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Ethics & Internal Investigations

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Lori currently serves as one of the firm's risk management and loss prevention lawyers. In this role, she advises on professional responsibility and ethics matters that arise in Mayer Brown's offices. Lori is also a member of the firm's Ethics and Loss Prevention Committee. Before taking on her current responsibilities, Lori litigated employment-related matters before federal and state courts and various administrative agencies, including the defense of individual and class claims of discrimination, wrongful discharge, and employment-related torts. She also provided clients with counsel and advice on other employment-related matters such as employee discipline and termination, proper use of employee background checks, employment policies, employment agreements, separation agreement and covenants not to compete.

Agenda

- Hypothetical: Internal complaint of employment discrimination
- Preservation of evidence
- Email review
- Social media review
- Witness interviews: privilege & confidentiality

Hypothetical

To: General Counsel, Alpha Corporation

From: Controller, Alpha Corporation

Re: CFO Promotion

I write to make a formal complaint about Alpha's failure to promote me to the CFO position. After two decades of loyal service to the company, I am eminently qualified for the position. It is no coincidence that each time a senior leadership position becomes available, the Board conducts a search for younger, external candidates rather than looking to more mature, loyal candidates from within the company. I also believe that I am still suffering the fallout from my decision to notify the Board that Alpha's Springfield branch office has been overcharging its biggest customer, Beta Corporation, in collusion with a certain corrupt buyer at Beta, in order to reach revenue targets and bolster earnings guidance provided to the public.

My lawyer has advised me that I have strong legal claims against Alpha related to its decision to pass over me for promotion to CFO. I demand that Alpha look into this matter and remedy its wrongdoing in an appropriate manner.

Preservation of Evidence

Is Alpha now under a duty to preserve documents and other information?

- Is it reasonably foreseeable that a lawsuit will be filed?
 - The test for “reasonable anticipation of litigation” varies by jurisdiction, but, in general, reasonable anticipation of litigation arises when a party knows there is a credible threat that it will become involved in litigation. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)
- Model Rule 3.4:
 - 3.4(a): A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.
 - Comment 2: The right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed.

5

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Preservation of Evidence

Assuming preservation is warranted, what steps are appropriate?

- Identify key witnesses
- Identify relevant IT staff
- Issue a litigation hold
- Identify primary types of electronic information that may exist and where that information might reside

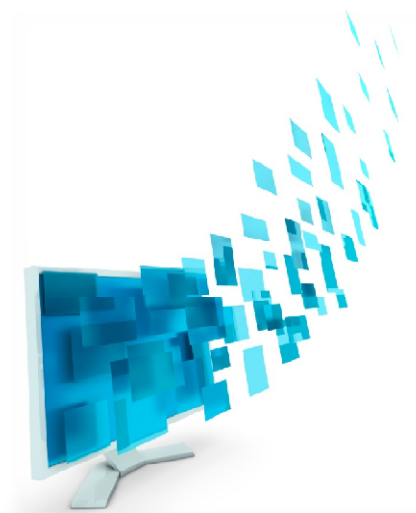
When does obligation to preserve evidence end?

6

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Email Review

As a first investigative step, Alpha's internal legal team wants to review the emails of relevant witnesses, including the controller, sent or received on their alpha.com email addresses and/or on their office computers.



7

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Email Review

Is this kind of general email review permissible?

- Review employer policy
- City of Ontario v. Quon, 130 S. Ct. 2619 (2010)
 - To check whether the texting limit for officers' pagers was inadequate, the police department reviewed transcripts of texts sent during work hours. Quon was disciplined for excessive personal texting, some of it sexually explicit, during work hours.
 - Court assumed Quon had a reasonable expectation of privacy but that the review was justified, necessary for a work-related purpose and that the city had a legitimate interest in determining whether the text limit was inadequate and whether employees were being made to pay out of pocket for work-related expenses.

8

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Email Review

What should Alpha do if during the review it discovers that the controller exchanged emails with his lawyer on the controller's Gmail account but using his Alpha computer?



9

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Email Review

Holmes v. Petrovich Dev. Co. – 191 Cal. App. 4th 1047 (2011)

- Attorney-client privilege did not protect e-mail communications that the plaintiff sent to her lawyer from her company-issued computer and company e-mail address.
- Policy:
 - provided that employer could inspect all files or messages at any time for any reason
 - advised employees that they had no right of privacy with respect to the use of company technology, and e-mails should be used only for company business
 - prohibited employees from sending or receiving personal e-mails

10

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Email Review

Pure Power Boot Camp v. Warrior Fitness, 587 F. Supp. 2d 548 (S.D.N.Y. 2008)

- Employer accessed employee's Hotmail account because the username and password were saved on the employee's work computer. Employer obtained employee's Gmail username and password from the Hotmail account and accessed the Gmail account. Employer accessed a third email account by guessing that the password was the same as the Hotmail and Gmail accounts' password.
- Employer had policy prohibiting internet access for personal use; informing employees that they had no expectation of privacy in activity conducted on employer's systems; reserved employer's right to review, monitor and access any matter stored in, created on, received from or sent through the employer's system.
- Court held that employer impermissibly accessed emails and that the one email obtained between employee and his attorney was privileged and therefore employer had to return that to employee.

Email Review

Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010)

- Stengart wrote emails to her attorney on her work laptop using her personal Yahoo email account. She filed an employment discrimination suit, and the employer recovered all of the files on the computer, including these emails. The employer argued that it had the right to review them because under the company's policy, the employee had waived attorney-client privilege by sending emails on the company's computer.
- Policy provided that the company could review, audit, intercept, access and disclose all matters on the company's media systems and services at any time, with or without notice. Policy also said that occasional personal use is permitted.
- Court held that plaintiff had a reasonable expectation of privacy. Policy said nothing about personal e-mail accounts and did not warn that the contents of such e-mails were stored on a hard drive and could be forensically retrieved and read by the employer. In contrast, policy permitted occasional personal use of email. Defendant's attorneys, by not informing plaintiff about the discovery of these e-mails, violated the applicable rules of professional conduct.
- Even a clearer policy would not have passed muster with respect to plaintiff's specific emails with her lawyer because of the important public policy concerns underlying the attorney-client privilege.

Email Review

Model Rule 4.4

- 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.



Email Review

MR 4.4

- Comment 1: Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons, including unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.
- Comment 2: If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived.

Social Media Review

As part of its investigation, Alpha wants to review the Facebook pages and other social media activities of relevant witnesses, including the controller.



15

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Social Media Review

Stored Communications Act, 18 U.S.C. § 2701, et seq. provides punishments for whoever:

- Intentionally accesses without authorization a facility through which an electronic communication service is provided.

Social Media Password Laws:

- Many states have laws that prohibit employers from requiring applicants and employees to disclose social media passwords, with certain exceptions to allow employers to monitor social media accounts in order to comply with other federal or state law or self-regulatory requirements, such as FINRA.

16

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Social Media Review

Ehling v. Monmouth-Ocean Hospital Serv. Corp. (D.N.J. 2013)

- The court concluded that SCA applies to Facebook wall posts when a user has limited his or her privacy settings.
- “Authorized user exception” applied here because the co-worker who showed the post at issue to management was not coerced into doing so and was the intended viewer of the post since he was Facebook friends with the plaintiff.
- Underscores that employers will lose protection of the “authorized user exception” if they coerce access to Facebook accounts or use other underhanded tactics.

17

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Social Media Review

Pietrylo v. Hillstone Restaurant Group (D.N.J. 2009)

- Employees set up an invite only website on MySpace.com that criticized their employer. The employer asked one of the employees for her username and password to the website, and she provided it. Based on what the employer saw on the website, it terminated some employees
- Employees sued under the Federal Stored Communications Act, and brought common law claims for invasion of privacy and wrongful termination, among other claims.
- A jury determined that the employer was not properly authorized to access the website under the Stored Communication Act because its request to the employee for her username and password was coercive. This ruling was based solely on the employee’s own testimony that she felt that there may have been negative consequences if she did not give her employer her password. The Court upheld the jury’s verdict.

18

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Social Media Review

Additional considerations:

- Social media accounts might reveal protected categories of information regarding an employee.
 - Consider having someone other than decisionmakers review social media accounts so that only relevant information is provided to decisionmakers.
- NLRB issues
 - Treat carefully posts that may be considered concerted activity.

Pretexting

As part of investigating the allegations concerning Beta, Alpha's investigation team considers calling the Beta personnel alleged to be colluding with Alpha, introducing themselves as a competitor of Acme, and asking about pricing issues.

The investigation team would also like to create fake social media profiles and attempt to "friend" or "follow" complainant on social media.

Is this permissible?

What if the team instead:

- retains a third-party investigator to make the calls to Beta?
- asks a co-worker to friend the complainant and get access to her private posts that way?

Pretexting

Model Rule 4.1(a): In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Model Rules 4.2 & 4.3: Communications with represented and unrepresented persons:

- If person is represented by another lawyer, a lawyer shall not communicate with that person about the subject of the representation.
- If a person is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

Pretexting

Model Rule 5.3: A lawyer shall be responsible for conduct of non-lawyers employed or retained by or associated with a lawyer that would be a violation of the Rule of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.

Model Rule 8.4: It is professional misconduct for a lawyer to:

- Knowingly assist or induce another to violate the Rules of Professional Conduct, or to do so through the acts of another
- Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Phila. Ethics Op. 2009-2 (2009) (lawyer may not use third person to contact or “friend” nonparty witness to access her private Facebook or MySpace pages, even if no affirmative misrepresentations made).

Witness Interviews, Privilege

After reviewing the relevant documents, the investigation team is ready to interview relevant witnesses employed at Alpha.

What preliminary comments should the interviewing attorney make at the beginning of the interviews concerning attorney-client privilege?

Witness Interviews, Privilege

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

- The lawyer represents the company only and not the witness personally.
- The lawyer is collecting facts for the purpose of providing legal advice to the company.
- The communication is protected by the attorney-client privilege, which belongs exclusively to the company, not the witness.
- The company may choose to waive the privilege and disclose the communication to a third-party, including the government.

Witness Interviews, Privilege

- Model Rule 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 constituents with whom the lawyer is dealing.
- Model Rule 4.3 (Dealing with Unrepresented Person)
 - In dealing on behalf of a client with a person who is not represented by counsel, the lawyer shall not give legal advice, 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.

25

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Witness Interviews, Confidentiality

Can the interviewing attorney instruct each witness that the witness is obligated, as a condition of continued employment, to keep the interview’s contents strictly confidential?

- KBR SEC Enforcement Action
 - In April 2015, the SEC announced its first enforcement action against a company for using overly restrictive language in confidentiality agreements. The SEC charged Houston-based KBR Inc. with violating whistleblower protection Rule 21F-17 under the Dodd-Frank Act by using language in confidentiality agreements in internal investigations that employees could interpret as prohibiting them from disclosing information to the SEC or other government agencies:
 - **KBR Agreement:** *“I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination.”*

26

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Witness Interviews, Confidentiality

NLRB

- Several board decisions indicate that employers may not be able to broadly prohibit employees from discussing company investigations without providing justification.
 - *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012);
 - *Hyundai America Shipping Agency*, 357 NLRB No. 80 (Aug. 26, 2011).

27

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Witness Interviews, Counsel

What should the investigation team do if the controller demands to have his own counsel present at the interview?

- Model Rule 4.2:
 - In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
- Comment 3:
 - The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

28

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Questions?

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