure that all employees have no expectation of privacy in anything they send or receive over the employer's network or on the employer's property. If employees use their personal cell phones or computers for work, the employer should have them sign similar acknowledgements that they have no expectation of privacy in their personal phones and computers used for work purposes, and that these items may be searched as part of an investigation or for other reasons consistent with business needs. These policies may later enable the employer to search even personal devices for potentially relevant information.

Document retention, including retention of all electronically stored information, is an important part of an investigation. An organization's duty to preserve information is derived from common law and statutes. The basic premise is once there is the prospect of litigation, an employer is under an obligation to preserve all potentially relevant information, no matter the form. That means that retention policies that provide for the destruction of certain

documents would need to be paused for potentially relevant information. So how does the employer communicate the retention obligations? Through a litigation hold letter or notice. Employers should have a sample or template litigation hold notice ready so that they can input relevant information and send to relevant employees as soon as the employer reasonably anticipates or becomes a party to litigation or an investigation. It is possible that this duty will arise even before a formal complaint is filed against the company. Determining when the duty arises is a fact-specific inquiry, and does not arise with every investigation. Therefore, employers are advised to consult with counsel whenever a complaint is received to determine if it is appropriate to implement a hold. An organization's failure to timely issue a litigation hold notice can subject the organization to sanctions.

Counsel should monitor the litigation hold, by making sure each recipient is complying. Counsel should have a plan in place to coordinate collection of the documents subject to the hold. Counsel should also send periodic reminders about the hold and confirm receipt. As new facts or allegations come to light, the litigation hold may be expanded to new recipients and/or to include more information.

Whenever possible, the information should be captured so that it can be produced in native format. That may mean, producing spreadsheets in Excel, for example, or producing electronic versions of other documents, not just paper copies. Employers may also have an obligation to produce metadata, so steps should be taken to ensure that it is preserved as well.

B. How does one decide on who to interview?

In order to identify the necessary witnesses to interview, compile a list of the individuals whose names appear on key documents or whose titles suggest they would be involved at key events that are part of the investigation. Sort witnesses into groups by level of importance and determine, at least at a high level, the topics and facts that they may be positioned to discuss. Build time into the schedule for additional interviews, including for follow-up interviews of key witnesses as additional facts are learned.

Consider whether there is a need to interview third-party witnesses, such as former employees. Interviewing third-party witnesses may raise privilege and reputational risk issues.¹ Interviewing an employee who left the company on negative terms could pose a risk to the company; in that circumstance, consider whether the risks outweigh the potential benefits of such an interview.

If the employee to be interviewed is represented by a union, the employer must confirm that how the interview is conducted complies with any applicable terms of a collective bargaining agreement. Consideration should be given to whether a union representative must be present for the interview under either the terms of the collective bargaining agreement or the law. Generally, if the employee being interviewed may be the subject of some form of discipline

¹ See generally Keith Krakaur and Ryan Junck, *Witness Interviews in Internal Investigations: The US Perspective*, *The Practitioner's Guide to Global Investigations* (3d ed. 2019).

based upon what information will be obtained in the interview, then the employer must notify the employee of the right to union representation.

C. How should the investigator determine the sequence of interviews?

If the investigation was prompted by an employee's complaint, consider starting with the complaining party to learn all of the allegations. Alternatively, consider starting with those individuals likely to have background knowledge of the company's processes and practices. Lower-level employees are often able to educate investigators on the mechanics of the company that in turn provide context for the allegations; they may also know the other individuals with on-the-ground knowledge. Finally, lower-level employees may be more candid in providing facts, as they may be less concerned about being a target of the investigation.²

Do not forget to consider whether the chief editor or other managers should be consulted before interviewing employees who they manage. The editors or managers may have valuable insight related to the order of interviews. Checking with these editors and managers will also give them the ability to respond to questions from employees who come to them either when they are first contacted about giving an interview or after they are interviewed.

D. Other issues to consider and steps to take before conducting the interviews.

Decide whether to give witnesses advance notice for interviews. It may be helpful for witnesses to have time to think about the topics beforehand, especially if the investigation concerns complicated facts or events that occurred over a long period of time. On the other hand, if the topics are of a sensitive nature or if you are concerned witnesses may have been involved in misconduct, it may be beneficial to avoid giving advance warning so that witnesses do not have time to plan or coordinate answers to questions. Those benefits may be even greater at a media company, where the sheer fact of an upcoming interview or ongoing investigation may be deemed newsworthy.

In preparation for an interview, it may be helpful to draft an outline of the interview. This document may include the key questions to cover or the topics planned for discussion with the witness. Interviews are often fluid and what topics may arise may be hard to predict. For this reason, it may be best to avoid a script of every question to avoid becoming too tied to that script rather than reacting to what the witness says. It should, however, reflect the key facts known to the interviewer, the witness's involvement with those facts, the involvement of other key individuals that the witness may have interacted with, and key aspects of the company's business that the witness is involved in.³ If the outline is prepared by legal counsel or if it will be reviewed by legal counsel, it may be appropriate to mark the document as "privileged and confidential" and "draft attorney work product" to provide an added layer of protection, albeit not guaranteed, should the document leak. Consider maintaining only

² See Juan Castañeda, *4 Keys to Witness Interviews in Internal Investigations*, Law 360 (Mar. 12, 2015).

³ *Id.*

electronic copies of the outline and not printing hard copies to minimize the opportunities for unauthorized disclosure.

Part of any interview in an investigation is to assess credibility of the witness. For this reason, while schedules may make it difficult to do in-person interviews, interviews by telephone or even video conferencing are not the best route. To judge credibility by just the sound of a person's voice on a telephone is difficult. While a video conference is better, there is still a better chance of properly assessing the witness's credibility in a face-to-face interview. Also, both telephone and video interviews carry greater risk that the interview will not be private.

Whether in-person or by video conference or teleconference, the interview should not be recorded. Recording the interview risks making a witness less candid in his or her responses. Especially when working with media company employees who may be accustomed to recording conversations, the interviewer may want to ask the witness whether he or she is using a device to record the interview.⁴ If the witness says he intends to record the interview, the interviewer needs to have considered how to respond. Responses may include telling the witness that her insistence on recording the interview will mean the interview does not go forward, it will be noted that she did not cooperate in the investigation, and whether she will be disciplined for this failure to cooperate will be discussed with her manager. If instead the interview will go forward, the interviewer may wish to also record the interview to ensure that the company has its own version of the recording as at times, such recordings have been altered by witnesses.

Sometimes, employees may not wish to cooperate with the investigation or be interviewed. An employer generally may require a current employee to cooperate in an investigation; refusal to participate could subject the employee to discipline.⁵ To preempt this issue, companies can implement corporate governance guidelines requiring board members and management to cooperate with investigations. Companies can also put provisions requiring cooperation in employees' service agreements before the need for any investigation arises.⁶ On the other hand, counsel should inform witnesses that they cannot face retaliation for cooperating with an investigation.

Decide who will conduct and attend the interview. If the company has decided to try to protect the investigation and result under privilege, it is generally a best practice for outside counsel to conduct the interview. Of course, there is a cost issue involved with using outside counsel. An interview conducted by in-house counsel would not involve same costs but the investigation and report may not be privileged if counsel is acting in a business, rather than

⁴ Randy C. Gepp, *Executive Investigations: Best Practices for Mitigating Risk and Liability*, Corporate Counsel (Sept. 4, 2015).

⁵ See *Gilman v. Marsh & McLennan Cos., Inc.*, 826 F.3d 69, 73 (2d Cir. 2016) (company's demand that employees cooperate with interviews as part of internal investigation was reasonable, and employees' refusal to comply gave the company cause for termination).

⁶ *The Delicate Task: A Practice Guide to Investigating Allegations of Company-Internal Misconduct*, Bloomberg Law, Apr. 19, 2018.

legal, capacity.⁷ Communications between a company’s employees and in-house counsel may be less clearly for the purpose of obtaining legal advice than communications with outside counsel.⁸ In *Tucker v. Fischbein*, the Court of Appeals for the Third Circuit held that communications between employee reporters and in-house counsel regarding potential defamation liability from the publication of the reporters’ articles were privileged.⁹ The Court noted the fact “[t]hat reporters regularly consult with in-house counsel to discuss potential liability for libel does not thereby deprive those communications of the protection of the attorney-client privilege.”¹⁰ Similarly, an interview by in-house counsel may be privileged if it was authorized and conducted under the direction of outside counsel.¹¹ By contrast, however, courts have held that “[a] media campaign is not a litigation strategy” and, therefore, that communications primarily for the purpose of coordinating such a campaign, rather than obtaining legal advice, are not privileged.¹²

In certain circumstances, it may be advisable to have a second individual present during an interview. A second person can take notes which will allow the investigator to concentrate on questions and observing the witness’s demeanor. An additional consideration that may drive this decision is that those in the interview may be witnesses as to what happens in the interview. If the interview is being conducted by an attorney, either in-house or outside counsel, the company may wish to avoid that legal counsel becoming a necessary witness to future legal proceedings. The inclusion of a members of the HR Department or a manager may relieve the attorney – investigator of the witness role.

If there is a possibility that the investigator or observer will be a witness in future legal proceedings, the employer needs to consider whether the people chosen for these roles will be good witnesses. This consideration may determine who fulfills either role.

E. What rules apply on confidentiality when the investigator is not an attorney?

The issue of confidentiality may be especially salient for a media company where employees may be accustomed to documenting and sharing information with the public, whether by social media, articles, or other means. While employers may be concerned about keeping an

⁷ See, e.g., *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (holding that the company had to show communication with in-house were in a legal rather than business capacity in order to invoke attorney-client privilege); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) (“Because in-house counsel may operate in a purely or primarily business capacity in connection with many corporate endeavors, the presumption that attaches to communications with outside counsel does not extend to communications with in-house counsel.”).

⁸ However, communications between employees and in-house counsel are privileged when the communications are “clearly for the purpose of rendering legal advice.” *Tucker v. Fischbein*, 237 F.3d 275, 288 (3d Cir. 2001).

⁹ *Id.*

¹⁰ *Id.* At 288.

¹¹ *Krakaur & Junck* (citing *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 149 (D.C. Cir. 2015); *Wultz v. Bank of China*, 304 F.R.D 384, 390-94 (S.D.N.Y. 2015)).

¹² *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 431 (S.D.N.Y. 2013) (quoting *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003)); see also *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 131-32 (N.D.N.Y. 2007) (where an attorney acts only as a media relations coordinator, attorney-client communications are not privileged).

investigation confidential, an employer that tells employees not to discuss the subject matter of an internal investigation could run afoul of the National Labor Relations Act (“NLRA”). Discussions of disciplinary investigations among employees are considered protected activity under Section 7 of the NLRA.¹³ Because “blanket confidentiality rule[s]” clearly limit employees’ rights under the NLRA, employers must have a “legitimate and substantial business justification” to outweigh employees’ rights to discuss the investigation.¹⁴ The employer must therefore determine, on a “case-by-case basis, that confidentiality is necessary based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality.”¹⁵

F. What special steps need to be taken when the investigator is an attorney?

If legal counsel conducts the witness interviews, at the outset of the interview, counsel should broadly—and briefly—explain the reason for the interview, the reason for the retainer, and the subject of the investigation. Only disclose the facts necessary for the witness to understand the basic purpose of the interview.

Otherwise, it is crucial to begin the interview with an “*Upjohn* warning,” which makes clear to the witness that counsel represents the company, not the individual witness.¹⁶ The other components of an *Upjohn* warning include an explanation that: the purpose of the interview is to provide the company with legal advice; the interview is confidential, and is therefore covered by the attorney-client privilege, but the privilege belongs only to the company, and not to the witness; because the privilege belongs to the company, the company may, at its discretion and without notice, waive the privilege and disclose the information learned in the investigation, including in the interview. The *Upjohn* warning thus serves the dual purpose of maintaining the attorney-client privilege for the company and avoiding any potential conflict of interest that could arise if the employee later claims the interview created an attorney-client relationship with the attorney, and that a privilege therefore belongs to the witness.¹⁷

The *Upjohn* warning is based on the Supreme Court’s decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court held that communications between a company’s lawyer and the company’s employees were protected by attorney-client privilege when the communications were 1) by employees providing relevant information within the scope of their duties, 2) to counsel for the company acting as such, 3) at the direction of corporate management, 4) in order to secure legal advice from counsel (and the

¹³ *Banner Health Sys. v. Nat’l Labor Relations Bd.*, 851 F.3d 35, 40 (D.C. Cir. 2017) (upholding the NLRB’s ruling that an employer’s confidentiality agreement directing its employees not to discuss disciplinary investigations violated the NLRA).

¹⁴ *Hyundai Am. Shipping Agency, Inc. v. N.L.R.B.*, 805 F.3d 309, 314 (D.C. Cir. 2015).

¹⁵ *Banner Health System*, 851 F.3d at 43 (internal quotation marks omitted).

¹⁶ After hearing an *Upjohn* warning, it is possible—even likely—that a witness may ask whether he or she should have a lawyer present. Because counsel conducting the interview only represents the company, the attorney should only tell the witness that the attorney cannot give him or her legal advice, including whether to get a lawyer. The attorney may tell the witness that if at any point during the interview the witness feels that he or she would like a lawyer present, the witness should let the interviewer know so that they can stop the interview.

¹⁷ Krakaur and Junck, *Witness Interviews in Internal Investigations*.

employees were aware of that purpose), and 5) confidential.¹⁸ The Supreme Court rejected the “control group” test that had been adopted by the Court of Appeals for the Sixth Circuit, which had considered only communications with “officers and agents responsible for directing the company’s actions in response to legal advice” to be privileged.¹⁹ The Court recognized the importance of mid-level and lower-level employees to an investigation, noting that because those employees “can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, . . . it is only natural that these employees would have the relevant information needed by corporate counsel” to provide legal advice.²⁰

In announcing these principles, the Court in *Upjohn* “decline[d] to lay down a broad rule or series of rules to govern all conceivable future questions in this area”—a decision that then resulted in courts undertaking factual inquiries to determine whether particular types of interviews with a company’s employees are privileged.²¹ For example, the District Court for the District of Massachusetts held that notes from an outside consultant’s interviews with a company’s employees were not privileged under *Upjohn* because the employees were not told that the company was soliciting information from them on behalf of the general counsel; that the company was concerned about potential legal liability; that the information was being gathered so counsel could provide legal advice to the company; or that the communications were highly confidential.²²

Importantly, while *Upjohn* is controlling in federal courts applying federal law, state courts and federal courts exercising diversity jurisdiction are not bound by *Upjohn* and have developed their own tests for determining the extent of privilege for communications between an organization’s employees and its attorneys. While some states have followed *Upjohn*,²³ others have continued to use the “control group” test rejected by the Supreme Court, applying the attorney-client privilege to only upper-level management employees.²⁴

G. What tips are there for how to question a witness and note taking?

This may be the one situation where it would be good for investigators, either attorneys or not, may want to have a training session with a journalist on how to conduct an interview. We anticipate there will be many transferrable skills between what a journalist does to obtain

¹⁸ *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981).

¹⁹ *Id.* At 391.

²⁰ *Id.* at 391.

²¹ *Id.* at 386.

²² *Davine v. Golub Corp.*, No. 3:14-30136-MGM, 2017 WL 517749, at *8 (D. Mass. Feb. 8, 2017).

²³ *See, e.g., Tabas v. Bowden*, No. Civ. A 6619, 1982 WL 17820, at *4 (Del. Ch. Feb. 16, 1982) (applying *Upjohn*).

²⁴ *See, e.g., Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, 13 (Me. 2016) (discussing Maine’s retention of the “control group” test following *Upjohn*); *Jentz v. ConAgra Foods*, Nos. 10-cv-0474-MJR-PMF, 10-cv-0952-MJR, PMF, 2011 WL 5325669, at *3 (S.D. Ill. Nov. 3, 2011) (applying the “control group” test under Illinois law and holding that management’s forward of an email to employees in the human resources department—who are not members of the “control group”—waived the attorney-client privilege).

the news through an interview and what an investigator needs to do to determine the veracity of an internal complaint.

When beginning to question the witness, start with the witness's background, such as the individual's educational background, prior jobs, and time at the company. These opening questions will help make the witness feel comfortable with rudimentary topics, establish a rapport between the attorney and the witness before moving to more sensitive topics, and help the attorney understand the person being interviewed. For example, a witness that has worked his or her way up at the company for many years is likely to have a different perspective than a witness who has worked at several different companies.

Upon moving to the subjects at issue in the investigation, begin with open-ended questions to learn the witness's perspective of the relevant topics. Use straightforward questions that are easy to understand and avoid "legalese" as much as possible. Be sure to ask the witness for the basis of his or her knowledge—that is, whether he or she has first-hand knowledge of the facts, heard about them from someone else, or is simply guessing.

Then, narrow the focus of the questions to drill down on the issues that prompted you to seek an interview with this witness. Save tough questions for later in the interview. Especially after asking these tougher questions, slow down and allow silence after the question. The witness may need to take time to think about his or her answer or may feel nervous answering. And, faced with silence, the witness may be more likely to continue speaking and share more information.

An interview likely will entail showing the witness documents. Using documents can help the attorney corroborate the narrative told through the documents. On the other hand, the interview may reveal that the documents do not convey the full picture. The attorney should only show the witness documents that the witness has received before. This approach will help ensure that the witness's perspective on the document is based on his or her recollection of the events, rather than speculation of unknown facts. This will also help protect the confidentiality of the documents.

Before concluding the interview, ask the witness if there is any information the witness thinks is relevant to the purpose of the interview that you did not cover. Similarly, ask if the witness thinks the interviewers should speak with any particular individuals. Inform the witness that you may need to speak with him or her again. Reiterate the importance of keeping the interview confidential. And, be sure to thank the witness for his or her time.

On note taking, it is important that the notes are such that they are useful to the investigator in preparing a report. There is no need to create a transcript of the interview. The notes should, however, contain the most important responses of the witness. At times, the exact words spoken by the witness are important and therefore the interviewer will want to record them verbatim. Feel free to take your time in the interview to do so. The notes should also reflect the documents used during the interview. Consider how you take the notes. Clicking away at a computer keyboard can be distracting for both the interviewer and the witness. In some circumstances, the less intrusive act of taking handwritten notes may allow the

interviewer to concentrate more on the answer and give more comfort to the witness in terms of believing they are being heard.

When the interviewer is legal counsel who is trying to protect the notes under privilege, as more thoroughly discussed below on the section of this paper on legal privileges, the attorney's notes should also include her observations where appropriate, such as by noting moments at which the witness exhibits behavior that may call into question the accuracy of what is being said.

H. How to write a report on an investigation.

For non-attorneys, writing a report on an investigation is a task done best with an understanding that the end result may be used or discovered in litigation and could even become publicly available. Therefore, the best practice is to record facts as they were found in the investigation and avoid judgments or conclusions. The decision makers should have sufficient facts as presented by the report to draw their own conclusions and make their own determinations on the appropriate course of action for the company on the matter.

Reports should address the allegation that required the investigation to occur. Any information relevant to those allegations and discovered during the investigation should be included in the report. There should also be a discussion of the process the investigation followed in terms of witness interviews, document collection and legal review. Credibility assessments made should be included but only if the interviewer has clear reason for such an assessment. Even if clearly based on objective facts, it is best to leave credibility assessments toward the end of the report so they do not create the appearance of bias by the interviewer.

Finally on reports, a late report may be as bad as no report at all. Life for a media employer moves quickly. Every day of delay in an investigation is another 24 hours of peril for a media employer. While thoroughness and care should not be sacrificed for speed, decisions on the number of documents reviewed and witnesses interviewed do need to be informed by the need to timely complete the investigation and the resulting report.

II. Which Investigation Records to Keep and For How Long

The documents relevant to an investigation include interview notes, documents reviewed in the investigation, written communications concerning the investigation, and the report including drafts. If the investigation is done in anticipation of or in the midst of a government investigation or litigation, the employer's litigation hold policy will require all of these documents to be retained until all proceedings related to the matter have been completed. Note that when deciding to claim privilege over these documents, application of the attorney work-product privilege may require the employer to illustrate it anticipated such a government investigation or litigation and one point a court will check in testing this assertion is whether the employer issued a litigation hold notice. Not issuing such a notice may allow the employer to argue that it did not foresee litigation or a government investigation and therefore decide whether to keep some of these documents but not sending the notice may hurt in arguing the attorney work-product privilege applies. Also, if the fact the investigation was done and done fairly is either part of a defense to a legal complaint or important in the court of public opinion, claiming privilege to these documents could be contrary to the media employer's best interests.

If litigation or a government investigation is neither begun foreseen, consider not keeping drafts of reports. Early versions of reports can obtain oversized importance if later examined in a dispute or government investigation. Likewise, there is no special reason to maintain communications about the investigation that are not used as the source of the facts incorporated into the report if the employer's retention policy otherwise would allow for their destruction. Such communications can cause controversy and confusion that distracts from the end result of the investigation. Otherwise, consider retaining the remainder of the documents relevant to the investigation for the applicable statute of limitations period for any claim that may come from the matter investigated. These documents may be important in the media employer's efforts to defend the merits of the investigation and its conclusion which is often important in employment litigation.

III. Privilege and Confidentiality in Investigations

Employers often conduct internal investigations in response to employee complaints and other issues that arise in the workplace. When undertaking an internal investigation, the employer must be mindful of the potential that the company could be forced in subsequent litigation to disclose information and documents generated during the investigation. The most effective defenses to compulsory disclosure are the attorney-client privilege and work product doctrine. Whether and to what extent the protections each affords will attach to an internal investigation depends on the facts and circumstances of each investigation. The following summary identifies key principles that frequently guide a court's determination. In all cases, it is critical to evaluate controlling law in the relevant state or federal judicial circuit.

A. When Will Communications in the Context of an Investigation Be Legally Privileged?

The attorney-client privilege applies to communications relating to an attorney's provision of legal advice, including communications relating to the client's request for such advice. The privilege provides absolute protection from disclosure if it applies and has not been waived. Accordingly, when contemplating an internal investigation, it is critical that the company consider at the outset whether the privilege could potentially apply and appropriate measures ought to be taken to avoid waiver.

As its name suggests, the attorney-client privilege only applies if an attorney is involved in the investigation, but an attorney's involvement alone is insufficient to trigger the privilege; the communication must relate to the provision of legal advice. For this reason, courts are sometimes skeptical about applying the privilege to communications involving in-house counsel, who often serve as business advisers in addition to legal counsel. Even though in-house counsel has greater familiarity with the company's operations and personnel, having outside counsel lead the investigation, while not dispositive, bolsters the case for applying the attorney-client privilege. In any event, investigations aimed at enabling the company to make a business decision will likely not be covered. For the attorney-client privilege to apply, at least the primary purpose of the investigation must be to obtain legal advice. This purpose should be acknowledged in writing at the outset of the investigation, usually in the engagement letter if outside counsel is involved, or in the authorization memorandum to in-house counsel.

Companies act through human agents, and it can be difficult to determine whose communications with the company's attorneys fall within the attorney-client privilege. Federal courts and most states follow *Upjohn Co. v. United States*,²⁵ in which the United States Supreme Court held that the privilege can apply to communications with any company employee as long as (i) the communication concerns matters within the scope of the employee's duties for the company, (ii) the purpose of the communication is to assist counsel in providing legal advice to the company, and (iii) the employee is sufficiently aware that he is being interviewed in order for the company to receive legal advice. Most courts have held that communications with former employees can fall within the *Upjohn* standard, provided the communications are limited to information obtained while the former employee was still employed by the company. If the company has reason to believe that a current or former employee is adverse to the company, while the privilege may still apply, the safe approach in such an interview is to proceed on the assumption that the attorney-client privilege will not apply.

Consistent with *Upjohn*, best practice is to expressly advise the employee that the purpose of the interview is to collect information necessary for the company to obtain legal advice from its attorneys. It is critical that the employee also be advised that the company's attorneys

²⁵ 449 U.S. 383 (1981).

represent the company only; they do not represent the employee.²⁶ To the extent the interview is privileged, the privilege is controlled solely by the company.

The company should document the fact that it provided *Upjohn's* "corporate *Miranda* warnings" to the employee. Failure to provide the warnings or to document them could result in a determination that the discussion is not privileged. Moreover, without the warnings, an employee might mistakenly but reasonably conclude that the company's attorneys also represent him personally, in which case the employee has the power to unilaterally waive the privilege and disclose the communication.

The attorney-client privilege can apply to communications between non-lawyers, provided the communication relates to the provision of legal advice. Thus, communications between non-lawyer employees about information requested by the company's attorney to assist in the investigation can be privileged, although it is advisable that the communication conspicuously acknowledges that it concerns "information requested by counsel." Similarly, communications between non-lawyer employees about the legal advice actually provided by the company's attorneys can be privileged, although given the risk that the privilege might not apply, it is advisable that such communications not be memorialized in writing. If a writing is necessary, the communication should include a conspicuous notation that the communication reflects legal advice from the company's attorneys.

The attorney-client privilege does not shield historical facts or documents from disclosure, but it can protect discussions with counsel about historical facts and documents. For example, an executive may be compelled to testify about her role in the termination of an employee. However, if during an internal investigation counsel interviewed the executive about her role in the termination, the privilege could protect the executive from being forced to disclose the substance of her discussion with counsel, including her statements to counsel describing her role.

A final investigative report can be privileged if its purpose is to provide legal advice to the company and is distributed only to company employees on a need-to-know basis. If the report merely serves to collect and convey factual information to enable the company to make a business decision, the attorney-client privilege likely will not attach.

The attorney-client privilege can be waived, hence the importance of consistently establishing the attorney's role as counsel to the company only and not to any of the company's employees. The employee's belief that the company's attorney also represents him personally need only be objectively reasonable for a court to conclude that the employee has co-ownership of the privilege, including the authority to unilaterally waive the privilege.

Sometimes waiver is strategic. A company may elect to waive the privilege in order to assert an affirmative defense, such as good faith reliance on advice of counsel. In the certain

²⁶ An employee may insist on having his personal lawyer present, in which case the company may elect not to interview the employee as part of the investigation. If the company chooses to proceed with the interview and the employee's lawyer is present, given the uneven way courts have applied the privilege in these circumstances, the interview should proceed on the assumption that the attorney-client privilege will not apply.

workplace harassment claims, the fact that an investigation was undertaken is itself the basis for an affirmative defense. Accordingly, at the outset and throughout an investigation, the company should consider the potential that any privilege will be waived and conduct the investigation accordingly. For example, if the company knows it or suspects it might waive the privilege, the company should consider engaging special outside counsel, separate from defense counsel, whose sole function is to conduct the investigation. If the company subsequently waives the privilege in litigation and the investigation become part of the evidence, the company's defense counsel does not become a witness and, therefore, does not have to withdraw from the defense.

Additionally, a company considering strategic waiver must be mindful that the privilege cannot be waived piecemeal. Disclosing one privileged communication usually requires the company to disclose all privileged communications concerning the same subject matter. Notably, how the reviewing court might define the boundaries of subject matter waiver can be difficult to predict.

Waiver can also be unintentional. Unintentional waiver often occurs when privileged communications are disclosed to third-parties not encompassed within the attorney-client relationship, thereby triggering a waiver on all communications concerning the same subject matter. Therefore, it is critical to limit access to, distribution and use of privileged information relating to an internal investigation. Privileged communications should only be shared with persons on a need-to-know basis, and to the extent possible, such communications should not be distributed through email, where it can more easily be disseminated to persons not encompassed within the privilege. In short, the company must treat privileged communications with the same heightened degree of confidentiality the company would want a court to apply.

B. When Will Documents and Reports Created During an Investigation Be Legally Privileged?

The work product doctrine applies to information and materials prepared for litigation that is either pending or that is reasonably anticipated to arise. Thus, the work product doctrine is similar to the attorney-client privilege in that its application depends on motivation. For the attorney-client privilege, the communication must be motivated by the desire to obtain or provide legal advice. For the work product doctrine, the motivation must be preparation for actual or anticipated litigation. These motives are not mutually exclusive. To the contrary, often both the attorney-client privilege and the work product doctrine will apply. Indeed, many internal investigations are initiated to obtain legal advice in preparation for probable or pending litigation.

The work product doctrine can protect a broader range of communications than the attorney-client privilege, insofar as the doctrine does not require the involvement of an attorney or the provision of legal advice. Nevertheless, in the investigation context, the threshold requirements for work product protection can be more limiting than one might assume. In particular, if a company has a policy or practice of routinely investigating certain workplace incidents or complaints, a court may conclude that the investigation was initiated in the ordinary course of business, not in anticipation of litigation. The existence of such a policy or

practice does not preclude work product protection, and indeed may be useful as an affirmative defense to certain employment causes of action, but it does require a company to carefully consider at the outset of an investigation whether sufficient grounds exists to reasonably anticipate litigation. As with the attorney-client privilege, engaging outside counsel to conduct the investigation can bolster the case for applying work product protection to investigation materials, as courts generally view the presence of outside counsel as demonstrating a qualitatively different approach than what would otherwise be a routine investigation. In any event, an investigation that begins as routine business might morph into a work product investigation upon the occurrence of certain events, such as the receipt of a letter expressly threatening litigation or circumstances that trigger the reporting of a potential claim to an insurer.

What constitutes litigation for purposes of triggering the work product doctrine is also an important threshold issue. Civil lawsuits and criminal cases clearly suffice. Courts have been uneven, however, in their treatment of lesser proceedings, such as administrative proceedings and subpoenas issued in the investigative phase of a criminal case.

Like the attorney-client privilege, the work product privilege does not protect historical facts from disclosure, but it does protect how those facts are described in materials prepared for pending or reasonably anticipated litigation. Accordingly, a witness statement prepared for pending or threatened litigation may be protected work product, but the witness's actual recollection of events is not.

Courts recognize two types of work product: fact and opinion. Fact work product refers to information and materials concerning historical facts, such as a witness statement prepared for pending or anticipated litigation. Opinion work product refers to mental impressions, conclusions or opinions about historical facts, as well as legal theories, prepared for pending or anticipated litigation. The line between fact and opinion work product can at times be difficult to discern. For example, final investigation reports often address both the background facts and the legal significance or implications of those facts. Most courts would treat the factual recitation section as fact work product, and the analysis of the facts as opinion work product. Yet, some courts might also characterize the factual recitation as opinion work product, to the extent the recitation reflects which facts the company's counsel deemed important and worth reporting. In any event, if a document prepared for actual or threatened litigation is intended to reflect opinion work product, the document should include a conspicuous notation to that effect.

Although the line between fact and opinion work product can be unclear, it carries significant consequences. Courts afford opinion work product, attorney opinion work product especially, greater protection than fact work product. Most courts will require disclosure of fact work product if the requesting party can demonstrate a substantial need for the information, and that the requesting party cannot obtain a substantial equivalent and will suffer an undue hardship without it. This exception usually arises when a critical piece of evidence was described or memorialized during the investigation but is no longer available for inspection

or investigation by the company's adversary in litigation.²⁷ An important eye witness, for example, might die after providing a witness statement during the company's internal investigation. If the statement collected during the investigation is the only source of the witness's statement, a court might require disclosure.

In contrast to fact work product, opinion work product will usually be afforded a heightened degree of protection, if not absolute protection. Courts sometimes will distinguish between opinion work product generated by attorneys and non-attorneys, the former receiving the greater protection. Similarly, opinion work product concerning legal theories may receive greater protection than fact work product or opinion work product concerning facts. Ultimately, though, most courts will only require disclosure of opinion work product in exceptional circumstances, if at all.

Work product protections can be waived, intentionally or unintentionally. However, work product protection is not as fragile in terms of waiver as the attorney-client privilege. In particular, disclosure of work product to a third-party usually does not automatically constitute waiver. Sharing work product with third-parties can facilitate preparation for litigation and the investigation. For waiver purposes, the key is whether the third-party is likely to disclose the work product to an adversary. Thus, sharing work product with a "friendly" third-party whose interests appear aligned with the company's might not constitute a waiver, but sharing it with someone whose interests conflict with the company's or who is otherwise aligned with the company's adversary will likely result in a waiver. Best practice is to enter into a confidentiality agreement with the third-party, thereby demonstrating the company's intent and commitment to keeping the work product confidential. Similarly, sharing work product among inside or outside counsel with direct responsibility for the matter is safer than sharing it with non-legal personnel, especially prospective witnesses.

C. When Should a Media Employer Assert an Investigation is Confidential?

A media company conducting an internal investigation may experience tension between the confidentiality afforded by the attorney-client privilege and work product doctrine and journalism's overarching mission to investigate and report information. However, as journalists know well, confidentiality is essential to obtaining the information necessary for a meaningful and fruitful investigation. Furthermore, voluntarily disclosing investigative materials can expose a company to liability to persons referenced or implicated in the materials, and the kinds of protections available when a media organization publishes information about a third-party's internal investigation are not necessarily available when the organization publishes information about its own investigation. Therefore, when contemplating an internal investigation, the company must thoroughly consider the application and maintenance of the attorney-client privilege and work product doctrine.

²⁷ Once the company is on notice that litigation is reasonable likely to ensue, or that it has commenced, the company has a duty to preserve all materials potentially relevant to the litigation. The company also has a duty not to spoliage evidence. If the company violates either of its duties, courts possess wide discretion to craft an appropriate sanction to address not only the violation, but also any resulting prejudice to the company's adversary.