

## **Municipal Law**

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# **Lawyers Are Lawyers Even When Investigating**

In January, 2005, a public school district in Berwyn, Illinois was rocked by news that one of its band teachers was arrested and charged with having molested over 20 junior high school girls over a seven-year period. Criminal charges were filed against the teacher, as well as a school principal based on allegations she had information sufficient to trigger her obligation as a mandatory reporter to notify the Department of Children and Family Services about the band teacher's conduct. A flurry of lawsuits alleging claims under various federal statutes and state law torts followed within days of the arrest, as did public outrage over the teacher's actions and the district's failure to prevent it.

The school board wanted an investigation into what exactly happened and why, and some insight into the holes in the district's oversight practices that allowed the serial molestation to continue for so long. To accomplish this, the school board hired the Sidley Austin law firm in Chicago to address the board and public concerns and provide the board with a report. This is the backdrop behind the Seventh Circuit opinion in *Sandra T.E. v. South Berwyn School District 100*, 600 F.3d 612 (7th Cir. 2010), a monumental decision preserving the confidentiality of investigation by attorneys of corporate critical incidents.

The case made its way to the Seventh Circuit after the plaintiffs in the civil lawsuits, as might be expected, wanted access to Sidley's investigation materials and report. The plaintiffs issued a subpoena to the Sidley firm for the contents of its file, including the statements taken in the course of the investigation, and the notes and memos of the Sidley lawyers who conducted the investigation. The Sidley firm and the district objected based on attorney-client and work product privileges. The district court judge, however, denied the objections, ordered the materials released, and an immediate appeal was taken from the judge's order. (After the appeal was filed, the Supreme Court decided *Mohawk Industries, Inc., v. Carpenter*, \_\_\_U.S.\_\_\_, 130 S.Ct. 599 (2009), raising a question about whether the district court order was immediately appealable, but that is a topic for another column.)

In jeopardy was a practice followed by municipal and private sector corporations everywhere. When critical incidents occur, accidents, allegations of sexual harassment or other prohibited employment practices, corruption or other events likely to lead to civil litigation, a common and effective practice is to have an investigation into the incidents conducted by attorneys. In doing so, the information gathered is shielded from discovery in any pending or impending litigation, allowing for a useful report addressing whatever deficiency in the system may have allowed the events to occur, without creating litigation ammunition for the plaintiffs, the risk of implied admissions of liability, or just plain bad publicity. Any comprehensive post-incident investigation inevitably provides a treasure trove to be exploited in litigation. Some courts may ask why the concern, because ultimately the story will be told. The same witnesses that lawyers interview while investigating will be deposed in the lawsuit, the documents will be produced, and the attorneys' post-incident conclusions or recommendations for organizational improvements are likely inadmissible anyway. But any

good investigation takes many turns and will produce at least some raw data that at later times may prove wrong, the product of faulty memories or mis-recorded facts, and even the most innocent or benign explanations for why something bad happened can be spun by a skillful plaintiff's lawyer into something devious. There is a high incentive to keep an investigation and report commissioned to improve an organization from sinking its defense in litigation.

The district court's decision in *Sandra T.E.* threatened to upend this practice. The district court ruled that the Sidley law firm was hired not to provide legal services, but to investigate. As such, they acted as investigators, not lawyers. Investigation materials had to be turned over, including the notes and memoranda of the Sidley attorneys containing their observations and mental impressions, even though such material has traditionally been excluded from disclosure under the attorney work product privilege. Even freshmen law students learn this principle in first year Civil Procedure class, in the plight of the brave Samuel Fortenbrough, in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947).

The Seventh Circuit's decision set the world of post-incident corporate investigation back on its proper axis. The court held that the view of lawyers as investigators rather than lawyers is ill-conceived. Regardless of what lawyers are hired to do, the Seventh Circuit reasoned, investigation is involved and the notion that lawyers somehow become something other than lawyers because they engage in investigation is plainly wrong. The court was buttressed by several important factors. The plaintiffs prevailed on their argument in the district court because the district superintendent and school board president announced to residents of the district that the Sidley firm was being retained to "conduct a thorough investigation." The Seventh Circuit, referring to a body of case law addressing similar issues, identified the fallacy in the district court's analysis by noting that "the relevant question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services." *Sandra T.E.*, 600 F.3d at 620. If even needed to be otherwise proven, the district's retention agreement with Sidley clarified that the firm was to "investigate the response of the school administration to allegations of sexual abuse of students" and "provide legal services in connection" with the investigation. *Sandra T.E.*, 600 F.3d at 616. In addition, the Sidley attorneys began their interviews of employees and former employees of the district with "Upjohn" warnings—a caution that the interviewer represented the corporation, not the employee, derived from *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677 (1981), a seminal decision in which the Supreme Court clarified that corporate investigations conducted by attorneys in most situations produce privileged communications. Finally, Sidley's investigation culminated with an executive summary, a written report labeled as "privileged and confidential," "attorney-client communication," and "attorney work product," provided only to the school board and discussed only in executive session during school board meetings.

The ever persistent plaintiffs' attorneys reached further and argued that although *Upjohn Co.* and other cases relied on by the court established attorney client privileges in private sector corporate investigations, no such thing exists in government. The plaintiffs pointed to *In Re: A Witness Before The Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002), where the Seventh Circuit held that former Governor George Ryan's general counsel could not assert the attorney client privilege to avoid giving testimony against Ryan before a federal grand jury. In *Sandra T.E.*, the Seventh Circuit recognized that the policy reasons for limiting the attorney related privileges in federal grand jury proceedings did not exist in the civil context. The court found it perfectly acceptable, indeed commendable, for government entities to take precautions to avoid liability, including shielding internal investigations from the reach of opposing civil litigants. The court found that "the public interest is best served when agencies of the government have access to the confidential advice of counsel regarding the legal consequences of their past and present activities and how to conform their future operations to the requirements of the law." *Sandra T.E.*, 600 F.3d at 621. Any abrogation of the attorney-client privilege would frustrate this interest.

*Sandra T.E.* provides a roadmap for how to ensure that the confidentiality of an internal investigation conducted by counsel regarding some critical incident likely to result in litigation can be preserved. The assignment should begin with a retention agreement which clarifies that the retention is for legal services, along with any other related work necessary to provide the legal representation. Where in-house government

counsel might be assigned the task, some clear written direction from the government administration should serve the same purpose. “Upjohn” warnings, or some form of them appropriate in the governmental context, should precede each witness interview. Although monikers declaring a particular document “privileged” will not create a privilege where the substance does not support it, labeling the lawyer’s written communications and report to the government as “confidential” and “privileged” could only support an argument to a court doing an in-camera review that the parties considered the relationship subject to legal representation related privileges. Finally, investigative results should be confined to the decision making authorities who requested or would benefit from legal analysis. *Sandra T.E.* preserves the ability of governmental entities to find out what exactly went wrong, why it went wrong, and with a way to obtain the expertise on how to fix it, without proving the plaintiff’s case.

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