The Legal Ethics of Internal Investigations

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Model Rules of Professional Conduct

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest)
- Rule 1.13 (Organization as Client)
Rule 1.6(a)

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 . . . .

Comment [3]

The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.
Upjohn Co. v. United States

- Attorney-client privilege applicable to corporations under Fed.R.Evid. 501.

- “Vast and complicated array of regulatory legislation . . .”

- Protects advice giving and fact gathering

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.”
Attorney-Client Privilege in Public Sector

- Restatement (Third) of the Law Governing Lawyers § 74


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:

(1) the representation of one client will be directly adverse to another client; or
(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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.
(2) the representation is *not prohibited by law*;

(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(a)**

*A lawyer employed or retained by an organization represents the organization* acting through its duly authorized constituents.
Rule 1.13(b)

- Violation of entity’s rights/violation of law imputed to entity; and
- Likely to result in *substantial injury* to the organization, then
- The lawyer shall proceed as is reasonably necessary in the best interest of the entity.

Rule 1.13(c)

- If... the highest authority . . . 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*
- 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.

**Rule 1.13(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 . . .
RPC 1.13(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 constituent].

Comment [2]

[I]f 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.
RPC 1.13(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 . . . .

The Role of the Attorney

- Purely factual investigation
- Securing legal advice on rights and obligations
- Anticipate likelihood of subsequent disclosure
Selecting the Investigator

- In-House Counsel
- Outside Counsel with Ongoing Relationship
- Completely Independent Counsel

Private Investigator Licensure Issues

- Check local requirements
- May turn on whether the investigation is closely related enough to the practice of law (page 10)
Identifying “The Client”

- Rule 1.13(a): Entity as Client
- Limited Engagement/Delegation to Committee
Rule 4.3

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.

Avoid Inadvertent Lawyer-Client Relationships

- Do not give legal advice.

- When investigation is in response to an employee’s complaint, clarify your role to the employee.
The “Upjohn Warning”

- You represent the employer, not the employee.
- The substance of the interview is privileged.
- The employer controls the privilege.
- The employer may disclose statements.

Legal vs. Business Purpose


- Legal advice need only be one of the significant purposes of the investigation.
Sandra T.E. v. South Berwyn Sch. Dist. 100 (9th Cir. 2009)

- Upjohn protections available in public school district internal investigations
- Attorneys structured activities to appear lawyer-like

Recent NLRB Rulings

- Banner Health Systems/Piedmont Gardens (Page 18)
  - Unfair practice to muzzle employees
  - Adoption by public sector labor boards
Dangers of Multiple Representation

- **United States v. Ruehle (9th Cir. 2009)** (page 20)

- Unclear who client was during employee interview due to simultaneous representation
Is anybody gonna know about this?

Do I have to answer these questions?
Do I need a lawyer?

Can I have a lawyer?
I’m not answering any questions without my lawyer (by the way, she’s on vacation and won’t be back until next Friday)

**Employee Privacy Rights**

- Inadvertent disclosure of privileged communications (page 23)
- Demanding access to employee’s personal e-mail or social media accounts
- “Pretexting”
Rule 4.4(a)

In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of such a person.

Rule 4.4(b)

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
Rule 8.4(c)

It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

Lawful Covert Activities

- Check local version of Rule 8.4
- Some jurisdictions permit “covert activity”
Responsibility for Non-Lawyers

- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance)
- Hewlett-Packard Pretexting Scandal

Rule 3.7

- A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . .

- A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.