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Attorney-Client Privilege in Investigations For Employees Who Have Given Notice

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In September 2022, the First Department upheld an order to compel production of videotaped interviews with two company employees conducted as part of an internal investigation. See *BDO USA v. Franz*, 208 A.D.3d 1088, 1089 (1st Dep't Sept. 27, 2022). In doing so, the First Department held that BDO could not have had a reasonable expectation that these interviews would be privileged because the employees had given notice prior to their interviews. Without question, in determining the scope of attorney-client privilege, courts have already distinguished between current and former employees. See, e.g., *Radovic v. City of New York*, 642 N.Y.S.2d 1015 (N.Y. Sup. Ct. April 16, 1998). But here, the First Department considered what happens in the in-between—when employees are employed with the company but have already tendered their resignation. The First Department's holding is one that corporations conducting internal investigations or otherwise considering potential privilege issues should keep in mind going forward.

In *BDO*, the company launched an internal investigation into whether a former partner had conspired with other employees to lure employees, clients and business away from BDO. As part of that investigation, corporate counsel interviewed current employees (now defendants) Matthew Franz and Donald Sowell after they had tendered their resignations, but a few weeks before they actually left the firm. Per common practice, counsel for the company provided "*Upjohn* warnings" to the individuals before beginning the interviews. After this internal investigation had concluded and after both Mr. Franz and Mr. Sowell had left BDO, BDO sued Mr. Franz and Mr. Sowell in the Supreme Court of the State of New York, New York County, for among other things, breach of contract based on the alleged breach of their employment contracts with the company. During that litigation, defendants sought to compel production of the videotapes of the interviews they gave to BDO's in-house counsel and outside counsel during the internal investigation. After several rounds of motions, the

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Supreme Court issued an order to compel production of the unredacted videotapes. See *BDO USA v. Franz*, 2022 WL 2663324 (N.Y. Sup. Ct. July 7, 2022).

On appeal, the First Department affirmed the Supreme Court's decision to compel production of the interview tapes, concluding that "BDO, the corporate client, could not have had a reasonable expectation that the interviews, which were purportedly conducted as part of an internal investigation into a former BDO executive, would be confidential, as defendants had already tendered their resignations at the time of the interviews." *BDO*, 208 A.D.3d at 1089. The First Department also reasoned that the interviews could not be protected from disclosure because "the corporate employees who provided statements to BDO's counsel [were] now defendants in this action, and the interviews were central to the facts underlying the complaint." Id.

Courts typically employ one of two different approaches for attorney-client privilege issues depending on whether the conversations in question were conducted with current or former employees. For current employees, courts typically follow the test laid out by the Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981), which dictates that privilege will apply to an attorney's communications with an employee if (i) the employee communicated with the attorney at the direction of corporate superiors, (ii) the employee made the communication to secure legal advice, (iii) the employee was aware that the purpose of the communication was for the corporation to obtain legal advice, (iv) the communication concerned matters within the scope of the employee's corporate duties, and (v) the communication was confidential. Thus, counsel often provide "*Upjohn* warnings" before beginning interviews with current employees to ensure that the elements of this test are met and that the conversation will remain privileged. For former employees, communications with corporate counsel remain privileged as long as the communications in question concerned information obtained in the scope of the former employee's employment. See *In re Richard Roe*, 168 F.3d 69, 72 (2d Cir. 1999) (holding that a document written by a former corporate counsel was privileged because it reflected knowledge obtained while employed by the company); see also *Radovic v. City of New York*, 642 N.Y.S.2d 1015, 1017 (N.Y. Sup. Ct. April 16, 1998).

The First Department's holding in 'BDO' is one that corporations and outside counsel conducting internal investigations and considering potential privilege issues should keep in mind.

But in *BDO*, the First Department appears to have created a third approach: one for still-current employees who have tendered their resignation but not yet actually left the company.

Under the more usual approach for current employees, counsel's interviews with the defendants, Mr. Franz and Mr. Sowell, would have remained privileged because they received *Upjohn* warnings before beginning the conversations. In this case, however, the First Department concluded that the conversations were subject to disclosure because the employees had already submitted their resignations at the time of their interviews, and therefore BDO could not expect the interviews to remain confidential. See *BDO*, 208 A.D.3d at 1089.

The First Department's holding in *BDO* is one that corporations and outside counsel conducting internal investigations and considering potential privilege issues should keep in mind. *BDO* suggests that the First Department will not rely on any formal distinction between current and former employees in determining whether attorney-client privilege applies. The decision also indicates that an *Upjohn* warning may not be enough to preserve attorney-client privilege in conversations with all current employees depending on the specific facts of the case. Although it remains to be seen whether other courts will similarly decline to extend attorney-client privilege to interviews with employees who have given notice or limit this holding to the facts specific to this situation (namely that the former employees were now adverse parties in litigation), corporations conducting interviews with such employees may want to consider carefully the best way to ensure whether attorney-client privilege applies and potentially explore other means of preserving privilege, such as the work-product doctrine. See *Charter One Bank, F.S.B. v. Midtown Rochester*, 738 N.Y.S.2d 179, 185 (N.Y. Sup. Ct. Feb. 5, 2002) (finding that the defendant had waived attorney-client privilege but noting that "waiver of the attorney-client privilege does not prevent a document from being protected as work product of an attorney"); but see *BDO*, 208 A.D.3d at 1089 (concluding that "the questions posed by BDO's counsel at the interviews are not protected as attorney work product because those questions are not uniquely the product of a lawyer's learning and professional skills"). Indeed, *BDO* may be a signal to corporate counsel that they may not be able to rely on the current/former employee dichotomy alone when considering privilege, and courts may use a different analysis based on the specific situation of the employees in question.