

Employment Law Notes

October 2005

ETHICAL CONSIDERATIONS OF INTERNAL INVESTIGATIONS

The way interviews are conducted in an internal company investigation – such as when responding to complaints of workplace harassment and the like – can give rise to issues under the Rules of Professional Conduct.

First, witnesses may misunderstand the lawyer's role. Under RPC 4.3, "Dealing with Unrepresented Person," an attorney has a duty to make his or her role clear. The lawyer should identify himself or herself as a lawyer, explain their role, say who he or she represents, and make it clear he or she is not the witness's lawyer. Also, a lawyer cannot promise confidentiality for the witness's statements; promising confidentiality in order to induce a witness to divulge information would constitute misrepresentation in violation of RPC 8.4(c).

Having an investigator or other non-lawyer perform the investigation under the lawyer's direction and supervision does not remove all of the ethical issues. Under RPC 8.4(a), a lawyer cannot direct a non-attorney to do something on their behalf that would be an ethical violation if an attorney did it.

The Lawyer should refrain from giving advice to the witness, other than possibly advising the witness to consult with a lawyer. Under Washington law, it is relatively easy for people to establish that they have an attorney-client relationship: They need only subjectively believe they do and have a reasonable basis for that belief, and if a lawyer's advice and assistance been sought and received on a legal matter, there is a reasonable basis for the belief. *Bohn v. Cody*, 119 W.2d 357 (1992). If a lawyer gives legal advice to a witness, the lawyer could end up with a conflict of interest under RPC 1.7 if the company has a claim

against the witness in connection with the issues involved in the investigation.

The lawyer's duty of competence under RPC 1.1 and duty to preserve confidences and secrets under RPC 1.6 require the lawyer to exercise care with respect to confidential information. Investigation by counsel may be privileged. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The privilege may extend to notes and memoranda and written responses to questionnaires that the lawyer circulated for response. Here's the rub: relying on the investigation as a defense (for example, in order to show "prompt and effective remedial action" has been taken in response to a harassment complaint) waives the attorney-client and work-product privilege. The attorney needs to make sure there are no unguarded discussions of case strategy or mental impressions of the lawyer that are included in investigation notes and memos. Otherwise, they could also end up being swept up in the required disclosure.

Finally, the lawyer that conducts the investigation will probably be a witness, and the lawyer and the lawyer's firm will be disqualified from appearing at trial. RPC 3.7. A lawyer who wants to participate at trial should have the investigation done by an outside attorney or an investigator at the direction and under the supervision of counsel. ✍

MINIMUM WAGE INCREASE COMING

Washington's minimum wage increases to \$7.63 an hour on January 1, 2006. Initiative 688, which was approved by Washington state voters in 1998, requires L&I to recalculate the minimum wage rate every year based on the federal Consumer Price Index for Urban Wage Earners and Clerical Workers. ✍

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