

## Publications

### What University Scandals Teach In-House Counsel About Protecting Attorney-Client Privilege

#### Related Attorneys

Jackie Ford

#### Related Services

Employer Internal Investigations

Labor and Employment

**AUTHORED ARTICLE** | 9.19.2016

*Corporate Counsel*

Jackie Ford, a partner in the Vorys Houston office and a member of the labor and employment group, authored an article for *Corporate Counsel* titled “What University Scandals Teach In-House Counsel About Protecting Attorney-Client Privilege.” Using controversies related to the investigations at Baylor and Penn State, Jackie's article discusses several critical underpinnings for any successful investigation by outside counsel.

#### The article states:

*“In some contexts, such as workplace sexual harassment cases, an employer's investigation of, and response to, alleged misconduct may be an affirmative defense to liability. The employer cannot assert that defense without also producing evidence of the underlying investigation and institutional response, which may in turn trigger privilege concerns. With that in mind, if an employer wants to avoid basing an employment decision on a privileged report combining factual recitation with legal analysis, it must exercise considerable caution to avoid losing the privilege. One option is to bifurcate the investigation such that the fact-finding is done primarily by nonlawyer employees, while the overall investigation, analysis of factual findings and applicable law and advice about any necessary corrective action is done by outside counsel.*

*This approach has the advantage of keeping counsel's report separate from the fact-based elements of the affirmative defense, but also the obvious disadvantage of risking that an unprivileged factual investigation will be readily discoverable and, potentially, less thorough than one performed by outside investigators. If nothing else, however, in-house counsel should work with outside counsel to specify how the entire investigatory process should be structured in order to best protect the client's interest in multiple potential uses of the investigatory report.*

*Tolstoy famously observed that, while all happy families are alike, each unhappy family is unhappy in its own way. By definition, unhappy situations, rather than happy ones, spark internal investigations. Like each unhappy family, each unhappy situation investigated is unique to its own circumstances. With that in mind, in-house counsel must carefully align investigation strategy, structure and reporting with the needs of the specific client, carefully document those decisions in engagement letters and elsewhere and ensure that investigators, counsel and clients all understand those decisions and their implications."*

To read the entire article, visit the [Corporate Counsel website](#). (Subscription may be required).