

Tips For Protecting Privilege In Remote Internal Investigations

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Though remote work is here to stay, at the very least for several more months and for some more permanently,[1] the possibility of allegations of workplace misconduct remains.[2] Organizations focused on ethics and compliance understand such misconduct cannot be ignored, and thus companies large and small must conduct remote investigations.

While remote investigations offer some benefits, such as eliminating travel costs, simplifying logistics and creating a greater level of comfort for interviewees on their home turf, an inescapable and significant risk is that privileged and confidential communications may be exposed to third parties, which could result in a waiver of these protections. Communications that have lost their protection may even be discoverable in subsequent litigation.

Whether they are exchanging sensitive data electronically, conducting video or telephonic interviews, or reporting out findings by videoconference, unwary attorneys face a number of privilege pitfalls. And a surprising number of inside and outside attorneys do not follow best practices.

Appropriate Warnings and Questions

Attorneys conducting remote interviews have less control over an interviewee's setting. To ensure interviewees — especially those unfamiliar with the process of a confidential internal investigation — understand the risk, importance, protections applicable to, and confidentiality of the proceedings, attorneys must communicate expectations and pose questions regarding the interviewee's environment.

First, explain the concepts of privilege and confidentiality.

The need for beginning each interview by explaining attorney-client privilege, and providing the witness with an adequate Upjohn warning clarifying that the organization — and not the interviewee — is the client is not unique to remote investigations. Consider, however, obtaining an email confirmation that the interviewee understands the



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warning and agrees to abide by the confidentiality requirements in order to ensure the protections of the warning.

Second, ensure there is no one else in the "room."

In the context of a remote investigation where highly sensitive information is being discussed, the presence of third parties — family members, roommates, babysitters or others — may lead to an inadvertent waiver of the attorney-client privilege or breach of confidentiality obligations, which can significantly impact the investigation and the protection of the underlying information.

The interviewing attorney should verbally confirm there are no third parties in the room or otherwise within earshot, and confirm this by requesting that the interviewee share a scan of the room. If an interviewee calls from a public location, object and reschedule the conversation until a time he or she can be isolated.

Attorneys should continue to ensure third parties are not present throughout the discussions. If the witness is unable to be completely separate from others, ask the witness to wear headphones to protect sensitive information, and ensure that the information cannot be broadcast through some other mechanism, for example, through the Xbox game chat being used by the interviewee's son in the next room.

Third, understand the tools the interviewee is using to access the interview. Depending upon the sensitivity of the topics of discussion or documents being shared, ask each interviewee about the use of shared computers and the protected nature of their internet connection.

And finally, close with a reminder about privilege and confidentiality. Remind the witness again of the attorney-client privilege and the confidentiality of the discussion.

Technological Considerations

Careful preparation and savvy use of available tools will protect your interviews.

Keep eavesdroppers out.

Use unique, password-protected login credentials for each conference through the platform you are using; almost all offer this feature. The password should be random, changed for each interview, and not shared with anyone other than the interviewee.

Make sure you know who is in the virtual room.

Account for all callers and participants in a conference by identifying the individuals and telephone numbers reflected on your videoconference. Drop those who are not invited. Throughout the interview, proactively monitor the attendees to ensure that no new unknown callers join.

Be careful when sharing your screen.

Sharing a document with an interviewee is not as simple as opening a manila folder and passing it across the table. Before an interview takes place, conduct a test run of the platform that will be used to ensure you are able to seamlessly share documents without exposing your protected outline or confidential investigation plan to the interviewee. Consider using a separate computer to share documents to avoid the risk of sharing protected information with an interviewee.

Prohibit recording by interviewees.

You would almost never let an interviewee tape your discussion on his phone, so ensure the platform you are using does not provide the ability to record the discussion. State explicitly that the interviewee may not record the discussion in any way, including on his or her phone or a tape recorder.

Prepare for your interviewee to have technical issues.

Be ready to assist each interviewee and solve technical problems without seeking outside assistance. For a videoconference, provide the interviewee with a dial-in phone number, with a secure access code, in the event the witness has difficulty connecting with sound on the videoconference. Offer to do a run-through with your interviewee to troubleshoot in advance of the interview.

Make sure internet connections are safe.

There should be a secure internet connection on both ends of the interview — i.e., a password-protected and private internet connection, not public Wi-Fi — so that unwanted attendees do not eavesdrop or overhear privileged information. Consider also whether a higher level of technological protections is advisable, such as consideration of a virtual private network, to minimize cyberthreat exposure if an investigation requires cross-border interviews via videoconference.

In conclusion, as attorneys refine their approach to remote investigations in the months and years ahead, diligent preparation and adherence to these best practices will protect privilege and safeguard the interests of their clients.

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[1] See The Washington Post, Big Tech was first to send workers home. Now it's in no rush to bring them back (May 18, 2020), <https://www.washingtonpost.com/technology/2020/05/18/facebook-google-work-from-home/> ("many experts expect the [Big Tech] companies' extended work-from-home timelines to set a similar agenda for smaller tech firms and outside industries. Other businesses have long followed in tech's trendsetting footsteps."); See NPR, Get A Comfortable Chair: Permanent Work From Home Is Coming (June 22, 2020), <https://www.npr.org/2020/06/22/870029658/get-a-comfortable-chair-permanent-work-from-home-is-coming> (insurance, investment banking, and food industries also embrace remote work during the pandemic).

[2] See Steven Peikin, Co-Director, Division of Enforcement, U.S. Securities & Exchange Comm'n, Keynote Address: Securities Enforcement Forum West 2020 (May 12, 2020), <https://www.sec.gov/news/speech/keynote-securities-enforcement-forum-west-2020> ("There are numerous active investigations of COVID-19-related potential misconduct, many of which are also proceeding at an accelerated pace. ... If history is a guide, this recent market decline and continuing economic stress may well reveal past misconduct, or result in new misconduct.").