The Legal Ethics of Internal School District Investigations

David B. Rubin, David B. Rubin, PC

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David B. Rubin, Esq.

Introduction

As the public has come to expect more transparency and accountability from the Nation's private and public institutions, internal investigations have become a commonplace tool for ferreting out wrongdoing and restoring confidence in our corporations and government agencies. Public school districts often launch their own internal investigations to probe financial improprieties, in response to an alarming whistle blower complaint or news media report, to evaluate affirmative action complaints by staff or students, or to get ahead of anticipated investigations by outside government agencies. The term "internal investigation" covers many types of inquiries, each with its own legal duties and ethical obligations driven by the specific purpose to be served. This article will discuss the ethical issues confronting counsel engaged to conduct these different types of investigations, with particular attention to the school district setting.

Relevant Ethics Rules

The Rules of Professional Conduct do not address internal investigations *per se*, except in passing. By and large, the professional duties of the attorney-investigator must be gleaned from the ground rules governing the relationship between attorneys and institutional clients generally.[1] The three most important Rules to bear in mind are 1.6, 1.7 and 1.13.

The cornerstone of all attorney-client relationships is confidentiality. Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation . . . ."[2] As Comment [3] to the Rule makes clear, this broad duty "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

In *Upjohn Co. v. United States*,[3] the U.S. Supreme Court recognized an attorney-client privilege for corporations under Federal Rule of Evidence 501, observing that such protection is necessary considering the "the vast and complicated array of regulatory legislation confronting the modern corporation," which requires corporations to "constantly go to lawyers to find out

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[1] Unless otherwise noted, this article presumes the applicability of the American Bar Association's Model Rules of Professional Conduct. *See* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html, last accessed on January 11, 2016. Readers are cautioned to consult the version of the Rules in effect in their own jurisdiction, which may vary.

[2] Other exceptions are listed in Rule 1.6(b), but they typically have no application to internal investigations so we will not address them here.

[3] 449 *U.S.* 383, 101 *S.Ct.* 677, 66 *L.Ed.*2d 584 (1981).

how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter."[4] The privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[5] The "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."[6] While there has been little case law squarely focusing on the existence of attorney-client confidentiality with government agencies such as school boards, it has been widely assumed and is now considered well-established.[7]

Conflicts of interest are addressed at Rule 1.7:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;

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[4] 449 *U.S.* at 392, 101 *S.Ct.* 677 (internal quotation marks and citation omitted).

[5] *Id*. at 390, 101 *S.Ct.* 677.

[6] *Id*. at 390-91, 101 *S.Ct.* 677.

[7] *See* David B. Rubin, "Confidentiality v. Transparency: The High-Wire Act of the Government Lawyer" (NSBA 2014); Patricia E. Salkin, *Eliminating* Political *Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 IND.L.REV. 561 (2006); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 Wash.U.L. Rev. 1033 (2007); AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (2000)("Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agency of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68-72."); *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 870 *N.E.* 2d 33, 38-39 (Mass. 2007).

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.13 prescribes the attorney's duties to an institutional client:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to

> paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
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> (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
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> (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Subsection (b) of Rule 1.13 generally requires attorneys to report significant wrongdoing up the ladder to "the highest authority that can act on behalf of the organization." In a public school district, this would be the school board, which functions in a manner similar to a corporate board of directors. Subsection (c) goes even further, authorizing the attorney to reveal client confidences to outsiders "to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization," when the highest authority turns a blind eye to unlawful conduct. This discretion is not available, however, when the attorney has been engaged "to investigate an alleged violation of law[.]" As Comment [7] to the Rule explains, "[t]his is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation . . . ."

Other Rules that come into play are 1.4 ("Communications"), 4.3 ("Dealing with Unrepresented Person"), 4.4 ("Respect for Rights of Third Persons"), 5.3 ("Responsibilities Regarding Nonlawyer Assistance") and 8.4 ("Misconduct"), which will be discussed below.

Defining the Mission

Before undertaking an internal investigation, it is crucial to define the purpose of the investigation and the role that lawyers will play. Is it merely a fact-gathering exercise or to secure legal advice? Is it conducted in reasonable anticipation of litigation or to get ahead of a regulatory inquiry by an outside agency? Is it at the Superintendent's request to determine whether an employee deserves to be disciplined, or in response to a rank-and-file staff member's complaint of mistreatment? The answers to these questions will drive the selection of the investigator, the role of attorneys, and how the investigation will be structured to serve the district's interests.

School districts should give thoughtful consideration at the starting gate to how confidential they expect the attorney-investigator's work product and final investigation report to remain, and counsel conducting the investigation should structure their written output accordingly. An investigation report intended to provide the school board with legal advice on

its rights and obligations might well disclose the attorney's mental impressions and legal brainstorming. A report intended to be shared with outside government agencies, to persuade them that the district has cleaned its own house, may need to be drafted with more circumspection.

A district may need to rely on the effectiveness and objectivity of an internal investigation as a substantive defense in employment discrimination litigation. The U.S. Supreme Court has held that, under Title VII, employers should conduct investigations as a matter of policy to prevent and deter discrimination in the workplace.[8] An employer who asserts the affirmative defense that it investigated a discrimination claim in a timely and appropriate manner will be deemed to have waived any attorney-client privilege that otherwise would have protected the investigation results.[9] This reflects our courts' general view that when the quality of an internal investigation is placed in issue, the attorney-client and work-product privileges may be waived.[10] Even when an investigation report is not relied on by the district itself, counsel should be mindful that the discoverability of their work may remain uncertain until well after the case is underway, and should take pains to structure their notes and final report with an eye toward possible *in camera* review and subsequent disclosure to adverse parties.

Attentiveness to the client's confidentiality preferences in an internal investigation can go too far, as a New Jersey federal court presiding over the ongoing "Bridgegate" prosecutions recently held. Members of Governor Chris Christie's staff were criminally charged for their alleged roles in the closure of traffic lanes on the New Jersey side of the George Washington Bridge to New York City, as political retaliation for the town's mayor not endorsing the Governor's re-election bid. The defendants subpoenaed notes, transcripts and recordings of witness interviews taken by a prominent law firm engaged by the Governor's office to conduct their own internal investigation of the matter, as other state and federal probes were getting underway. The firm responded that it had no materials responsive to the request, because it had an attorney electronically summarize the substance of each interview, then edited the summaries into a final version to ensure that contemporaneous notes of witness interviews and draft summaries were not preserved. The firm had a stellar reputation for conducting high-profile investigations, and acknowledged that this method was a deviation from their normal note-taking practices in such investigations specifically to avoid public scrutiny of their work.

The court could not require the firm to produce what never existed, but did not conceal its displeasure with the firm's tactics:

> It is easy to see why Defendants have cried foul. . . . This Court shares Defendants' frustration. Although [the firm] did not delete

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[8] *See Burlington Industries, Inc. v. Ellerth*, 524 *U.S.* 742 (1998); *Faragher v. City of Boca Raton*, 524 *U.S.* 775 (1998).

[9] *See, e.g., E.E.O.C. v. Outback Steakhouse of Fla., Inc.*, 251 *F.R.D.* 603, 611-12 (D. Colo. 2008); *Walker v. County of Contra Costa*, 227 *F.R.D.* 529 (N.D. Cal. 2005). A party asserting the attorney-client privilege "'cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.'" *In re Sealed Case*, 676 *F.*2d 793, 807 (D.C. Cir. 1982)(quoting 8 JOHN H. WIGMORE & JOHN T. MCNAUTHTON, EVIDENCE IN TRIALS AT COMMON LAW § 2327 (1961)).

[10] *See In re Kellogg Brown & Root, Inc.*, 796 *F.*3d 137, 145-46 (D.C. Cir. 2015).

> or shred documents, the process of overwriting their interview notes and drafts of the summaries had the same effect. This was a clever tactic, but when public investigations are involved, straightforward lawyering is superior to calculated strategy. The taxpayers of the State of New Jersey paid [the firm] millions of dollars to conduct a transparent and thorough investigation. What they got instead was opacity and gamesmanship. They deserve better.[11]

The court did not refer the matter to ethics authorities, but the decision was a self-executing rebuke that any attorney would wish to avoid.

Selecting the Investigator

When dealing with an isolated incident of low-level employee misconduct, and the district faces no prospect of government sanctions or legal liability to third parties, any necessary investigation might be handled adequately by an experienced administrator without direct involvement of legal counsel. But when the subject matter of the investigation raises those potentials, attorneys often are chosen, and for sound reasons. Their training and experience sensitizes them to the legal significance of facts they may come across. Since some jurisdictions do not recognize a "self-critical analysis privilege" for internal investigations,[12] attorney involvement also maximizes the odds of preserving confidentiality of the interview notes, factual findings and recommendations due to the attorney-client privilege and work product protections.

Even when the decision is made to proceed with an attorney as the investigator, the district must choose from among its in-house or outside general counsel, special counsel who work with the district regularly, or other counsel with no prior ties to the district. When speed and cost are important, the district's general counsel has the advantage of prior knowledge of district practices and personnel, and can hit the ground running at less expense to the district. The problem is that general counsel, or even special counsel who work with the district regularly, may find themselves saddled with a "material limitation" conflict under Rule 1.7(a)(2) if the attorney's personal friendship or ongoing working relationship with the players may cloud her objectivity. Even if the attorney believes that she can maintain the required even-handedness, the district should be mindful of how the perception of coziness might affect the credibility of the investigation results. When reliability in the eyes of outsiders is important, it usually behooves a district to engage counsel who have no ongoing ties to the district or any of the individuals involved.

One issue often overlooked, even by experienced counsel, is the existence of any private investigator licensure requirements in the investigator's jurisdiction. Many states require private investigators to be licensed, but may provide exemptions for attorneys acting as such. For example, New York requires investigators to be licensed, but exempts practicing attorneys acting

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[11] *United States v. Baroni, et al*, Case 2:15-cr-00193-SDW, slip op. at 6-7 (D.N.J. December 16, 2015), accessible at http://dng.northjersey.com/media_server/tr/2015/12/16judge/opinion.pdf.

[12] *See, e.g., Slaughter v. Nat'l R.R. Passenger Corp.*, No. Civ. A. 10-4203, 2011 *WL* 780754 (E.D. Pa. 2011)(declining to apply a self-critical analysis privilege and discussing the status of the privilege in other jurisdictions).

"in the regular practice of their profession."[13] Whether an internal investigation constitutes the practice of law may not be as simple a question as it appears.[14] In *Spectrum Systems Intern. Corp. v. Chemical Bank*,[15] the New York Court of Appeals found the attorney-client privilege applicable to an attorney's internal investigation into possible fraud by a corporation, notwithstanding the "conceded investigative function" of the attorneys, and that their report "did not focus on any imminent litigation," "reflected no legal research," and "was inconclusive, looking forward further discussion[.]"[16] The court nevertheless held that the report was "primarily and predominantly of a legal character" because it "related[d] and integrate[d] the facts with the law firm's assessment of the client's legal position."[17] Under this analysis, as well as that of a growing number of federal courts, the sort of factual investigations commonly performed by attorneys would be considered the practice of law.[18]

Identifying the "Client"

Rule 1.13(a) provides: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This means that the attorney-investigator engaged by a school district owes his professional duty to the district as an entity, and may not skew his factual findings or legal advice to suit the interests of a particular board member or superintendent who recommended his firm.

In the corporate world, especially since the Sarbanes-Oxley Act came online in 2002, internal investigations often will be commissioned to minimize the company's exposure to regulatory or criminal sanctions when wrongdoing by high-level corporate officials is suspected. It is not unusual for the board of directors, in such situations, to authorize the engagement of counsel by an audit committee or other select group to allow the investigation to proceed with the appearance of independence and absence of full-board influence. Such arrangements are rare in the school district setting and, even in the private sector, it remains unclear whether such attempts to limit the scope of the attorney-investigator's professional relationship can effectively negate her overarching professional duty to the entity as a whole.

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[13] New York General Business Law §70(2) (N.Y. GBL).

[14] *See* Ronald C. Minkoff, Lindsay Harris and Andrew Jacobs, *Tinker, Tailor, Lawyer, P.I.: Are Your Workplace Investigations Complying with the Law?*, New York Legal Ethics Reporter (June 2, 2015), http:www.newyorklegalethics.com/tinker-tailor-lawyer-p-i-are-your-workplace-investigations-compying-with-the-law/, last accessed on December 24, 2015.

[15] 78 *N.Y.*2d 371 (1991).

[16] *Id*. at 378-81.

[17] *Id*. at 380.

[18] *See, e.g., Gruss v. Zwim*, 276 *F.R.D.* 115, 122-27 (S.D.N.Y. 2011)("[i]nterviews of a corporation's employees by its attorneys as part of an internal investigation into wrongdoing and potentially illegal conduct have been repeatedly found to be protected by the attorney-client privilege." (applying New York law), *rev'd on other grounds*, 2013 *WL* 3481350 (S.D.N.Y. 2013).

A Pennsylvania state court tackled this question in *Kirschner v. K&L Gates LLP*,[19] where there was an internal investigation into allegations of fraudulent activities by the CEO of a publicly held company. A law firm was retained by a special committee of independent directors tasked with overseeing the investigation. The firm's engagement letter explicitly limited the firm's duties to that committee "and . . . no other individual or entity, including the company." The investigating attorneys found no fraudulent conduct but, when the company later filed for bankruptcy, the trustee sued the firm for negligence in failing to uncover wrongdoing that actually occurred. The court found that, despite the limiting language in the retention letter, the firm owed a duty to the corporation as an entity.

The Employee Interview

The employee interview is the most probative stage of the investigation, and also the one most fraught with ethical landmines. Because the investigating attorney's client is the district, it is essential that the attorney clarify his role when meeting with employees. Rule 4.3 addresses communication with unrepresented persons:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

In most cases, persons interviewed in internal investigations are unrepresented and there is certainly a potential for an interviewee to misunderstand the issues of representation, privilege, and possible subsequent disclosure to third parties. If that potential misunderstanding exists, Rule 4.3 requires the lawyer "to make reasonable efforts to correct the misunderstanding."

Rule 1.13(f) further provides: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Comment [2] to the Rule elaborates:

> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.

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[19] 2012 *Pa. Super*. 102, 46 *A*.3d 737 (Pa. Super. Ct. 2012).

> This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

Attorney investigators also must take care to avoid the inadvertent creation of personal attorney-client relationships with interviewees. The attorney-investigator's relationship with the company usually is reflected in an express agreement, but an attorney-client relationship with a "constituent" of the institution is more likely to be informal and implied.[20] Some focus on whether the employee's perception of an attorney-client relationship is based on a reasonable belief.[21] Other courts consider whether the employee requested personal advice or representation from the company's counsel.[22] When called upon to conduct so-called "affirmative action" investigations, initiated in response to a school district employee's claim of class-based discrimination, counsel should be wary of the employee's possible perception that the attorney is her personal advocate, and should make doubly sure the employee knows that counsel's job is to advise the district on its legal obligations, not to represent the employee personally.

In the wake of *Upjohn*, attorneys conducting internal investigations for institutional clients typically advise employees that they represent the employer not the employee, that the substance of the interview is legally privileged, that the employer exclusively controls the privilege, and that the employee's statements may be disclosed as the employer deems appropriate. This so-called "*Upjohn* warning" often has been analogized to a corporate *Miranda* warning, but the analogy is flawed because the latter is for the interviewee's benefit, and the former most assuredly is not. In the corporate world, these admonitions usually are in writing, and signed by the employee. Practices in most school district investigations usually are less formal, but that informality may come with a price if the employee later disputes what was said. Counsel also should be mindful that *Upjohn* was decided under federal law's version of the attorney-client privilege, and that the elements of privilege, and what sorts of warnings to employees are necessary to protect it, may be different under the substantive law of the state where the investigation is taking place.

An *Upjohn* warning will only protect an attorney-client privilege if there is one to protect in the first place. The mere involvement of an attorney does not necessarily trigger a confidential attorney-client relationship, and courts have differed on how the purpose of the

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[20] *See* ABA White Collar Crime Comm., *"Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees,"* 17 (2009), http://demo.acc.com/advocacy/loader.cfm?csModule=security/getfile&pageid=704931&page=/legalresources/resource.cfm&qstring=show=704931&title=ABA%20UpJohn%20Task%20Force%20Report, last accessed on January 2, 2016.

[21] *See, e.g., Ross v. City of Memphis*, 423 *F*.3d 596, 605 (6th Cir. 2005); *In re Grand Jury Subpoena*, 68 *F*.3d 480 (9th Cir. 1995).

[22] See, e.g., *United States v. Int'l Bhd. Of Teamsters*, 119 *F*.3d 201, 216 n. 6 (2d Cir. 1997)(rejecting reasonable belief standard); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 *F*.2d 120, 123-25 (3d Cir. 1986).

investigation affects the availability of attorney-client and attorney work product confidentiality. A recent case on point from the District of Columbia Circuit, *In Re Kellogg Brown & Root, Inc.*,[23] has taken a broad view of what purposes will suffice. There, the court held that "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply by an exercise of company discretion."[24] "[T]he primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other."[25] "In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy."[26]

The court addressed several other matters of interest to counsel conducting internal investigations, finding that *Upjohn* confidentiality applies even if no outside counsel are consulted,[27] and that investigative interviews need not be conducted by attorneys provided that the attorneys are overseeing the process.[28] The court also observed that *Upjohn* does not require the employer to "use magic words to its employees" in order to preserve the privilege in an internal investigation. In that case, confidentiality agreements signed by employees did not explicitly mention that the purpose of the investigation was to obtain legal advice. It sufficed that the employees knew that the investigation was of a sensitive nature and that the information they disclosed would be protected, and they also were told not to discuss their interviews "without the specific advance authorization of KBR General Counsel."[29]

The applicability of *Upjohn*'s privileges to internal investigations by public school districts was affirmed by the Seventh Circuit in *Sandra T.E. v. South Berwyn School District 100*.[30] The court cited an earlier holding that the attorney-client privilege does not apply to

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[23] 756 *F*.3d 754 (D.C. Cir. 2014).

[24] *Id*. at 758-59.

[25] *Id*. at 759.

[26] *Id*. at 760.

[27] The court found that a lawyer's status as in-house counsel "does not dilute the privilege." *Id*. at 758 (citing *In re Sealed Case,*737 *F*.2d 94, 99 (D.C. Cir. 1984). *See also* 1 *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2000), § 72, cmt. c, at 551.

[28] 756 *F*.3d at 758.

[29] *Id*. Subsequent decisions have found the privilege inapplicable nevertheless, where the investigation was not undertaken at the direction of legal counsel. A mere expectation that the information would be shared with legal counsel at some future date is insufficient. *See, e.g., Wultz v. Bank of China Ltd.*, 304 *F.R.D.* 384 (S.D.N.Y. 2015).

communications between a public employee and a government attorney when he is subpoenaed to testify before a federal grand jury,[31] but found that the policies underlying the attorney-client privilege have their normal application in civil litigation.[32] As the panel observed, "[t]he public interest is best served when agencies of the government have access to the confidential advice of counsel regarding the legal consequences of their past and present activities and how to conform their future operations to the requirements of the law."[33] In finding the privilege applicable to the law firm's notes and memoranda in that case, the court emphasized language in the firm's engagement letter stating that the firm had been hired to "investigate the response of the school administration to allegations of sexual abuse of students" and "provide legal services in connection with the specific representation."[34] The firm conducted itself during the investigation in a manner consistent with how attorneys typically function. They provided *Upjohn* warnings to interviewees, no outsiders attended the interviews, the school board received the firm's findings in a closed executive session, and the investigation report was marked "Privileged and Confidential," "Attorney-Client Communication" and "Attorney Work Product."[35]

An employee receiving an *Upjohn* warning may be understandably concerned about proceeding without counsel, and may seek the investigator's guidance on whether she should retain an attorney. Counsel should never offer an opinion that counsel is unnecessary, and ordinarily should respond that it is up to the employee. Any issues around legal representation should be addressed and resolved before the interview goes forward. The investigating attorney should be familiar with the district's policies and state law governing reimbursement for an employee's legal expenses in an investigation, and have a sense of how long a postponement will be allowed if the employee elects to engage an attorney.

Although the *Upjohn* warning includes a direction to the employee that the substance of the interview is confidential, attorneys conducting internal investigations for school districts must be mindful that their ability to muzzle interviewees now has limits in those jurisdictions that look to private sector labor law for guidance in determining the rights of public employees. The National Labor Relations Board ("NLRB") has issued two decisions, *Banner Health Systems*[36] and *Piedmont Gardens*[37], drastically limiting the employer's right to insist that the employee maintain confidentiality of an internal investigation interview. In *Banner Health Systems*, the NLRB held that, because employees have a right under the National Labor

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[30] 600 *F*.3d 612 (7th Cir. 2009).

[31] *In re Witness Before the Special Grand Jury 2000-2*, 288 *F*.3d 289 (7th Cir. 2002).

[32] 600 *F*.3d at 621.

[33] *Id*. at 621.

[34] *Id*. at 619.

[35] *Id*. at 620.

[36] 358 *N.L.R.B.* No. 93 (2012); *see also In re Verso Paper*, Case 30-CA-089350, 2013 *WL* 1702453 (N.L.R.B.G.C. 2013).

[37] 32–CA–063475 (2015).

Relations Act to discuss potential discipline with co-workers or union representatives, employers violate the Act by insisting that employees refrain from doing so unless the employer can demonstrate a substantial business justification for maintaining secrecy in a particular case.

In *Piedmont Gardens*, the NLRB also held that employee statements during an internal investigation will no longer be subject to a blanket exemption from production in a union grievance proceeding, and that a case-by-case "balancing test" will be applied, weighing the union's need for the information against "any legitimate and substantial confidentiality interest established by the employer." Even when a legitimate and substantial need for confidentiality is established, the employer will still have a duty to offer an accommodation to the union. If the union rejects the accommodation, the employer will need to show that witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated or there is a need to prevent a cover-up, and that this interest outweighs the union's need for the statements. Both *Banner Health Systems* and *Piedmont Gardens* found that a generalized interest in protecting the integrity of employment investigations, or a unsubstantiated fear of witness intimidation or retaliation, will not suffice to preserve confidentiality. The employer must show on a case-by-case basis that it has a legitimate and substantial need for confidentiality.

California's public sector labor board already has adopted the holding of *Banner Health System*,[38] and claims for similar protections are being raised in other states.[39] Counsel conducting investigations for school districts should determine, before going forward, whether these decisions have been adopted in their own jurisdiction.

Joint Representation

Before interviewing an employee, the attorney must consider whether there has been any separate representation of the employee that might create a conflict of interest under Rule 1.7. Failure to do so can have high-stakes consequences, as attorneys from one firm discovered in *United States v. Ruehle*.[40] In that case, a law firm was engaged to conduct an internal investigation of Broadcom Corporation's securities practices. At about the same time, a civil suit was brought against the corporation alleging that its CFO, William Ruehle, had engaged in the practices under review in the firm's investigation. The firm defended Ruehle in that civil suit, as it had done in other litigation.

While the investigation and civil suit were ongoing, attorneys from the firm met with Ruehle to discuss his securities activities. Shortly afterward, when the Securities and Exchange Commission ("SEC") started its own investigation, the firm disclosed its discussions with Ruehle

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[38] *See, e.g., Los Angeles Community College District* (2014) PERB Decision No. 2404; *"PERB Adopts Banner Health Rule Prohibiting Blanket Confidentiality Clauses During Investigations,"* California PERB Blog, http://www.caperb.com/2015/01/05/perb-adopts-banner-health-rule-prohibiting-blanket-confidentiality-clauses-during-investigations/, last accessed on December 29, 2015.

[39] *See, e.g. "Fairbanks school district internal investigation may have violated labor laws,"* ***http://www.newsminer.com/news/local_news/fairbanks-school-district-internal-investigation-may-have-violated-labor-laws/article_291a82e8-c88e-11e4-9b3d-5785de76fa39.html,*** last accessed on December 31, 2015.

[40] 583 *F*.3d 600 (9th Cir. 2009).

to Broadcom's auditors, the SEC and the U.S. Attorney. When the government tried to use his statements to the attorneys in a subsequent criminal prosecution against him, he claimed his own attorney-client privilege.

The district court found that Ruehle had an objectively reasonable belief that the attorneys were representing him *personally* during their interview. While the attorneys told him they were speaking on the corporation's behalf, they never explicitly said that they were not representing him, never encouraged him to consult with other counsel, and never mentioned that his statements could be disclosed to third parties. The court blasted the attorneys, and reported them to state disciplinary authorities, for unethically failing to disclose their conflict of interest in representing both the corporation in the investigation and Ruehle in the related civil litigation, then violating their duty of confidentiality to Ruehle by disclosing his statements.

The Ninth Circuit accepted the lower court's findings that the firm's attorneys did not give Ruehle an *Upjohn* warning, and also that they simultaneously represented the corporation and Ruehle when they interviewed him. Nevertheless, the court found that Ruehle's statements to the attorneys were not covered by the attorney-client privilege because they were not made in confidence. Ruehle was aware, at the time of the interview, that the findings of the investigation would be disclosed to the company's outside auditors, and also knew of the auditors' obligation to truthfully report that information to the SEC. The attorneys successfully avoided discipline in that case, but only by the skin of their teeth, and the case stands as a cautionary tale for counsel who fail to provide *Upjohn* warnings to interviewees in internal investigations, particularly when they have ongoing professional relationships with the individual.

Attorney-Client Privilege vs. Work Product Privilege

When undertaking an internal investigation, the attorney-client privilege, which belongs to the client, must be distinguished from the attorney work-product doctrine which protects the attorney's privacy. The work product doctrine, first articulated by the Supreme Court in *Hickman v. Taylor*,[41] protects from discovery all documents and materials prepared "in anticipation of litigation ...."[42] It primarily protects an attorney's mental impressions and ruminations.

Our courts distinguish between "fact" work product and "opinion" work product. Fact work product is limited to factual material, such as a recitation of questions and answers during an employee interview. Opinion work product reveals the mental impressions and legal brainstorming of the attorney, and is entitled to greater protection than fact work product.[43] Unlike the attorney-client privilege, work-product protection is generally qualified, and can be overcome by demonstration of substantial need for the materials, and the adverse party's

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[41] 329 *U.S.* 425 (1947).

[42] *Fed.R.Civ.P.* 26(b)(3(A).

[43] *In re Initial Public Offering Securities Litigation*, 249 *F.R.D.* 457, 459 (S.D.N.Y. 2008).

inability, without undue hardship, to obtain the substantial equivalent of the materials by other means.[44] Opinion work product, however, is typically given absolute protection.[45]

Because the attorney-client privilege and the work-product doctrine are different in focus, strength of protection and waivability, their applicability must the analyzed separately whenever they are both raised as a defense to disclosure of internal investigation materials.[46] Even if the attorney-client privilege extends to investigations where a significant purpose is to secure legal advice, protection for attorney work product requires that the investigation be conducted based on a reasonable apprehension of anticipated litigation, not merely in the ordinary course of business.

Respecting Employee Rights

Ethical and privilege issues often arise when employees caught up in an internal investigation engage in communications with their own private legal counsel on the employer's e-mail system. Rule 4.4(b) provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Whether and to what extent employees have a reasonable expectation of privacy in their workplace e-mail accounts is still evolving in the courts, but most apply a fact-sensitive analysis of whether the employee had an objectively reasonable privacy expectation based on company policies and practices regarding the employer's monitoring of employee e-mails. [47]

In one case, a Delaware court found that e-mails between high-ranking corporate officials and their private counsel, sent and received through their company e-mail accounts, were not privileged. [48] The company had a clearly-announced policy reserving the right to monitor employee e-mails, although the evidence showed that it never had. The employees also inserted the phrase "subject to the attorney client privilege" in the subject line. Nevertheless, the court declined to recognize a privilege because the employees failed to take more effective steps to avoid disclosure, such as using their own web-based personal e-mail accounts or encrypting their communications.

A New Jersey court found that an employer's lawyer, in an employment discrimination case, violated that state's version of Rule 4.4(b) by failing to notify the employee's counsel that the employer had downloaded pre-suit e-mails between the employee and her lawyers on a

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[44] *See In re Grand Jury Subpoenas Dated March 19, 2002 &Aug. 2, 2002*, 318 *F.*3d 379, 383 (2d Cir. 2003).

[45] *See Hickman*, 329 *U.S.* at 510-13; *Upjohn*, 449 *U.S.* at 400.

[46] *See In re Kellogg Brown & Root, Inc.*, 796 *F.*3d 137, 145 (D.C. Cir. 2015).

[47] *See, e.g., In re Information Management Services, Inc., Derivative Litigation*, 81 *A.*3d 278, 285-86 (Del. Ch. 2013); *In re Asia Global Crossing, Ltd.*, 322 *B.R.* 247, 256 (Bankr. S.D.N.Y. 2005).

[48] *In re Information Management Services, Inc., Derivative Litigation*, *supra*, 81 *A.*3d at 290-91.

personal e-mail account accessed through a company-issued laptop.[49] The court held that the employee "had an objectively reasonable expectation of privacy" in the e-mails because the employee "could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them." The court held that the employer's computer use policy did not defeat the employee's reasonable expectation of privacy because it did not address personal e-mail or warn that the company might retrieve them. The court went even further, holding that, given the public policy concerns underlying the attorney-client privilege, even a more clearly written policy giving unambiguous notice would not permit the employer's attorneys to review e-mails with the employee's attorney: "We find that the Firm's review of privileged e-mails between [the employee] and her lawyer, and use of the contents of at least one e-mail in responding to interrogatories, fell within the ambit of RPC 4.4(b) and violated that rule."[50]

The New Jersey court's broad interpretation of Rule 4.4(b) has not generally been adopted elsewhere. Other jurisdictions have found that the attorney-client privilege did not protect attorney-client communications downloaded by an employer from a computer used by its employees, and did not find a duty to notify when the employer turned over such communications to the employer's lawyer.[51] American Bar Association Formal Opinion 11-460 (2011) takes the position that Rule 4.4(b) *per se* does not require notification to the sender if the communication was not "inadvertently sent," but cautions counsel that discovery rules in a particular jurisdiction may require such disclosure and expose counsel to sanctions for failing to comply. To avoid tiptoeing through this minefield, as soon as employees retain separate counsel, they should be advised not to use the district's e-mail system, or district-issued computers, to communicate with their attorneys, even on private password-protected e-mail accounts.

Attorney investigators must be mindful of Rule 4.4(a)'s warning that attorneys "not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Counsel also should check for any state law statutory prohibitions against employer demands for access to employees' social media accounts.[52] New Jersey's law, for example, provides that: "No employer shall require or request a current or prospective employee to provide or disclose any user name or password, or in any way provide the employer access to, a personal account

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[49] *See Stengart v. Loving Care Agency, Inc.*, 201 *N.J.* 300, 990 *A.*2d 650 (2010).

[50] 990 *A.*2d at 666.

[51] *See, e.g., Long v. Marubeni Am. Corp.*, No. 05-CIV-639(GEL)(KNF), 2006 *WL* 2998671, at *4 (S.D.N.Y. 2006); *Kaufman v. SunGard Inv. Sys.*, No. 05-CV-1236(JLL), 2006 *WL* 1307882, at *3 (D.N.J. 2006); *Scott v. Beth Israel Medical Center, Inc.*, 847 *N.Y.S.*2d 436, 444 (Sup.Ct. 2007).

[52] The National Conference of State Legislatures tracks developments at http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx, last accessed on January 2, 2016.

through an electronic communications device[,]"[53] even for the purpose of conducting legitimate internal investigations.

Other investigative techniques have also gotten counsel into hot water – most notably, "pretexting,[54] that is, misrepresenting one's identity to deceive another into sharing private information. The practice implicates Rules 4.1(a), 4.2 and 8.4(c)(prohibiting attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation"), and lawyers have been disciplined for it.[55] On the other hand, some jurisdictions permit attorneys to engage in limited covert investigative activities. For example, a comment to Iowa's version of Rule 8.4 provides:

> It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules. "Covert activity" means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule. [56]

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[53] *N.J.S.A.* 34:6B-6.

[54] For a discussion of the issue, *see Steven C. Bennett,* "*Ethics of 'Pretexting' in a Cyber World*," 41 McGeorge Law Review 271 (2010).

[55] *See, e.g.*, *In re Crossan*, 880 N.E. 2d 352 (Mass. 2008) (disbarring two attorneys who conducted false employment interviews with judge's former law clerk in attempt to gain evidence of judicial bias*); In re Paulter*, 47 P.3d 1175 (Colo. 2002) (upholding discipline against deputy district attorney who misrepresented his identity to criminal suspect); *In re Ositis*, 40 P.3d 500 (Or. 2002) (whether or not lawyer actually directed private investigator to pose as journalist and interview party to potential legal dispute, lawyer played major role in scheme and thus bore responsibility for it directly as well as vicariously); *In re Gatti*, 8 P.3d 966 (Or. 2000) (upholding discipline against lawyer who misrepresented his identity to insurance company); *Allen v. International Truck and Engine*, 2006 U.S. Dist. LEXIS 63720 (S.D. Ind. 2006) (attorneys violated Model Rules by directing investigators to pose as employees and question employees about litigation with the company).

[56] Iowa Rules of Professional Conduct, Rule 32:8.4, cmt. [6], https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/12-31-2012.32.pdf, last accessed on January

Given the variance in the ethics rules on pretexting from state to state, investigating counsel should familiarize themselves with the latest pronouncements in their own jurisdiction.

When private investigators or other non-attorneys are employed to assist in the investigation, counsel must honor their obligation under Rule 5.3 to assure that non-attorneys working under their supervision comport themselves in a manner consistent with the ethics rules and other legal requirements. The highly-publicized Hewlett-Packard pretexting scandal drives the point home. Hewlett-Packard conducted an investigation of leaks by its board members. The company's general counsel, senior counsel and ethics director hired investigators to determine the source of the leaks, who resorted to "pretexting" as a means of investigating. Media accounts suggest that the general counsel and ethics director were not comfortable with the practice, but allowed it to continue. The technique was of dubious legality and, once revealed, caused the company much adverse publicity, as well as congressional and regulatory reviews.[57] It is the attorney-investigator's ethical obligation to assure that non-attorneys working under their supervision know the ground rules to be followed.

Conclusion

Internal investigations, conducted with professionalism and objectivity, can foster confidence in a school district's commitment to keep its legal house in order. The ethical precepts discussed in this article can be difficult to navigate at times, but counsel who honor them serve their clients well and perform a valuable public service.

2, 2016. *See also* Oregon Rule of Professional Conduct 8.4(b), https://www.osbar.org/_docs/rulesregs/orpc.pdf, last accessed on January 3, 2016.

[57] *See, e.g.,* "HP 'pretexting' scandal ends with former P.I.'s sentencing," http://www.cnet.com/news/hp-pretexting-scandal-ends-with-former-p-i-s-sentencing/, last accessed on January 15, 2016.