

PAUL  
HASTINGS

# Ethical Considerations For In-House Counsel

Emily Pidot

Daniel Prince

Elizabeth Minoofar

January 11–13, 2022

Annual Employment Law Update & MCLE Conference

# Ethical Considerations For In-House Employment Counsel

## Topics:

- > Who Is the Client
- > The Application of Privilege and Work Product Protections
- > Communications with Employees
- > Internal Investigations
- > Unique Issues in Our Digital World



The background of the slide features a dark blue overlay with silhouettes of several business professionals. On the left, a group of people are standing and talking. In the center, a woman is carrying a box. On the right, a man is on a phone call. The background also shows a city skyline with many skyscrapers.

# Who Is the Client?

# Sources of Ethical Duties and Professional Standards

JURISDICTION	SOURCES
All Jurisdictions	<b>Court local rules and standing orders</b> <b>Court and state bar decisions</b> <b>ABA's Model Rules of Professional Conduct (in some states binding, in others merely guidance),</b> <b>local bar opinions, and other advisory resources</b>
California	State Bar Act (Cal. Bus. & Prof. Code §§ 6000-6238) Cal. R. Prof. Conduct (revised as of 04/23/20)
Connecticut	Conn. Practice Book for Rules of Professional Conduct (2022 version)
D.C.	D.C. Bar Rules of Professional Conduct
Maryland	Maryland Attorneys' Rules of Professional Conduct (Md. Court Rules, tit. 19, ch. 300) (effective as of 07/01/16)
Illinois	Ill. Supreme Court Order M.R. 3140, art. VIII; Illinois Rules of Professional Conduct of 2010 (amended as of 07/17/20)
New Jersey	N.J. Rules of Professional Conduct (revised 9/1/21) N.J. Ct. R. 1:20. Discipline of Members of the Bar
New York	Part 1200 of the Joint Rules of the Appellate Division (22 N.Y.C.R.R. § 1200) N.Y. Rules of Professional Conduct (amended as of 06/24/20)
Texas	Tex. Disciplinary Rules of Professional Conduct (amended as of 09/1/21)
Virginia	Va. State Bar Professional Guidelines – Rules of Professional Conduct (updated as of 09/25/18)

# Who Is the Client?

In-house counsel represent the corporation or organization.

In-house counsel do not represent:

---

**Shareholders**

**Directors**

**Officers**

**Employees**

**Other agents Individuals acting on behalf of corporation**

# Who Is the Client?

Conflicts with individuals associated with a client corporation or organization:

---

**Individuals accused of wrongdoing**

**Individuals who disagree with the client's decisions**

**Individuals who will testify adversely to the client's interests**

# Who Is the Client?

Individuals accused of wrongdoing

---

## ▶ QUESTIONS

Will actions implicate the corporation?

Are interests aligned with corporation?

## ▶ EXAMPLES

Manager commits act or omission that can be attributed to the corporation

Manager following corporate directive accused of wrongdoing

Manager accused of sexual harassment

# Who Is the Client?

Individuals who disagree with decisions of the client

---

## **EXAMPLES**

Employee who is purported whistleblower

Employee who posts criticism of the company on the internet

Individuals who will testify adversely  
to the client's interests



# Who Is the Client?

## Obligations owed to non-clients

---

Disclosure that in-house counsel do not represent the non-client

Disclosure that information gained from the non-client will be disclosed to the client

Disclosure that non-client may bear personal liability for claims asserted

Disclosure that non-client has right to separate counsel

## Obligations owed to non-clients (*cont'd*)

---

Duty to pay for separate counsel?

- ▶ **Under Labor Code § 2802:**

“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”

- ▶ **The duty to indemnify can include the duty to pay for the cost of defense against an asserted claim.**
- ▶ **The employer can await final adjudication of the claim to confirm the duty to indemnify applies; but should it?**

# Who Is the Client?

## HYPOTHETICAL

Jane (in-house counsel at Acme Corp.) is approached by her friend and non-attorney colleague Jim (Acme Corp. manager) for advice “as a friend” regarding concerns that Jim has about the safety of Acme Corp.’s new product. He does not want to report the concerns for fear of retaliation by his boss.

*What should Jane do?*



# The Application of Privilege And Work Product Protections

# The Application of Privilege and Work Product Protections

## Attorney-Client Privilege:

---

The attorney-client privilege protects disclosure of communications between lawyer and client

Communications with directors, officers, employees are not necessarily protected by the privilege



# The Application of Privilege and Work Product Protections

## The “Subject Matter” Test

---

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

Communications are protected by privilege if:

- ▶ **Made to secure legal advice**
- ▶ **Made to appropriate persons**
- ▶ **The subject matter of the communication is within the employee’s corporate duties**

# The Application of Privilege and Work Product Protections

## Privileged Communications:

---

In-house and outside counsel to secure legal advice

In-house counsel to essential employees regarding legal advice

Directive from in-house counsel regarding legal advice

# The Application of Privilege and Work Product Protections

## Non-Privileged Communications:

---

Communication to essential **and** non-essential employees regarding legal advice

In-house counsel included on non-legal communication

No legal advice sought

In-house counsel acting outside of legal capacity (*i.e.*, providing business advice)

# The Application of Privilege and Work Product Protections

## Attorney Work Product:

---

Materials collected in anticipation of litigation

Materials prepared by lawyers

Materials prepared under the direction and supervision of lawyers

# The Application of Privilege and Work Product Protections

## Waiver of Privilege

---

Disclosure to adverse party

Disclosure to non-essential third parties

- ▶ **Non-essential employees**
- ▶ **Individuals outside the organization**
- ▶ **Individuals uninterested in maintaining privilege**
- ▶ **Spouse or significant other**

Disclosure during proceedings



# The Application of Privilege and Work Product Protections

## Waiver of Privilege (*cont'd*)

---

Disclosure as element of defense

Disclosures in public or social gatherings

Unintentional disseminations

Failure to assert privilege

Using information for improper purposes

# The Application of Privilege and Work Product Protections

## HYPOTHETICAL

Acme Corp. decides to conduct a pay equity study at the behest of its Board of Directors

The study is initiated by Acme's Compensation group who engage a third-party consultant (non-attorneys) to conduct the audit

Compensation and HR employees collect information requested by the consultant

Acme's attorneys become involved three weeks after the work has started, and are copied on all communications

*Is the audit privileged?*

# The Application of Privilege and Work Product Protections



## Communications: Are They Privileged?

### Questions

Confidential?

Made to appropriate persons?

Made to secure legal advice?

Is the subject matter of the communication within the employee's current or former corporate duties?



# The Application of Privilege and Work Product Protections



## Communications: Are They Privileged?

**Facts themselves may not be privileged**

**Communications with adverse or potentially adverse persons not privileged**

# The Application of Privilege and Work Product Protections

## Best Practices to Ensure Communications Remain Privileged

---

Always establish privilege

- ▶ **State you are a lawyer**

Explain purpose of communication

Explain privilege and application

Use “Attorney-Client Privilege/Attorney Work Product”  
legend on written communications



# The Application of Privilege and Work Product Protections

## Avoid waiver of privilege

---

Explain how privilege waived

Ensure safeguards in place

Purpose only to secure legal advice

Purpose only to gather information for litigation

Include only essential recipients

# The Application of Privilege and Work Product Protections

Be aware of boundaries of privilege and work product protections

---

- ▶ **Facts may not be protected**
- ▶ **Business vs. legal communications**
- ▶ **Concerns with conflict and waiver**

# The Application of Privilege and Work Product Protections

A conflict can be waived if:

---

The conflict is fully disclosed in writing to each affected client,  
and the client waives the conflict in writing

The lawyer's independent judgment is not compromised

As required by the client or applicable standards,  
ethical walls are raised to protect client confidentiality

The background of the slide features a dark blue, semi-transparent overlay. Within this overlay, there are silhouettes of several people in business attire. Some are standing and talking on mobile phones, while others are seated at desks. The background also shows a blurred city skyline with numerous skyscrapers, suggesting a corporate or urban environment.

# Communications with Employees



# Communications with Employees

## Communications with Employees Represented by Counsel

---

***Ex parte* communications prohibited**

**Communications related or reasonably related to litigation**

**Employee cannot waive privilege**

**Lawyer cannot circumvent**

Non-attorney

Private investigator



# Communications with Employees

## HYPOTHETICAL

During initial disclosures, defense counsel submits a list of witnesses including current and former managers and employees who worked on plaintiff's team

Instead of providing contact information for each of the witnesses listed on the initial disclosures, defense counsel designates that all witnesses may be contacted through the firm

In-house counsel asks the firm to reach out to the former employees and managers and offer to represent them at the company's expense for purposes of the lawsuit

The former employees agree; therefore, plaintiff's counsel can no longer contact them directly

Plaintiff's counsel challenges this as an improper solicitation

*Outcome?*

# Communications with Employees

## Communications with Members of Certified Class

---

Certified class members are represented parties

Same prohibitions apply to communicating with certified class members as apply to communicating with represented parties

# Communications with Employees

## Communications with Members of Certified Class (*cont'd*)

---

### **HYPOTHETICAL**

**Hourly employee promoted to manager**

**Class action filed on behalf of hourly employees**

**Class is certified**

**Can attorney talk to manager about:**

*Experiences as employee?*

*Experiences as manager?*

# Communications with Employees

## Communications with Members of Certified Class (*cont'd*)

### ▶ EXAMPLES

**Class action filed on behalf of hourly employees**

**Class is certified**

**Can attorney have hourly employee:**

*Pull data related to class?*

*Is it privileged? Protected by the attorney work product doctrine?*

## Communication with Putative Class Members

---

Putative class members are **not** represented parties

Potentially adverse

Reasonable safeguards should be taken to prevent information from reaching opposing counsel



## Communication with Putative Class Members *(cont'd)*

---

### Preserving testimony through declarations

“Who We Are” Statements

“Coercive” communications

Form declarations

Declarations prepared by attorney

## “Aggrieved Employees”

---

Labor Code Private Attorneys General Act

Other than named plaintiff, aggrieved employees are not represented parties

# Communications with Employees

## Union Members

---

Union members are not represented parties

*Johnnie's Poultry* statements



# Internal Investigations



# Internal Investigations



## What triggers an internal investigation?

- Hotline calls/reports
- Complaints raised to HR or to Managers
- Employee exit interviews
- Adverse events
- Media inquiries/Press
- Litigation (including pre-litigation demands)
- Government subpoenas or investigations



## Investigations required by statute (Federal, California, New York, Florida):

Employers have a legal duty to promptly investigate allegations of **workplace harassment, discrimination, or retaliation**. Cal. Gov't Code §§12940 (j), (k); 29 C.F.R. §1604.11(f)); Title VII of the Civil Rights Act of 1964; Title 29 of the Code of Federal Regulations § 1604.11; the New York State Human Rights Law, and the Florida Civil Rights Act (FCRA).

Under the Sarbanes-Oxley Act, we have a duty to investigate and report **fraud, material violations of securities law and other financial malfeasance**.

Investigations required by company policy, for example:

---

- (i) a report of possible **discrimination, harassment, or retaliation**
- (ii) a report of **threats or acts of violence in the workplace** and/or the presence of weapons in the workplace
- (iii) an employee's reported **concerns about overtime payments, payroll deductions, or salary deductions**

# Internal Investigations



## Is there a duty to investigate?

Counsel is concerned that a senior manager has violated a company policy

Does the attorney have a duty to report, or is she required to keep the client's (i.e., company's) confidences?





## Who should lead the investigation?

---

HR

Compliance officer (*in connection with counsel*)

In-house counsel

Outside counsel

## Factors to Consider:

- > Conflicts of Interest

*Do not involve anyone in conducting the investigation that would be a witness to the facts to be investigated, including anyone from HR*

- > Likelihood of litigation or government involvement

- > Seriousness of Allegations and Risk of Exposure

- > Possible Implication of Organizational Leadership

- > Time Pressures

- > Internal Capacity

- > Sensitivity of Allegations

- > Potential Media Coverage

- > Perceived Objectivity

- > Privilege Concerns



# Internal Investigations



## Determine privilege at the outset:

---

Whether the adequacy of the investigation will be used as a litigation defense (*not privileged*)

Whether you will rely on the content of the witness interviews and the report of findings in litigation, with the government, or with the media (*not privileged*)

Whether you want the interview memoranda and findings to be protected from disclosure (*privileged*)

# Guidelines for Establishing and Preserving Privilege



Conducting the investigation by or at the direction of counsel

Documenting the purpose to obtain legal advice

Privilege headings on all communications and reports

Limited number of persons with access  
to privileged information

Third party experts engaged by, directed,  
and controlled by counsel

# Document Preservation, Collection, and Control



## When do document retention obligations arise?

“[A] litigant is under a duty to preserve evidence which it **knows or reasonably should know is relevant to the action.**” *Apple Inc. v. Samsung Electronics Co., Ltd.*, 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012): “[F]rom **the moment that litigation is reasonably anticipated.**”

*In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006)

If litigation is anticipated, a party “must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”

*Zubulake v. UBS Warburg*, 2020 FRD 212, 218 (S.D.N.Y. 2003)



# Document Preservation, Collection, and Control



## When do document retention obligations arise?

An “important deterrent to spoliation is the customary involvement of lawyers in the preservation of their clients’ evidence and the State Bar of California **disciplinary sanctions that can be imposed on attorneys** who participate in the spoliation of evidence.”

*Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 12-13 (1998)

Violation of a duty to preserve evidence may result in a Court order of evidence preservation or ***adverse jury instruction*** where evidence has been destroyed.

California Civil Jury Instruction 204

# Document Preservation, Collection, and Control

Issue written document preservation/hold notices

Secure necessary databases and suspend destruction

Takes steps to avoid witness spoliation problems

Collect all relevant documents and materials—including electronic evidence, paper documents, other tangible evidence

Image hard drives (phones and laptops), where appropriate

Designate a point person for custodian questions



# Document Preservation, Collection, and Control



## Consequences of Spoliation

Employer sanctioned for destroying documents, as part of its regularly-scheduled document destruction practices, related to female plaintiffs' and male comparators' qualifications and sales leads in gender discrimination case

Employer had been notified of the lawsuit before it completed destroying the documents, which the court considered spoliation of evidence

*EEOC v. JPMorgan Chase Bank, N.A.*, 2013  
U.S. Dist. LEXIS 27499 (S.D. Oh. 2013)

## Consequences of Spoliation

---

Employer sanctioned for destroying HR documents and emails related to plaintiff who alleged gender discrimination and wrongful termination

Spoliation was sanctionable because plaintiff could not adequately challenge the employer's testimony that he was terminated due to poor performance

Employer not allowed to testify regarding plaintiff's qualifications

Jury was given "adverse inference" instruction to assume that the contents of the destroyed emails would demonstrate gender discrimination

*EEOC v. Ventura Corp.*, 2013 U.S. Dist. LEXIS 19662 (D.P.R. 2013)





# Unique Issues In Our Digital World

---

# Unique Issues In Our Digital World

## Access to employee e-mail

### **Reasonable expectation of privacy**

Corporate e-mail system

Third-party e-mail system

### **BEST PRACTICES**

Notice to employees regarding monitoring

Signed acknowledgements

Periodic warnings on websites, computers, and devices



# Unique Issues In Our Digital World



## Tape Recordings

Illegal to record conversations  
absent consent of all parties to communication

Illegally obtained recordings are  
not protected by privilege or work-product

### EXAMPLE

Conversation between San Francisco and New York

### BEST PRACTICES

Always disclose

# Unique Issues In Our Digital World



## Social Media

### Developing area of the law

### Prospective Employees

Improper use of information from social media actionable

### Current Employees

NLRA protections

Duty to monitor to prevent harassment

Access to information protected by password



# Unique Issues In Our Digital World



## Social Media (*cont'd*)

### Adverse Parties

Communications

“Active” vs. “Passive”

“Friending” or “Connecting”

Sites that track movements

# Unique Issues In Our Digital World



## Social Media (*cont'd*)

### Use for work

Advertisements

Be mindful of connections

Dangers of uploading, posting, and using social media communication tools



# Unique Issues In Our Digital World



## Safeguarding Employee Personnel Data

**Developing area of the law**

**Reasonable safeguards to protect private information**

Hacking

Unintentional disseminations

“Meta” data

# Unique Issues In Our Digital World



## Compelled Production of Digital Messages

*Calendar Res. LLC v. StubHub Inc.*, 2019 WL 1581406, at \*3-4 (C.D. Cal. Mar. 14, 2019) (compelling defendants to produce Slack messages in trade secrets case)

*Thomas v. City of New York*, 336 F.R.D. 1 (E.D.N.Y. 2020) (compelling production of emails, text messages, and GroupMe chats from plaintiff's managers in retaliation case)



The background of the slide features a dark blue overlay with silhouettes of several business professionals. On the left, a woman is on a phone call. In the center, a man and a woman are standing, with the woman holding a folder. To the right, another man is on a phone call. The background also shows a city skyline with many skyscrapers and a highway interchange. The text "Thank You" is written in a large, white, sans-serif font on the left side of the slide.

# Thank You



# Speakers

**Emily R. Pidot**



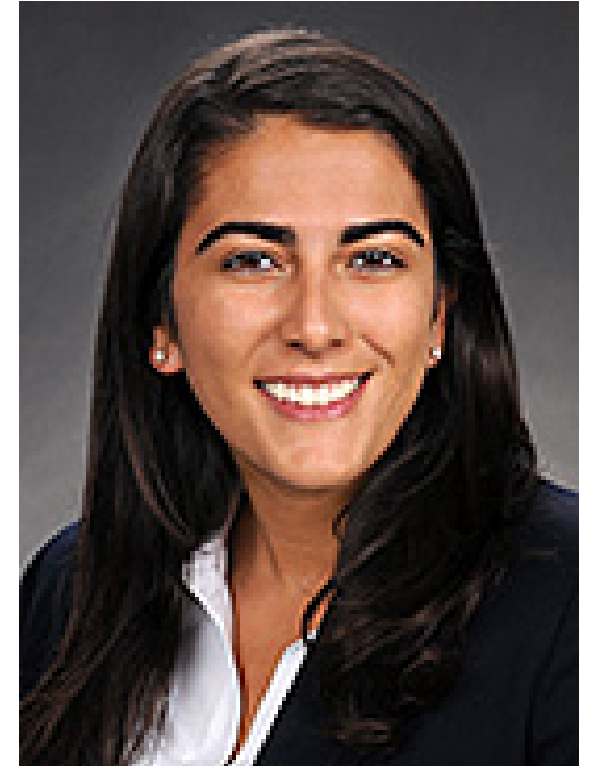
Employment Partner  
New York  
emilypidot@paulhastings.com  
213.318.6279

**Daniel Prince**



Litigation Partner  
Los Angeles  
danielprince@paulhastings.com  
213.683.6169

**Elizabeth S. Minoofar**



Employment Associate  
Los Angeles  
elizabethminoofar@paulhastings.com  
213.683.6249