

# Ethical Dilemmas for In-House Counsel During the Pre-Litigation Employment Practices Liability Insurance Audit

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*ABSTRACT: This Note addresses the current landscape of Employment Practices Liability Insurance (“EPLI”). EPLI provides liability coverage for employers at risk of employment-practices lawsuits alleged by individuals within an organization—for claims such as discrimination, retaliation, or harassment. This Note focuses on the ethical pitfalls facing in-house counsel during the pre-litigation EPLI audit of the insured employer. Following the introduction in Part I, Part II of this Note provides some of the contextual and historical background to the EPLI insurance discussion. Part III of this Note addresses the ethical concerns facing in-house counsel during the pre-litigation audit, including confidentiality, attorney–client privilege, work-product doctrine, and conflicts of interest. Part IV of this Note concludes with some proposed solutions to help in-house counsel manage the ethical dilemmas present during the EPLI process.*

I.	INTRODUCTION.....	1364
II.	BACKGROUND .....	1367
	A. HISTORY & CONTEXT OF EMPLOYMENT PRACTICES LIABILITY INSURANCE (EPLI).....	1367
	B. THE EPLI PROCESS.....	1371
	C. THE DUTY TO DEFEND.....	1374
III.	ETHICAL DILEMMAS FOR IN-HOUSE COUNSEL DURING THE PRE-LITIGATION EPLI AUDIT .....	1377
	A. CONFIDENTIALITY.....	1378
	B. ATTORNEY–CLIENT PRIVILEGE .....	1381
	C. WORK-PRODUCT DOCTRINE.....	1383
	D. CONFLICT OF INTEREST.....	1383

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IV.	SOLUTIONS .....	1386
A.	CLARIFYING THE BOUNDARIES BETWEEN LEGAL AND BUSINESS COMMUNICATIONS WITHIN THE ORGANIZATION.....	1386
B.	NEGOTIATING THE BOUNDARIES OF CONFIDENTIALITY UP-FRONT DURING THE EPLI UNDERWRITING STAGE .....	1388
C.	GETTING INVOLVED WITH LEGAL ETHICS COMMITTEES AND THE AMERICAN BAR ASSOCIATION .....	1389
D.	MAINTAINING CANDOR AND FAIRNESS AT ALL TIMES.....	1390
V.	CONCLUSION .....	1391

## I. INTRODUCTION

In 2018, on behalf of the U.S. Department of Justice, Acting Assistant Attorney General John Gore stated that “[a]ll Americans are entitled to work with dignity in a place that is free of sexual harassment.”<sup>1</sup> The basic need for employment must be balanced with policies that promote human dignity in the workplace. Part of advocating for human dignity in the workplace is holding companies accountable for workplace harassment<sup>2</sup> and discrimination.<sup>3</sup> This is particularly true as employment-related litigation—like sexual harassment—continues to rise in frequency.<sup>4</sup> In a 1996 law review article, Joseph P. Monteleone stated that “[e]mployment-related litigation has unfortunately reached every nook and cranny of this vast

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1. Press Release, U.S. Dep’t of Just., Off. of Pub. Affairs, Justice Department Launches Initiative to Fight Sexual Harassment in the Workplace (Mar. 5, 2018) (quoting Acting Assistant Attorney General John Gore), <https://www.justice.gov/opa/pr/justice-department-launches-initiative-fight-sexual-harassment-workplace> [<https://perma.cc/TZ5M-USC3>].

2. See *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, [https://www.eeoc.gov/laws/types/sexual\\_harassment.cfm](https://www.eeoc.gov/laws/types/sexual_harassment.cfm) [<https://perma.cc/6UAV-W9KF>] (“It is unlawful to harass a person (an applicant or employee) because of that person’s sex. Harassment can include ‘sexual harassment’ or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature . . . and can include offensive remarks about a person’s sex.”).

3. See *Retaliation*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/retaliation.cfm> [<https://perma.cc/QUN2-HDS8>] (explaining that “[r]etaliation is the most frequently alleged basis of discrimination in the federal sector and the most common discrimination finding” and that retaliation occurs when the employer unlawfully “retaliate[s] against applicants or employees for” participation in a protected activity like “answering questions during an employer investigation of alleged harassment”).

4. See Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data (Apr. 10, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm> [<https://perma.cc/4K2X-66TG>] (“[W]e cannot look back on last year without noting the significant impact of the #MeToo movement in the number of sexual harassment and retaliation charges filed with the agency. . . . The agency . . . received 7,609 sexual harassment charges—a 13.6 percent increase from FY 2017—and obtained \$56.6 million in monetary benefits for victims . . .”).

nation.”<sup>5</sup> Today, this is evidenced by the scope of the #MeToo movement,<sup>6</sup> a phrase coined by Tarana Burke “in 2006 to address rampant sexual violence” in her community.<sup>7</sup> One benefit of the #MeToo movement is its increased transparency of workplace harassment and discrimination, and the transformation of employment-related practices and policies.<sup>8</sup> In the future, the #MeToo movement “may also lead to additional innovations in employ[ment] practices, fueled by a tech industry ready to test new approaches with real time analytics.”<sup>9</sup> The transformation of employment-related practices may take time, but employers are expected to finance the defense of workplace allegations immediately as they occur.

This Note addresses the recent developments and ethical concerns with Employment Practices Liability Insurance (“EPLI”). Employers choose to purchase EPLI to protect their company from the risk of large jury awards and the defense costs associated with wrongdoing alleged by employees.<sup>10</sup> EPLI coverage can also benefit employees—because of the potential payout from the insurer—especially when the employer cannot cover the costs of settlement up front.<sup>11</sup> Without EPLI, “employers exclusively b[ear] these damages payable to injured employees, EPLI . . . allows employers to pass these costs on to insurance companies, who charge a premium to offset their

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5. Joseph P. Monteleone, *Employment Practices Liability Insurance (EPLI) Policies: Who Controls Selection of Defense Counsel*, 18 W. NEW ENG. L. REV. 159, 177 (1996).

6. See The Editors, *The Reach of #MeToo*, COLUM. JOURNALISM REV. (2019), [https://www.cjr.org/special\\_report/reach-of-metoo.php](https://www.cjr.org/special_report/reach-of-metoo.php) [<https://perma.cc/XGE8-NJ2K>] (“The #MeToo movement began in the United States with a hashtag coined by Tarana Burke, and it has become a global phenomenon [from the United States to India].”). *But see* Megan Twohey, Jodi Kantor & Jan Ransom, *All Bets Are off as Harvey Weinstein’s Sexual Assault Trial Opens Today*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/01/05/us/harvey-weinstein-trial.amp.html> [<https://perma.cc/M26D-6KZE>] (“Lawyers for Mr. Weinstein, who [is accused of workplace sexual misconduct and] lost his company, his reputation and his marriage, are arguing that the case is proof that #MeToo has gone too far.”).

7. Morgan Jerkins, *The Way Forward for Me Too, According to Founder Tarana Burke*, VOX (Oct. 15, 2019, 8:30 AM), <https://www.vox.com/platform/amp/identities/2019/10/15/20910298/tarana-burke-morgan-jerkins> [<https://perma.cc/2M7R-RNKN>].

8. Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 298 (2018).

9. *Id.*

10. See Stephanie D. Gironde & Kimberly W. Geisler, *Employment Practices Liability Insurance: A Guide to Policy Provisions and Challenging Issues for Insureds and Plaintiffs*, 33 A.B.A. J. LAB. & EMP. L. 55, 55–56 (2017) (“Large jury verdicts under the Civil Rights Act of 1991 and renewed public attention to sexual harassment prompted increased sales of EPLI. Today, EPLI is key to risk management for employers of all sizes . . .” (footnote omitted)).

11. Danielle Paquette, *More Companies Are Buying Insurance to Cover Executives Who Sexually Harass Employees*, WASH. POST (Nov. 3, 2017), [https://www.washingtonpost.com/business/economy/more-companies-are-buying-insurance-against-sexual-harassment-complaints/2017/11/02/a7297f9a-bd69-11e7-959c-fe2b598d8c00\\_story.html](https://www.washingtonpost.com/business/economy/more-companies-are-buying-insurance-against-sexual-harassment-complaints/2017/11/02/a7297f9a-bd69-11e7-959c-fe2b598d8c00_story.html) [<https://perma.cc/2TCZ-6ZTS>] (“In cases against smaller or midsize employers, it can help[] [employees] . . . [b]ecause if you have a significant claim, they might not have the capital or liquidity to pay such a claim without the insurance.” (internal quotation marks omitted)).

liability.”<sup>12</sup> While EPLI coverage can benefit both employers and employees, it is worth acknowledging that plaintiffs may have mixed feelings knowing that the employer “may rely on the coverage to lessen the potential financial consequences of a harassment claim[, and that] can also be toxic.”<sup>13</sup> However, the fact of the matter is that “[e]mployers and EPLI providers know that developing sound employment practices now . . . will pay dividends in preventing employment-related allegations and lawsuits” in the future.<sup>14</sup> EPLI carriers are thus generally willing to assist employers in the development of better workplace practices.<sup>15</sup>

It is imperative for attorneys who handle employment cases—as well as the employer’s in-house counsel—to understand the contours of EPLI as it becomes a more common type of coverage.<sup>16</sup> In particular, defense “attorneys need to understand the structure of a typical EPLI policy and, . . . the special challenges of working with EPLI insurers.”<sup>17</sup> Some of these EPLI-related challenges involve serious ethical dilemmas for attorneys under the ABA Model Rules of Professional Conduct (“Model Rules”).<sup>18</sup>

This Note submits that in-house legal counsel for the insured employer face ethical dilemmas during the pre-litigation EPLI audit. First, to better understand the purpose and background of EPLI, Part II of this Note covers the history of EPLI, the process of filing a claim, and the traditional tripartite relationship of representation that is formed between the insured employer, insurance carrier, and the defense attorney. Additionally, Section II.C of this Note discusses the ethical dilemmas intertwined with the insurance carrier’s express duty to defend. Legal scholars, like Amy S. Moats,<sup>19</sup> as well as the

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12. Shaubin Talesh, *Legal Intermediaries: How Insurance Companies Construct the Meaning of Compliance with Antidiscrimination Laws*, 37 LAW & POL’Y 209, 210 (2015).

13. Paquette, *supra* note 11.

14. Nancy H. Van der Veer, Note, *Employment Practices Liability Insurance: Are EPLI Policies a License to Discriminate? Or Are They a Necessary Reality Check for Employers?*, 12 CONN. INS. L.J. 173, 205 (2005).

15. See *infra* Section II.B (describing the services offered to the insured employer following the EPLI audit, including assistance with handbooks and access to employment-related resources); see also *Employment Practices Liability Insurance for Professional Firms*, CHUBB, <https://www.chubb.com/us-en/business-insurance/employment-practices-liability-insurance-for-professional-firms.aspx> [<https://perma.cc/BKL6-FUVQ>] (“Chubb is committed to helping our customers prevent losses before they occur in the first place.”).

16. Gironda & Geisler, *supra* note 10, at 56.

17. *Id.*

18. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS’N 2020); see *infra* Part III (detailing the ethical conflicts under the ABA Model Rules for in-house counsel for the insured employer during the pre-litigation EPLI audit).

19. Amy S. Moats, Note, *A Bermuda Triangle in the Tripartite Relationship: Ethical Dilemmas Raised by Insurers’ Billing and Litigation Management Guidelines*, 105 W. VA. L. REV. 525, 525–26 (2003).

American Bar Association<sup>20</sup> recognize the ethical dilemmas involved with the traditional tripartite relationship of representation in jurisdictions that permit defense counsel to jointly represent the insured and the insurer.<sup>21</sup> However, this Note proposes that there are also ethical dilemmas before litigation commences for the in-house legal counsel of the insured employer. Part III of this Note outlines some of the ethical dilemmas for in-house counsel that occur during the pre-litigation EPLI audit, including confidentiality,<sup>22</sup> attorney–client privilege,<sup>23</sup> work-product doctrine,<sup>24</sup> and conflict(s) of interest<sup>25</sup> as defined in the Model Rules. Part IV of this Note proposes the following solutions to the ethical dilemmas for in-house counsel during the pre-litigation EPLI audit and investigative process: (1) clarifying the boundaries between legal and business communication to protect the attorney–client privilege; (2) negotiating the bounds of confidentiality upfront during the underwriting process of the EPLI policy; (3) encouraging in-house legal counsel to get involved with ethics committees and increasing lobbying to the ABA for more guidance in the Model Rules; and (4) maintaining candor and fairness in the profession at all times.

## II. BACKGROUND

### A. HISTORY & CONTEXT OF EMPLOYMENT PRACTICES LIABILITY INSURANCE (EPLI)

To address the rise in workplace litigation, many employers carry EPLI—a form of liability insurance that has been around since at least the 1980s.<sup>26</sup> Though initially intended only to provide employers coverage for wrongful termination claims, EPLI now “cover[s] a wide array of” employment-related lawsuits—including harassment and discrimination.<sup>27</sup> Employers increasingly

20. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 01-421 (2001) (addressing “the ethical issues that arise under the Model Rules of Professional Conduct when a lawyer retained by an insurance company to defend an insured is required to work under litigation management guidelines or other restrictions imposed by the insurer”).

21. See *infra* Section II.C.

22. See *infra* Section III.A.

23. See *infra* Section III.B.

24. See *infra* Section III.C.

25. See *infra* Section III.D.

26. Gironda & Geisler, *supra* note 10, at 55. Notably, EPLI is different from workers’ compensation insurance which provides employers with coverage for injuries that occur during the course of employment. See generally Robert M. Horkovich & Mark Garbowski, *EPLI and the #MeToo Movement*, 65 RISK MGMT. 10 (2018) (discussing how EPLI policies only cover employment-practices claims and exclude workers compensation claims).

27. TORT TRIAL & INS. PRAC., AM. BAR ASS’N, THE PRACTITIONER’S GUIDE TO DEFENSE OF EPL CLAIMS 436 (Amy S. Wilson ed., 4th ed. 2018) [hereinafter WILSON] (“EPL policies now typically cover a wide array of employment claims, including wrongful termination, harassment, discrimination, and retaliation. They may also cover claims arising from violations of the Family and Medical Leave Act.”). Employers should also make sure to check state laws which can differ from federal laws. See SEYFARTH SHAW LLP, EMPLOYMENT PRACTICES LIABILITY LOSS PREVENTION: A PRACTICAL GUIDE FROM CHUBB 29 (“Federal antidiscrimination laws do not preempt more

began purchasing EPLI policies following the 1991 amendments to the Civil Rights Act of 1964<sup>28</sup> (“Title VII”).<sup>29</sup> Title VII increased employment-related litigation<sup>30</sup> because, for the first time, employers owed a duty to their employees to provide a workplace free from discrimination or harassment on the basis of “race, color, religion, sex, or national origin.”<sup>31</sup> Also, after the 1991 Title VII amendments, cases could be tried in front of a jury, exposing employers to increasingly “[l]arge jury verdicts.”<sup>32</sup> The purpose of employers purchasing EPLI following the Title VII amendments was thus “to secure their businesses from the potentially devastating effects of discrimination lawsuits.”<sup>33</sup> In addition to Title VII, the 1991 televised hearings to confirm Clarence Thomas’ appointment to the U.S. Supreme Court changed the atmosphere surrounding employment litigation, and put preventing and insuring against “workplace sexual harassment in the forefront of the business, legal, and general news media.”<sup>34</sup>

By 2012, “employees [we]re suing their employers in record numbers, and that trend is not likely to change.”<sup>35</sup> The scope of individuals liable for workplace-related claims under Title VII has also expanded over the years. For example, in 2013 the Supreme Court of the United States expanded the definition of “employee” to include “a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take

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restrictive state laws . . . . Although these laws are similar to the federal laws already discussed, key differences include the following: 1) state laws generally apply to smaller employers that may be exempt from compliance with the comparable federal law; 2) state laws may create additional protected statuses (e.g., sexual orientation, marital status, residency); 3) state laws may provide for damages (such as unlimited punitive damages) that are not available under federal law; and 4) state laws may not require exhaustion of administrative procedures and may allow plaintiffs to proceed directly to court. It is imperative that employers discern what obligations their local jurisdictions impose.”).

28. Gironda & Geisler, *supra* note 10, at 55–56.

29. Civil Rights Act (Title VII) of 1964, 42 U.S.C. § 2000e (2018). The provisions of Title VII apply to employers with 15 or more employees. *Id.*

30. Gironda & Geisler, *supra* note 10, at 55–56.

31. 42 U.S.C. § 2000e-2 (“It shall be an unlawful employment practice for an employer —(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

32. Gironda & Geisler, *supra* note 10, at 55.

33. Van der Veer, *supra* note 14, at 175.

34. WILSON, *supra* note 27, at 2. During his confirmation hearings, Supreme Court nominee Clarence Thomas was accused by law professor Anita Hill of sexually harassing her while he was head of the Equal Employment Opportunity Commission (“EEOC”). *Id.*

35. Charles G. Meyer, III, *The Case for Employment Practices Liability Insurance*, EMP. RELS. L.J., Autumn 2012, at 54, 54.

tangible employment actions.”<sup>36</sup> The EPLI industry has grown alongside the rise in employment-related claims and expanding scope of Title VII. While there were only five carriers in 1991, “[n]ow there are more than fifty carriers with a volume of business of \$1.72 billion just in the United States.”<sup>37</sup>

By 2014, “forty-one percent of companies with more than one thousand employees had stand-alone EPLI [policies].”<sup>38</sup> Unfortunately, EPLI is “prohibitively expensive” for small business owners.<sup>39</sup> “Small business[] [owners] are the least likely [to] have taken out an EPLI policy, but are also the most vulnerable if hit with a claim.”<sup>40</sup> It may be wise for small business owners to simply focus on improving employment practices,<sup>41</sup> but they “are less likely . . . to have dedicated human resources departments and in-house legal counsel” to assist with federal EEOC and state law compliance.<sup>42</sup> Many smaller companies also lack the financial resources to successfully defend an employee lawsuit without EPLI coverage.<sup>43</sup> EPLI deductibles in 2013 ranged “between \$5,000 and \$20,000, particularly for small to midsize privately held companies.”<sup>44</sup> Additionally, “[d]efense costs regularly range from \$200,000 to \$300,000 per lawsuit, which often take between 18 to 24 months to resolve.”<sup>45</sup> However, for most employers “EPLI is a bargain at any price” because the benefits of financial protection against potential lawsuits generally outweigh the costs of the monthly premiums.<sup>46</sup>

36. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) (clarifying the *Faragher-Ellerth* defense framework in its applicability to workplace supervisors as employees); *see also* Talesh, *supra* note 12, at 227 (“[U]nder traditional agency law principles, an employer can be held vicariously liable under Title VII if one of its supervisors engages in discriminatory behavior.”).

37. WILSON, *supra* note 27, at 1–2. According to ISO MarketStance, the industry is expected to grow “[a]nother 49 percent . . . in the coming years, eventually reaching \$3.1 billion in 2025.” David Tobenkin, *EPLI: Protection Against Bad Actors at Work*, SHRM (Aug. 23, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0918/pages/epli-protects-against-bad-actors-at-work.aspx> [<https://perma.cc/Y4GC-gQNW>].

38. Gironde & Geisler, *supra* note 10, at 56.

39. Liz O’Brien, *Do Doctors Need EPLI?*, MED. ECON., Mar. 3, 2006, at 77, 77.

40. Meyer, *supra* note 35, at 55.

41. O’Brien, *supra* note 39, at 77 (“[For an] even greater incentive to reduce your liability in this area through good employment practices . . . [a]ppoint one of your partners as human resource director, responsible for making sure your state’s labor laws are followed and good management practices [are] implemented.”).

42. Meyer, *supra* note 35, at 55.

43. *Id.* (“The reality is that many smaller employers simply do not have the resources to develop, implement, and maintain all of the human resources policies, procedures, and records necessary to properly protect their businesses and mount a successful defense if the company ever gets sued by an employee.”).

44. David Schooler, *Ethical Issues for Defense Counsel in Employment Practices Liability Insurance Litigation*, 80 DEF. COUNS. J. 201, 205 (2013).

45. Teresa Lewi, *Employment Practices Liability Insurance Policies*, ABA (Nov. 21, 2016), <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2016/fall2016-employment-practices> [<https://perma.cc/KJD7-3XWL>].

46. Jill S. Cox, *Employment Practices Liability Insurance*, PAPER360°, Apr. 2008, at 46, 46.

Today, EPLI continues to evolve as claims diversify and premiums increase.<sup>47</sup> Coverage may include “judgments, settlements, back pay and front pay awards, pre-judgment and post-judgment interest, attorneys’ fees and costs, and defense expenses.”<sup>48</sup> The type of claim covered under an EPLI policy varies, but usually includes discrimination, harassment, hostile work environment, wrongful termination, Family Medical Leave Act (“FMLA”),<sup>49</sup> Americans with Disabilities Act (“ADA”),<sup>50</sup> and Age Discrimination in Employment Act (“ADEA”)<sup>51</sup> violations. Additionally, some “policies now cover retaliation, defamation, [and] invasion of privacy.”<sup>52</sup> Coverage generally excludes wage and hour claims,<sup>53</sup> punitive damages, bodily injury, property damages, and *intentional* wrongdoing on the grounds that coverage for these claims are traditionally against public policy in the employment context.<sup>54</sup> Bodily injury and property damages could also be covered by other insurance policies such as general liability or directors’ and officers’ (“D&O”) liability

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47. Lewi, *supra* note 45 (“[R]ecent employment law trends indicate that EPLI coverage options will continue to evolve as the types of EPLI claims become more diverse.”).

48. Girona & Geisler, *supra* note 10, at 57.

49. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2018). FMLA guarantees eligible employees job-protected leave to care for family or themselves for up to 12 weeks for a serious health-related condition. *Id.* § 2612. FMLA leave is unpaid. *Id.*

50. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101–12213 (2018); *id.* § 12101(b) (“It is the purpose of this chapter—(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”); *see also* 28 C.F.R. pt. 35 (2020) (Title II Regulations); 28 C.F.R. pt. 36 (Title III Regulations).

51. Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621–634 (2018). The ADEA prohibits employment discrimination on the basis of age by “promot[ing] employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.” *Id.* § 621(b); *see also* 29 C.F.R. pt. 1625 (ADEA Regulations).

52. Talesh, *supra* note 12, at 211.

53. Cox, *supra* note 46, at 49 (“Wage and hour claims are not always clearly covered under the terms of a typical EPLI policy. In recent years, some EPLI carriers have begun offering definitive coverage for wage and hour claims. This wage and hour coverage might be for defense costs only or it might include defense and settlement, and it is sometimes subject to sublimits that are lower than the overall policy limits.”).

54. Schooler, *supra* note 44, at 201 (“Additional exclusions in EPLI policies exist for bodily injury and property damage and intentional wrongdoing.”); Van der Veer, *supra* note 14, at 192–93 (“Despite coverage by some insurance policies of intentional acts or conduct, public policy may prevent the coverage of claims for intentional conduct on the part of the insured. . . . [N]o individual or entity should profit from his own malfeasance. . . . The public policy against insuring for intentional torts is generally grounded in a fear of moral hazard, the danger that insurance may encourage wrongful or negligent behavior.” (footnotes omitted)).



insurance.<sup>55</sup> Stand-alone EPLI coverage is preferred because it can be more tailored to an employer's particular needs and provides entities with broader protection.<sup>56</sup> Whereas, general liability and D&O policies only cover "named insureds in their individual capacity," rather than the entity as a whole.<sup>57</sup>

### B. THE EPLI PROCESS

Like most insurance policies, the EPLI process starts with underwriting. Employers have different needs, so "[t]here is no standardized EPLI policy" across insurance carriers.<sup>58</sup> This lack of uniformity means that the employer, in-house legal counsel, and human resources personnel will need to read coverage terms and initial disclaimers very closely during the underwriting stage.<sup>59</sup> For example, the employer should know to ask the underwriters if independent contractors and seasonal workers are covered.<sup>60</sup>

Employers should also be aware that EPLI "[p]olicies issued are on a claims-made basis."<sup>61</sup> The Chubb Group of Insurance Companies—a leader in specialty insurance products and risk services<sup>62</sup>—states that coverage is "claims made coverage, which applies only to 'claims' first made [or reported] during the 'policy period.'"<sup>63</sup> Claims-made coverage means that any potential claim must be promptly reported during the coverage period, and coverage is typically not retroactive to cover prior acts. An agreed-upon retroactive date of coverage can, however, be negotiated during the underwriting stage.<sup>64</sup> A

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55. See Tobenkin, *supra* note 37.

56. Cox, *supra* note 46, at 46 ("Most companies prefer stand-alone coverage because the policies contain definitions and damages allowances/exclusions that are specifically tailored to EPLI matters.")

57. Van der Veer, *supra* note 14, at 186–87.

58. *Id.* at 188.

59. Lewi, *supra* note 45 ("In the absence of uniformity among EPLI policies, policyholders should assess the most common or likely employment-related claims they may face, and examine critical policy terms and the scope of available EPLI coverage to determine not only what coverage should be purchased but how to maximize the value of the coverage in the case of a loss.")

60. Cox, *supra* note 46, at 46 ("You will want to determine how seasonal, temporary, leased or contract employees will be treated, and how newly acquired organizations and subsidiaries are regarded under the policy.")

61. Van der Veer, *supra* note 14, at 196.

62. See *About Chubb*, CHUBB, <https://www.chubb.com/us-en/about-chubb> [<https://perma.cc/WS62-SY72>] ("Chubb is the world's largest publicly traded property and casualty insurance company, serving consumers and companies of all sizes with traditional and specialty insurance products and industry-leading claims and risk engineering services.")

63. Van der Veer, *supra* note 14, at 196.

64. See Horkovich & Garbowski, *supra* note 26, at 10–11 (describing how retroactive dates can be negotiated with the carrier but only during the underwriting stage of the EPLI policy). However, there is no absolute guarantee of coverage for retroactive acts, because whether a retroactive harassment claim in its *entirety* falls within the agreed upon policy period may be an issue of material fact as stated in *Manganella v. Evanston Insurance Co.*, 700 F.3d 585, 588 (1st Cir. 2012) (holding that "a [w]rongful [e]mployment [p]ractice must have 'happened' in its 'entirety' during the policy period or after the retroactive date").

claims-made policy helps the insurer reassure “itself that it is not writing insurance for a ship that is already sinking.”<sup>65</sup> Thus, the insurer will do an employment practices audit of the employer during the coverage determination period. The pre-litigation audit is a key step in the underwriting process, because it allows the insurer to assess the employer’s risk of future employment-practices litigation.

The pre-litigation audit is typically oriented toward the approval of the EPLI application as opposed to a formal investigation once a claim is filed—but the fact-gathering process is still extensive. During the pre-litigation audit “the employer [must] disclose, in detail, information about all policies relating to discrimination and wrongful employment practices” in addition to providing documents such as a copy of the employee handbook.<sup>66</sup> EPLI policies are renewed annually, and “require employers to disclose all previous litigation, administrative proceedings, demand letters, formal or informal government investigations or inquiries, and EEOC investigations that have occurred in the previous policy period.”<sup>67</sup> The initial or annual audit is intended to “hold[] employers accountable,” because the insurer may refuse to renew the EPLI policy or increase premiums if discriminatory or wrongful employment practices are discovered.<sup>68</sup> The audit also provides suggestions for improvement and employment-related resources, including risk management services, web-based resources, toll-free hotlines “to put employers in direct contact with law firms or lawyers,” newsletters, sample handbooks, and confidential third-party audits.<sup>69</sup>

There are criticisms of employers and third parties conducting a pre-litigation audit or investigation of the employer’s workplace. First, legal scholar Elizabeth Tippet notes that scholars and sociologists have taken a “skeptical stance towards . . . employers adopt[ing] internal mechanisms to address discrimination and harassment long before there was a *legal*

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65. WILSON, *supra* note 27, at 21. In fact, there are some industries that carriers refuse to cover as a result of the #MeToo movement. Ted Knutson, *After #MeToo, Insurers Are Forcing More Execs into Training, but Raising Premiums Selectively*, FORBES (Feb. 22, 2018, 12:56 PM), <https://www.forbes.com/sites/tedknutson/2018/02/22/metoo-forcing-more-ceos-into-training-rooms-than-into-their-wallets> [<https://perma.cc/8JUC-FSEG>] (“[A] small slice of companies can’t get new coverage at all. The #MeToo Movement went viral last October after The New York Times reported over a dozen women had accused now-deposed movie producer Harvey Weinstein of sexual harassment and assaults. Since then, insurers have stopped writing new EPL policies for studio/production companies . . . .”); Susan Antilla, *Entire Industries Are Being Blacklisted by Insurers Over #MeToo Liability*, INTERCEPT (Feb. 2, 2019, 9:30 AM), <https://theintercept.com/2019/02/02/workplace-harassment-insurance-metoo> [<https://perma.cc/3FUH-RRJV>].

66. Van der Veer, *supra* note 14, at 193; Talesh, *supra* note 12, at 230 (“EPLI insurers also often audit an employer’s written policies, procedures, forms, and handbooks to determine whether they comply with federal, state, and local laws.”).

67. Van der Veer, *supra* note 14, at 194.

68. *Id.*

69. *Id.* at 201–04.

justification for doing so.”<sup>70</sup> In addition, these audits tend to “represent a form of ‘symbolic compliance’ intended to signal the employer’s ‘attention to’ legal norms,” where unfortunately, “[t]he efficacy of those [symbolic compliance] processes is *secondary*.”<sup>71</sup>

Another criticism of the pre-litigation employment practices audit and investigation stems from the *Faragher-Ellerth* defense.<sup>72</sup> The *Faragher-Ellerth* defense provides an affirmative defense for employers who enact reasonable disciplinary measures following an internal investigation into wrongdoing.<sup>73</sup> The defense stems from two “1998 Supreme Court rulings, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*.”<sup>74</sup> Employers satisfy the “defense if (1) the employer took reasonable measures to *prevent* or redress the harassment, and (2) the plaintiff unreasonably fails to take advantage of those measures.”<sup>75</sup> However, Tippett argues that courts typically apply too low of a standard of reasonableness in employment litigation cases, and “the *Faragher[-Ellerth]* defense essentially insulates employers from liability following an initial harassment complaint,” if preventative measures for such conduct were taken.<sup>76</sup> Following the #MeToo movement, Tippett also warns employers “that superficial disciplinary measures following an investigation will [not] satisfy the *Faragher[-Ellerth]* defense.”<sup>77</sup> Reasonable measures to prevent harassment should include changing company-wide policies, or commencing disciplinary actions as a result of an EPLI or an independent third-party audit.<sup>78</sup> Today, however, courts are on high alert for reoccurring patterns of misconduct—particularly the concealment of misconduct—whenever a pre-litigation employment practices audit occurs.<sup>79</sup>

70. Tippett, *supra* note 8, at 244 (emphasis added).

71. *Id.* (emphasis added).

72. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (“[H]old[ing] that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer’s conduct as well as that of a plaintiff victim.”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (finding “[n]o affirmative [*Ellerth*] defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment”).

73. Tanina Rostain, *The Emergence of “Law Consultants,”* 75 *FORDHAM L. REV.* 1397, 1418 (2006) (“In the employment arena, investigations are also an important dimension of compliance, functioning as part of a defense to show that an employer ‘exercised reasonable care to prevent and correct promptly any sexually harassing behavior.’” (quoting *Ellerth*, 524 U.S. at 745)).

74. Tippett, *supra* note 8, at 239.

75. *Id.* (emphasis added).

76. *Id.* at 240.

77. *Id.* at 247.

78. *See id.* at 246 n.121.

79. *Id.* at 236 (describing how courts may be “grow[ing] more stringent in their application of the *Faragher[-Ellerth]* defense, which relates to the reasonableness of the employer’s efforts to prevent and address discrimination. The Me-Too movement revealed defects in employers’ internal compliance systems, which may make judges and juries more receptive to arguments that the employer’s efforts were unreasonable.”).

Following the initial audit, the EPLI application may be approved or renewed by the carrier. Then, an employment practices claim can commence in the future when any of the following events occur: (1) an “insured receives a written demand for relief that is within the scope of the policy’s coverage”; (2) there is “[a] written demand or request for mediation or arbitration”; (3) there is “[r]eceipt by the insured of a Notice of a Charge of Discrimination from the EEOC or . . . another federal, state, or local agency”; or, (4) the insurer receives a copy of a civil notice of service for a complaint or pleading filed against the insured employer.<sup>80</sup> Once a complaint is reported to the EPLI carrier, a tripartite relationship of representation forms between the insured employer, insurer, and defense attorney.<sup>81</sup> In a majority of jurisdictions, the defense attorney will jointly represent the insured and the insurer, so long as he or she can satisfy all ethical obligations and maintain independent legal judgement.<sup>82</sup>

### C. THE DUTY TO DEFEND

After litigation commences, EPLI coverage presents ethical dilemmas for defense attorneys involved in the traditional tripartite insurance relationship formed between the insured employer, insurer, and defense attorney. This Note will not go in-depth into all of the ethical dilemmas involved in the tripartite EPLI relationship. However, legal scholars have identified six ethical concerns,

includ[ing]: 1) identifying the client; 2) determining who controls the selection of defense counsel; 3) analyzing whether a reservation of rights<sup>83</sup> *changes* who controls the selection of counsel; 4) complying with litigation management guidelines; 5) determining who manages the litigation [process]; and 6) analyzing who controls the decision to settle.<sup>84</sup>

In addition to the six dilemmas listed above, the determination of who controls the selection of defense counsel is ethically complicated by the insurer’s express duty to defend.<sup>85</sup>

80. WILSON, *supra* note 27, at 11–12.

81. Moats, *supra* note 19, at 525.

82. See MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS’N 2020) (“Loyalty and independent judgement are essential elements in the lawyer’s relationship to a client.”).

83. Schooler, *supra* note 44, at 201–02 (“[A] reservation of rights . . . ‘allows the insurer to comply with the defense obligations without waiving its right to a derogative defense at [a] later date or its right to refuse indemnity for non-covered claims[]’ . . . [and] alter the right of the insurance company to assign counsel, depending on the state in which the case is venued.”).

84. *Id.* at 201 (emphasis added).

85. Gironda & Geisler, *supra* note 10, at 59 (“EPLI policies vary widely with respect to the duty to defend and the related right to select defense counsel. Insurers that assume the duty to defend normally reserve the right to select defense counsel.”).

The duty to defend is a common provision in liability insurance policies, and it provides the insurer with the right to control the selection of defense counsel once it is notified of a potential claim.<sup>86</sup> There is usually a panel of pre-approved local attorneys from which the carrier selects counsel.<sup>87</sup> Some carriers permit insured employers to pre-select defense counsel, but

Insurance companies almost always reject this option and do so for several reasons: 1) the insurer has the right to appoint counsel; 2) most insurers have found that panel counsel is more economical and gets better results; and 3) the counseling law firm that provided advice regarding the termination may have a conflict of interest because it is now a [potential] witness.<sup>88</sup>

Although there has been a recent push by EPLI carriers to “allow the insured a voice in the selection of counsel,” insurers are generally more concerned with avoiding “unqualified legal representation” and maintaining “control over [legal] fees,” such as billable hours.<sup>89</sup> The duty to defend also allows the EPLI insurer to control the litigation process and choose whether to approve of various litigation tactics.<sup>90</sup> For example, the EPLI insurer may restrict what defense counsel is permitted to pursue in the course of litigation (e.g., depositions, mediations, and subpoenas) to cut costs.<sup>91</sup> In effect, the insured employer loses its choice in representation if it does not reserve the right to select independent counsel during the negotiation or renewal stage of the

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86. Richard D. Fincher, *Mediating Class Action Litigation Involving the EEOC: Insights for Employment Mediators and Counsel*, 67 DISP. RESOL. J. 19, 36 (2013) (“[T]he carrier’s ‘duty to defend’ the client . . . creates significant control by the carrier over litigation strategy. This issue includes who will be the defense attorney: is the existing law firm acceptable to the carrier, or will the carrier impose its own counsel?”).

87. Gironda & Geisler, *supra* note 10, at 59 (“Insurers tend to use a pre-approved list of firms or individual attorneys with employment litigation experience in a particular market. Insureds with experience with a particular firm may seek to include a policy provision naming that firm as pre-selected counsel. Even if the insured’s preferred counsel is not pre-approved before policy issuance, the insurer may consent to the insured’s selection after a claim arises. Nevertheless, insurers are more likely to approve such requests if made during policy negotiations.” (footnote omitted)).

88. Schooler, *supra* note 44, at 203.

89. RICHARD S. BETTERLEY, THE BETTERLEY REPORT: EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2015, at 13 (2015).

90. Gironda & Geisler, *supra* note 10, at 61 (“Because insurers pay for the defense, EPLI policies usually allow them to steer the defense and control costs with litigation management guidelines.”).

91. *See id.* at 62 (“EPLI carriers frequently require pre-approval for fundamental litigation tools, such as ‘(1) hiring an expert; (2) hiring an investigator; (3) taking depositions; (4) videotaping depositions; (5) filing motions; (6) undertaking discovery; (7) expenditures for travel; (8) computerized legal research; and (9) determining how many attorneys may attend depositions, hearings, and trials.’” (quoting Amber Czarnecki, *Ethical Considerations Within the Tripartite Relationship of Insurance Law—Who Is the Real Client?*, 74 DEF. COUNS. J. 172, 182 (2007))).

EPLI policy.<sup>92</sup> In a majority of jurisdictions, if the deadline to waive or negotiate the duty to defend has passed, the EPLI carrier reserves the right to defend the claim and select counsel from their pre-approved panel of defense attorneys without the prior consent of the insured employer.<sup>93</sup> For these reasons, the express duty to defend often invokes tension between the insured employer and the EPLI carrier.

The duty to defend also presents ethical dilemmas for defense attorneys selected from the EPLI panel depending on which theory of representation counsel is acting under. There are two main theories of defense attorney representation in liability insurance claims after a lawsuit commences: the single and the dual (or joint) client theory of representation.<sup>94</sup> In the history of EPLI coverage, “the insured and the insurer were considered dual clients” of one defense attorney.<sup>95</sup> Dual theories of client representation present several ethical concerns under the Model Rules, including the duty of confidentiality, undivided loyalty, diligence, and concurrent conflicts of interest.<sup>96</sup>

A minority of jurisdictions no longer permit the dual-client theory of representation in insurance litigation, because of the aforementioned ethical concerns. These jurisdictions mandate a single-client theory of representation. For example, “West Virginia considers the insured to be the sole client . . . [and] defense counsel must protect the insured’s interests[:] . . . [t]his distinction makes it somewhat easier to resolve problems created by the eternal triangle.”<sup>97</sup> Similarly, California reacted to this tension following a California Court of Appeals case in 1984<sup>98</sup> that led to clarification of the California Civil Code section 2860.<sup>99</sup> California implemented new provisions

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92. Margaret Grisdela, *EPLI Panel Counsel Trends*, INSURANCEDEFENSEMARKETING.COM (May 6, 2018), <https://www.insurancedefensemarketing.com/epli-panel-counsel-employment-practices-trends> [<https://perma.cc/YJ9F-K3PF>].

93. See Schooler, *supra* note 44, at 202 (“Most EPLI policies are a duty to defend policies. Absent any significant coverage issues . . . the insurer may generally rely on the policy contract language providing it with the right to select defense counsel.”).

94. Moats, *supra* note 19, at 527.

95. *Id.*

96. See MODEL RULES OF PRO. CONDUCT r. 1.3, 1.6, 1.7, 1.8 (AM. BAR ASS’N 2020).

97. Moats, *supra* note 19, at 527.

98. See *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc’y, Inc.*, 208 Cal. Rptr. 494, 506 (Ct. App. 1984) (holding that “the Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent to continued representation, counsel must cease to represent both.”).

99. CAL. CIV. CODE § 2860(e) (West 2020). Section 2680(e) includes the following express language for waiver of right to select independent counsel:

I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a

empowering the selection of counsel by the insured, despite the insurance carrier's express duty to defend, in addition to emphasizing the strict ethical obligations of counsel in matters of joint representation.<sup>100</sup> Moreover, California Civil Code section 2860 also contains a provision mandating that all liability insurance policies include express language notifying the insured of its ability to waive the right to select independent counsel.<sup>101</sup>

In addition to the ethical dilemmas for defense counsel litigating an EPLI case under an express duty to defend, this Note argues that the insured employer's in-house legal counsel must be on high alert for various ethical issues that arise during the pre-litigation EPLI audit and investigation.

### III. ETHICAL DILEMMAS FOR IN-HOUSE COUNSEL DURING THE PRE-LITIGATION EPLI AUDIT

The EPLI process creates ethical dilemmas for the insured employer's in-house counsel before litigation even commences. In general, "[f]ollowing the spate of Enron-era corporate scandals, lawyers, directors, and academics have taken an increased interest in the professional responsibility challenges faced by corporate counsel."<sup>102</sup> The Enron scandal involved "an Enron associate corporate counsel, and . . . general counsel for its global finance division, [two in-house attorneys who] helped cover up the energy trader's financial troubles by omitting required disclosures from public filings in 2000 and 2001."<sup>103</sup> Following the Enron era, "[i]n-house counsel are . . . [now] brought into the thick of sensitive situations at the corporation, such as internal audit investigations, disputes, regulatory matters, and litigation."<sup>104</sup> The pre-litigation EPLI audit is one example of how in-house counsel are brought into the thick of sensitive situations. The pre-litigation EPLI audit presents in-

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defense attorney to represent me in this lawsuit.

*Id.*

100. *Id.* § 2860 (relating to "[c]onflict of interest; duty to provide independent counsel; waiver; qualifications of independent counsel; fees; disclosure of information").

101. *Id.* § 2860(e).

102. E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 4 (2006).

103. *SEC Alleges Coverup by 2 Enron Lawyers*, N.Y. TIMES (Mar. 29, 2007), <https://www.nytimes.com/2007/03/29/business/worldbusiness/29iht-enron.3.5072712.html> [<https://perma.cc/BDW3-P7AD>].

104. Doug Gallagher & Manasi Raveendran, *Attorney-Client Privilege for In-House Counsel*, LANDSLIDE, Nov.–Dec. 2017, at 39, 41.

house counsel with ethical concerns that include confidentiality,<sup>105</sup> attorney–client privilege,<sup>106</sup> work-product doctrine,<sup>107</sup> and conflicts of interest.<sup>108</sup>

#### A. CONFIDENTIALITY

One of the main concerns for employers during an EPLI audit is confidentiality. Most employers want to “prevent[] the public disclosure of the investigation’s results.”<sup>109</sup> Due to the increase in alternate dispute resolution, “[t]he risk of bad publicity” or “reputational costs” are “potentially far greater[] than the risk of litigation” for employers.<sup>110</sup> An employer’s concern with public exposure and reputational costs is heightened during the pre-litigation stage because there is minimal protection for audit results.<sup>111</sup> If the corporation has in-house counsel, he or she has likely obtained important and confidential information pertaining to the entity as a client in the course of representation.<sup>112</sup> Thus, in-house counsel are trusted to closely guard any confidences of the employer during the pre-litigation EPLI audit without misleading the insurance carrier as to the company’s risk of litigation exposure.<sup>113</sup> Unlike outside or independent counsel, in-house counsel have a “deep and daily understanding of, and involvement in, the corporation’s business,” making “counsel more valuable in many contexts.”<sup>114</sup> However, “in-house lawyers are [also] more likely to assume multiple roles as business

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105. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2020) (titled “Confidentiality of Information”).

106. FED. R. EVID. 502; RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000) (“Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”).

107. FED. R. CIV. P. 26(b); FED. R. EVID. 502.

108. MODEL RULES OF PRO. CONDUCT r. 1.7 (titled “Conflict of Interest: Current Clients”).

109. WILSON, *supra* note 27, at 132.

110. Tippett, *supra* note 8, at 272. It is also worth noting that even though alternate dispute resolution is on the rise in employment-related litigation, some legal scholars criticize the effect of mandatory arbitration and non-disclosure agreements (“NDAs”) as a method of silencing victims of workplace misconduct and allowing employers “to escape liability and public scrutiny.” Nicolette Sullivan, Note, *The Price Is (Not) Right: Mandatory Arbitration of Claims Arising Out of Sexual Violence Should Not Be the Price of Earning a Living*, 21 VAND. J. ENT. & TECH. L. 339, 339 (2018).

111. WILSON, *supra* note 27, at 132.

112. Jan C. Nishizawa, Note, *Ethical Conflicts Facing In-House Counsel: Dealing with Recent Trends and an Opportunity for Positive Change*, 20 GEO. J. LEGAL ETHICS 849, 856 (2007).

113. Brian J. Christensen & Bret G. Wilson, *An Essential Guide to Attorney-Client Privilege and Work Product for the In-House Practitioner*, 68 J. MO. BAR 82, 86 (2012) (“Corporations must proceed carefully when working with external auditors. Until federal regulators or courts adopt a universal standard protecting disclosure of privileged materials to outside auditors, corporations will continue to be put in a position of having to make a Hobson’s choice: Failure to disclose protected information may lead to a qualified opinion or liability for misrepresentation, but disclosure may waive the attorney-client and work product protections.”).

114. Veasey & Di Guglielmo, *supra* note 102, at 8.



adviser and legal adviser . . . [which] makes issues of confidentiality more difficult as a practical matter.”<sup>115</sup>

Pursuant to Model Rule 1.6(a), “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation,” or disclosure is permitted under Model Rule 1.6(b).<sup>116</sup> Model Rule 1.6(b), an exception to the general rule in Model Rule 1.6(a), applies when a “lawyer reasonably believes” that it is necessary to disclose confidential client information in the course of representation.<sup>117</sup> This exception applies any time there is a risk of bodily harm or injury, the client has committed a crime or fraud and is using or has used attorney services, the attorney is acting in self-defense in an action against himself or herself, or pursuant to any other law or court order requiring disclosure of confidential information.<sup>118</sup>

In-house counsel is expected to comply with additional confidentiality measures under Model Rule 1.13(b).<sup>119</sup> Model Rule 1.13(b) states that a lawyer for an organization is required to report confidential information up the chain of command (e.g., to the board of directors) when it is reasonably necessary and in the best interest of the organization.<sup>120</sup> For corporate in-house counsel, the “duty to report can hinder communication and may make managing ethical conflicts more difficult.”<sup>121</sup> Herein lies the tension—the organization’s lawyer must comply with reporting requirements during the pre-litigation EPLI investigation, but is not ethically permitted to violate confidentiality under Model Rule 1.6 in defense of the organization (or its affiliates).<sup>122</sup> This applies to an audit of employment practices or an investigation into allegations of wrongdoing.

A breach of confidentiality may occur when the in-house counsel is asked to disclose sensitive or protected client information to the EPLI carrier. For example, insurers request disclosure from the in-house counsel regarding

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115. Dennis P. Duffy, *Selected Ethics and Professionalism Issues in Labor and Employment Law Cases*, SLO31 A.L.I.-A.B.A. COURSE STUDY 943, 1051 (2005).

116. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS’N 2020).

117. *Id.* r. 1.6(b).

118. *Id.*

119. *Id.* r. 1.13(b) (“If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law . . . then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.”).

120. *Id.*

121. Nishizawa, *supra* note 112, at 850.

122. MODEL RULES OF PRO. CONDUCT r. 1.13(d).

“all previous litigation, . . . demand letters, . . . and EEOC investigations.”<sup>123</sup> Demand letters include those written by terminated employees, and any “employee’s attorney asserting allegations of discrimination and retaliation.”<sup>124</sup> Demand letters and disclosure to the carrier of all prior investigation or litigation can include confidential, non-public information. This is contrary to the inaccessibility of similar EEOC documents despite a Freedom of Information Act (“FOIA”) request.<sup>125</sup> EPLI audits also risk disclosure of sensitive communications pertaining to the recruiting and hiring practices of the employer,<sup>126</sup> including employment applications and documents concerning termination of employees. EPLI carriers “want to understand how progressive [the employer is] in hiring, tenure, promotion and exiting people . . . [and are] going to look at all those procedures [and] make a determination about coverage.”<sup>127</sup> In addition, the carrier may seek information pertaining to employee complaints, grievances, payroll information, and even the contemplation of corporate decisions (e.g., mergers and acquisitions or risk of bankruptcy).<sup>128</sup> Carriers also seek information on any internal investigations following prior reports of

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123. Van der Veer, *supra* note 14, at 194. It is important to note that when giving the carrier the requested information during the pre-litigation audit, counsel for the insured employer should make sure all metadata is removed from the document(s).

124. Laura A. Foggan, Benjamin C. Eggert & Parker J. Lavin, *Recurring Coverage Issues in Employment Practices Liability Insurance*, ABA (Feb. 26, 2013), <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2013/janfeb2013-employment-practices-liability> [<https://perma.cc/6GRX-8TJJ>] (citing *Van G. Miller & Assocs., Inc. v. Gulf Ins. Co.*, No. Co0-2051, 2001 WL 1165135 (N.D. Iowa Aug. 8, 2001)).

125. WILSON, *supra* note 27, at 141; *see also* *Questions and Answers—Freedom of Information Act (FOIA) Requests*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/foia/questions-and-answers-freedom-information-act-foia-requests> [<https://perma.cc/3J24-4EQC>] (indicating that under a FOIA request, individuals can request “materials in field office investigative files relating to charges filed under” federal anti-discrimination and harassment laws). However, the EEOC does not disclose the entirety of its case records to the public. *See id.* (“EEOC will not disclose to the public charges of employment discrimination, . . . [f]ederal sector complaint files[,] . . . [r]ecords containing inter or intra agency pre-decisional deliberations, recommendations, analyses and opinions, attorney-client, attorney work-product, information given to EEOC by confidential sources and matters involving the personal privacy and personnel or medical records of a third party . . .”).

126. For example, consider the disclosure of drug testing results documented in the employment file as part of the onboarding process. In many states, employers have a statutory right to drug test employees, but undoubtedly the results of the drug test—or later participation in a substance abuse-related rehabilitation program—would be private and confidential information at risk of disclosure during the EPLI audit.

127. Jared Shelly, *Pressure Mounts on Prices: A More Aggressive Labor Department Creates Implications for Employment Practices Liability Coverage*, RISK & INS., Apr. 2012, at 86, 87.

128. *See, e.g.*, THE HARTFORD, APPLICATION FOR EMPLOYMENT PRACTICES LIABILITY 2–7 (2019), [https://tso.hfdstatic.com/sites/the\\_hartford/files/epl-app.pdf](https://tso.hfdstatic.com/sites/the_hartford/files/epl-app.pdf) [<https://perma.cc/UZ3X-PXVE>].

misconduct, which may expose confidences.<sup>129</sup> Many employers can resolve employment-related grievances relatively quickly if the complaint “only involves a few witnesses and a small quantity of documents.”<sup>130</sup> However, the version of events shared with in-house counsel is typically documented and likely includes confidential emails or text messages that were exchanged. It is important for the in-house counsel to guard the confidentiality of these reports or investigations to maintain the trust of employees who report misconduct. Employees should feel encouraged to report misconduct without fear of retaliation should their confidential information be exposed following any disclosure to the carrier during the third-party EPLI audit.<sup>131</sup>

A counterargument may be that not enough confidential information is disclosed during the pre-litigation EPLI audit to hold individuals within the corporation liable. And, if confidential information is fully disclosed to the third-party insurance carrier, perhaps such disclosure would increase transparency and hold employers accountable for enforcing policies that punish misconduct, harassment, and wrongdoing within the organization. However, increased exposure of confidential information still places in-house counsel in the middle of an ethical dilemma. In-house counsel is expected to carefully disclose only relevant information with very little guidance from the Model Rules.<sup>132</sup> Prior to the EPLI audit, in-house counsel must remember to educate all employees on the company’s policies and procedures regarding the scope of confidentiality during an audit. Discussing the scope of confidentiality with employees builds the organization’s trust and strengthens the attorney–client relationship.

### B. ATTORNEY–CLIENT PRIVILEGE

Attorney–client privilege is another issue for the employer’s in-house counsel during the pre-litigation EPLI audit. Attorney–client privilege applies to confidential communications “made between privileged persons,” “in

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129. Antilla, *supra* note 65 (describing how carriers often “demand detailed information about previous charges of sexual harassment” such as “a list of all incidents, including ones that have not triggered a formal complaint, with the name of the claimant, the allegations made, the settlement amount any complainant received, and what remedial actions were taken”).

130. Tippet, *supra* note 8, at 277.

131. See Crawford v. Metro. Gov’t of Nashville, 555 U.S. 271, 279 (2009) (“If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that ‘[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.’” (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005))); Lauren Weber, *After #MeToo, Those Who Report Harassment Still Risk Retaliation*, WALL ST. J. (Dec. 12, 2018, 2:45 PM), <https://www.wsj.com/articles/after-metoo-those-who-report-harassment-still-risk-retaliation-11544643939> [<https://perma.cc/EN8U-gD36>] (describing how despite the increase in EEOC retaliation claims, a majority of harassment complaints are not reported due to fear of retaliation).

132. See *infra* Section IV.C.

confidence,” and “for the purpose of obtaining or providing legal assistance.”<sup>133</sup> This privilege does not attach to the underlying facts of an audit or investigation, and “[w]hile many communications regarding an internal investigation may be privileged, there is no absolute protection over the facts garnered.”<sup>134</sup>

It is also very difficult for in-house counsel to assert the attorney–client privilege during the pre-litigation stage, because protection only occurs if the in-house attorney can prove that the communication was exchanged for the purpose of providing legal advice. The role of in-house counsel blurs the lines between attorney and business employee, so it is rare that the attorney–client privilege will apply outside the course of litigation.<sup>135</sup> For example, attorney–client privilege would not likely apply when “in-house counsel is the decision maker of whether an employee is terminated for disclosing confidential information . . . and is discussing with the employee’s supervisor whether the employee should be terminated.”<sup>136</sup> Without the protection of attorney–client privilege, this could subject the in-house counsel to testifying as a witness on behalf of the employer if litigation ensues in the future.

On the other hand, if sensitive communications are exchanged between the client corporation and in-house counsel for the purpose of seeking legal advice, the presence of a third-party auditor can also result in waiver of the attorney–client privilege. One exception to this waiver of privilege is the common-interest—or joint-defense—doctrine.<sup>137</sup> The common-interest doctrine “serves to protect the confidentiality of communications passing from one party to the attorney for another party where joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.”<sup>138</sup> Courts are divided on whether this doctrine applies between insured and insurer, and some “courts have rejected the idea that the interests of the insured and insurer are sufficiently aligned for the privilege to be maintained.”<sup>139</sup> The common-interest doctrine thus has limited applicability between insured and insurer, and it may not preserve the attorney–client privilege even if it were to apply to pre-litigation communications.<sup>140</sup>

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133. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS, § 68 (AM. L. INST. 2000).

134. Christensen & Wilson, *supra* note 113, at 87.

135. Also, it is worth noting that corporate *Miranda* warnings under *Upjohn Co. v. United States* arguably do not apply to pre-litigation audits because information is not exchanged for the purpose of securing legal advice—rather it is exchanged for a business transaction in purchasing insurance. See *Upjohn Co. v. United States*, 449 U.S. 383, 394–97 (1981) (noting that communications made to secure legal advice fall under the attorney–client privilege).

136. Gallagher & Raveendran, *supra* note 104, at 41.

137. Christensen & Wilson, *supra* note 113, at 88–89.

138. *Id.* (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)).

139. *Id.*

140. See *Ryan v. Gifford*, No. 2213-CC, 2007 WL 4259557, at \*3 n.8 (Del. Ch. Nov. 30, 2007) (“The common interest doctrine extends the protections of the attorney–client privilege to

### C. WORK-PRODUCT DOCTRINE

In-house counsel also faces an ethical dilemma during the pre-litigation EPLI audit with the attorney work-product doctrine. The work-product doctrine does not apply to documents discovered or prepared in the course of the audit because they are considered a part of the insurance application—whereas true work product is prepared in anticipation of litigation. Pursuant to Federal Rule of Evidence 502(g)(2), “‘work-product protection’ means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”<sup>141</sup> Thus, even after the pre-litigation audit, work-product protection is qualified, not absolute, and can be challenged by opposing counsel. The results of the EPLI audit could therefore be discoverable down the road if litigation ensues.<sup>142</sup>

To avoid ethical dilemmas and the lack of privilege protections, the insured employer can obtain pre-approval from the EPLI carrier during the underwriting process to have the audit performed by its in-house counsel.<sup>143</sup> However, while insured employers tend to prefer trusted in-house counsel to perform the EPLI audit, the carrier may insist on doing the audit itself with its chosen panel counsel.<sup>144</sup> EPLI carriers prefer outside counsel selected from the pre-approved EPLI panel, because sham or biased investigations risk strict-liability down the road.<sup>145</sup>

### D. CONFLICT OF INTEREST

In addition to these aforementioned dilemmas, in-house counsel may have a materially limited conflict of interest during the pre-litigation EPLI audit. According to Model Rule 1.7(a)(2), a materially limited conflict of interest occurs when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of

disclosures of communications among parties who share a common interest. . . . [H]owever, for the communication to remain privileged even after its disclosure to others, the ‘others [must] have interests that are “so parallel and non-adverse that . . . they may be regarded as acting as joint venturers.’” (second alteration in original) (quoting *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at \*4 (Del. Ch. Nov. 13, 2002)).

141. FED. R. EVID. 502(g)(2).

142. Gallagher & Raveendran, *supra* note 104, at 40 (“Unprivileged discovery documents can then be used as evidence during depositions and at trial (if admissible) and could later be disclosed publicly, such as to the media, through court files.”).

143. WILSON, *supra* note 27, at 131.

144. Schooler, *supra* note 44, at 203 (“[T]he day-to-day counseling law firm is perceived as a trusted advisor and panel counsel is not.”).

145. WILSON, *supra* note 27, at 135 (“[F]ailure to conduct an investigation—or worse, conducting a sham investigation for the sake of appearances—can result in strict liability for the company and exclusion from coverage under some EPL contracts.”).

the lawyer.”<sup>146</sup> According to Model Rule 1.7, an attorney cannot represent a client if representation involves a conflict of interest.<sup>147</sup> Avoiding a conflict of interest protects in-house counsel’s independent judgment and the duty of loyalty. The duty of loyalty requires that an attorney put a client’s interests first: before the interests of other clients, before the interests of third parties, and before the interest of himself or herself.<sup>148</sup> However, there are exceptions to Model Rule 1.7(a) under Model Rule 1.7(b). Pursuant to Model Rule 1.7(b), a conflict of interest is permissible as long as “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client[,] . . . the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation,” and each party “gives informed consent . . . in writing.”<sup>149</sup>

During the EPLI audit, a conflict of interest for in-house counsel occurs if the insurer or employer insists on in-house counsel testifying as a witness during future litigation. If in-house counsel testifies as a defense witness at trial, his or her independent legal judgment will be materially limited by the responsibilities owed to the corporation as the client, as well as the attorney’s personal interests in maintaining employment. In-house counsel may also have strong personal feelings about the alleged internal misconduct because he or she is deeply involved in the organization. “In-house lawyers are frequently . . . witnesses in litigation. For example, lawyers involved in drafting or adopting personnel policies are likely witnesses in employment disputes.”<sup>150</sup> The “lawyer-witness rule,”<sup>151</sup> the Model Rule preventing lawyers from testifying as a witness for their client, “does not present a significant problem for in-house counsel.”<sup>152</sup> However, there is a chance that in-house counsel will be called as a witness following the pre-litigation EPLI audit. To avoid having the in-house counsel testify as a witness down the road, many employers may seek out independent legal counsel or business consultants to oversee the employment-practices audit or internal investigation.

If the insured employer negotiates with the EPLI carrier during the underwriting stage to waive the insurer’s express duty to defend, an independent business consultant may seem like a good option to avoid the

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146. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR ASS’N 2020).

147. *Id.* r. 1.7 (titled “Conflict of Interest: Current Clients”).

148. *Id.* r. 1.7(a) (“A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”).

149. *Id.* r. 1.7(b).

150. Duffy, *supra* note 115, at 1060.

151. See MODEL RULES OF PRO. CONDUCT r. 3.7(a) (“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . .”).

152. Duffy, *supra* note 115, at 1060.

conflict of interest that in-house counsel face during the pre-litigation EPLI audit. Independent “[c]onsultants do not have to satisfy educational or other licensing requirements; nor are they governed by enforceable codes of ethics or subject to meaningful malpractice liability.”<sup>153</sup> The early 2000s saw an increase in “a ‘new breed’ of employment lawyers—employment law consultants.”<sup>154</sup> There remain “signs that various forms of consulting among lawyers are on the rise.”<sup>155</sup> This trend is arguably fueled by the increase in employment-related litigation and the need for independent legal counsel.<sup>156</sup> Proponents of independent employment consulting say that “[u]ltimately, the growth of legal consultants is a good thing for the general legal environment.”<sup>157</sup> Lawyers who choose to move their practice to business consulting do not represent clients and therefore “can opt out of professional regulation.”<sup>158</sup> There are additional benefits to employment consulting, including differences in pay and hours.<sup>159</sup> Another benefit for both the insured and the insurer is that consultants are able “to serve as expert witnesses at trial” and avoid the conflict of interest dilemma that in-house counsel face.<sup>160</sup>

However, the problem with independent consultants is that there are often blurred lines between the attorney–client relationship and the consultant–client relationship, and misunderstandings within each role. Model Rule 3.7 governs lawyers as witnesses in trial, but it “is intended to protect clients who may become confused about a lawyer’s duties with regard to law-related services, when these are offered alongside legal services.”<sup>161</sup> Independent legal consultants may serve as witnesses in trial, but “[u]nlike lawyers who represent clients, [they] are not required to refrain from using their expertise and authority in ways that may harm the interests of employees and other third parties.”<sup>162</sup> This is not to say that independent employment consultants would intentionally harm the interests of their clients, but there is no code of ethics holding them accountable. Arguably, the Model Rules

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153. Rostain, *supra* note 73, at 1398.

154. *Id.* at 1397 (quoting Michael Sullivan & Carrie Garcia, *Under a Different Shingle: There’s a New Breed of Employment Lawyer in the Market—The Employment Law Consultant.*, HR MAG., Mar. 2005, at 119, 119).

155. *Id.* at 1398.

156. See generally Sullivan & Garcia, *supra* note 154 (describing the shifting roles of employment lawyers and human resources professionals); Rostain, *supra* note 73 (discussing regulatory incentives and emerging business activities which may lead to more legal consulting).

157. Larry Alton, *How Modern Lawyers Are Doing More as Consultants*, HUFFPOST (Apr. 27, 2017), [https://www.huffpost.com/entry/how-modern-lawyers-are-do\\_b\\_9772768](https://www.huffpost.com/entry/how-modern-lawyers-are-do_b_9772768) [<https://perma.cc/5XQF-92W2>].

158. Rostain, *supra* note 73, at 1419.

159. Alton, *supra* note 157.

160. Rostain, *supra* note 73, at 1423.

161. *Id.* at 1411.

162. *Id.* at 1425.

should extend to attorneys acting as business consultants because of the likelihood for client confusion in the attorney–consultant’s role. For example, while consultants typically do not advertise as “practicing law, some of their services bear more than a passing resemblance to activities traditionally considered law practice.”<sup>163</sup>

Given these considerations, insured employers often choose to stick with the EPLI panel counsel provided by the carrier, despite the tripartite ethical dilemmas mentioned in Part II of this Note, and instead of dealing with the problems of hiring an independent legal consultant. However, in-house counsel are *still* stuck in the middle—treading ethical boundaries once the EPLI audit commences.

#### IV. SOLUTIONS

As described in Part III of this Note, in-house counsel face ethical dilemmas in the following areas during the pre-litigation EPLI audit: confidentiality,<sup>164</sup> attorney–client privilege,<sup>165</sup> work-product doctrine,<sup>166</sup> and conflicts of interest.<sup>167</sup> This Note proposes four solutions to these ethical dilemmas. First, in-house counsel must clarify the boundaries between legal and business communications within the organization. Second, in-house counsel, along with the organization, should negotiate the boundaries of confidentiality up-front during the EPLI underwriting stage. Third, in-house counsel should get involved with legal ethics committees and advocate for additional guidance in the Model Rules. Finally, in-house counsel must continue to uphold candor and fairness in the workplace.

##### A. CLARIFYING THE BOUNDARIES BETWEEN LEGAL AND BUSINESS COMMUNICATIONS WITHIN THE ORGANIZATION

To address the likelihood of waiver of privileged communications during the pre-litigation EPLI audit, in-house counsel should clarify the boundaries between legal and business communications in daily practice. Employers must determine which communications pertain to legal matters, and which communications derive from the ordinary course of business, and mark them

163. *Id.* at 1407.

164. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS’N 2020).

165. FED. R. EVID. 502; RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000).

166. FED. R. CIV. P. 26(b)(3) (“(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial . . . (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials . . . .”); FED. R. EVID. 502 (“The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.”).

167. MODEL RULES OF PRO. CONDUCT r. 1.7.



accordingly.<sup>168</sup> However, employers should “assum[e] that no communication will automatically be protected.”<sup>169</sup> If in-house counsel is performing a non-lawyer function, it is more likely that attorney–client privilege will be waived.<sup>170</sup> Purely legal communications might not need to be shared with the carrier during the EPLI audit. However, if disclosing to the carrier is in the best interests of the company, the goal should be to keep those documents marked privileged. If opposing counsel requests the EPLI audit results in the course of future litigation, courts will be less skeptical of privileged communications if they are marked privileged and clearly exchanged for the purpose of legal advice.<sup>171</sup> This process should be a joint effort between in-house counsel and the employer. For example, companies might want to “[a]void funneling all correspondence through in-house counsel, because doing so may result in the perception of over-designation . . . lead[ing] to a court viewing legitimate claims of privilege with skepticism.”<sup>172</sup> An organization also might want to “[c]onsider including phrases in the subject line [of e-mails] such as ‘Do Not Forward’ and include ‘Privileged Communication/Do Not Forward’ in the first line . . . [and] us[e] technological methods to prevent the use of ‘reply all’ or forwarding of e-mails containing privileged communications” if necessary.<sup>173</sup>

For all attorneys, good communication is an expectation under Model Rule 1.4<sup>174</sup> and for in-house counsel “[g]ood communication practices should be maintained at all times.”<sup>175</sup> This directive applies to electronic communication and written correspondence. One way to prevent the inadvertent waiver of attorney–client privilege is to “[a]void circulating privileged communications too broadly . . . [b]y including parties in the communication who are unnecessary to the conversation.”<sup>176</sup> Even if the

168. See Christensen & Wilson, *supra* note 113, at 87 (“While an investigator’s communications with in-house counsel made in preparation for litigation are usually protected by the work product doctrine, investigations ‘prepared in the ordinary course of business’ usually are not.” (footnote omitted)); Gallagher & Raveendran, *supra* note 104, at 42 (“Be careful how you mark documents.”).

169. Gallagher & Raveendran, *supra* note 104, at 42.

170. Christensen & Wilson, *supra* note 113, at 89 (“Segregate legal functions from those that typically are non-legal by determining whether the function could have been performed by a non-lawyer.”).

171. See generally *id.* (explaining the importance of using discretion when designating communications as privileged).

172. *Id.* at 89.

173. Gallagher & Raveendran, *supra* note 104, at 42.

174. MODEL RULES OF PRO. CONDUCT r. 1.4(a)(5) (AM. BAR ASS’N 2020) (“A lawyer shall[] . . . consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”); see also *id.* r. 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

175. Gallagher & Raveendran, *supra* note 104, at 42.

176. *Id.*

recipients are employees within the organization, in-house counsel should “[l]imit recipients of communication intended to be privileged to only those [who] need to know.”<sup>177</sup> In-house counsel should also consider making a log of privileged correspondence for future reference. However, counsel must be careful to “[a]void overuse of the ‘privileged’ legend, especially in documents that do not contain communications that would be protected by privilege.”<sup>178</sup> Over-inclusiveness with regard to the marking of privileged documents “will result in diluting the privilege and courts scrutinizing privilege logs to determine the scope and accuracy of the corporation’s assertions of privilege.”<sup>179</sup> Instead, in-house counsel should only mark particular documents as “‘privilege review required’ or ‘attorney work product.’”<sup>180</sup>

Next, if the organization faces an internal investigation or audit into employment practices, “the corporation should consider retaining outside counsel immediately.”<sup>181</sup> In the meantime, “[i]n-house counsel should not execute affidavits refuting accusations against the company, because doing so may cause corporate counsel to become a fact witness and lead to waiver assertions.”<sup>182</sup> In-house counsel should also ensure that results of the audit are “disclosed only to senior management and treated confidentially.”<sup>183</sup>

*B. NEGOTIATING THE BOUNDARIES OF CONFIDENTIALITY UP-FRONT DURING THE EPLI UNDERWRITING STAGE*

As previously mentioned in Section II.C, the key time to negotiate with the EPLI carrier is during the underwriting process, or at the time of policy renewal.<sup>184</sup> In addition to negotiating the express duty to defend, in-house counsel and the insured employer should “negotiat[e] engagement letters that will protect the company.”<sup>185</sup> This might “[i]nclude an agreement that the auditor will maintain the confidentiality of the audit materials and give advance warning prior to disclosing documents in response to government or third party subpoena.”<sup>186</sup> Additionally, in-house counsel “should not be afraid to quiz prospective carriers on the scope, cost, and methodology of their pre-coverage audits.”<sup>187</sup> In-house counsel could even negotiate on behalf of the

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177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Christensen & Wilson, *supra* note 113, at 90.

182. *Id.*

183. WILSON, *supra* note 27, at 132.

184. *See supra* Section II.C.

185. Christensen & Wilson, *supra* note 113, at 90.

186. *Id.*

187. WILSON, *supra* note 27, at 133.

employer “to have input regarding who will perform the audit.”<sup>188</sup> The key for in-house counsel is to maintain as much control as possible over the pre-litigation EPLI audit process before the terms of the policy are finalized.<sup>189</sup> This includes “narrow[ing] the scope of the necessary information as much as possible.”<sup>190</sup>

C. GETTING INVOLVED WITH LEGAL ETHICS COMMITTEES AND  
THE AMERICAN BAR ASSOCIATION

Similar to traditional private practice lawyers, “in-house lawyers will confront a wide range of ethical issues over the course of their careers.”<sup>191</sup> However, the Model Rules do not provide in-house counsel with sufficient guidance. “When it comes to ethical guidance, in-house lawyers get the short end of the stick.”<sup>192</sup> The majority of the Model Rules regarding attorney ethics are written in a way that “are more compatible with [traditional] law firm practice than in-house work.”<sup>193</sup> One example is the inapplicability of Model Rule 1.10 on imputation of conflicts of interest, which applies to conflicts imputed to a traditional “firm” of private practice attorneys, but is hazy in its application to in-house counsel.<sup>194</sup> In-house counsel need more guidance on what happens when they have a conflict of interest in the non-legal corporate setting.

Legal scholar Nicole I. Hyland proposes that the solution for the lack of ethical guidance in the Model Rules is for in-house counsel to get more involved in legal ethics committees.<sup>195</sup> “Ethics committees can help by developing more creative solutions to the ethical challenges faced by in-house lawyers . . . .”<sup>196</sup> If more in-house counsel get involved in the ethics process, they can shape the way policies, model rules, and ethics opinions are developed.<sup>197</sup> The first step in getting involved with legal ethics committees is to become an active member of the state bar association. Second, in-house counsel should review their state bar association’s bylaws to determine which

188. *Id.* at 134 (“In some cases, insurance carriers have been willing to allow an employer to choose the firm or organization to perform the pre-coverage audit, pay for the audit itself, and then receive a credit toward its policy payments to compensate for the out-of-pocket expense of the audit.”).

189. *Id.*

190. Christensen & Wilson, *supra* note 113, at 90.

191. Nicole I. Hyland, *Ethics Corner: In-House Counsel Ethics: Practicing Law as a Square Peg*, BUS. L. TODAY, May 2014, at 1, 3.

192. *Id.* at 1.

193. *Id.*

194. *Id.*; see also MODEL RULES OF PRO. CONDUCT r. 1.10 (AM. BAR ASS’N 2020) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . . .”).

195. Hyland, *supra* note 191, at 3.

196. *Id.*

197. See *id.* at 1–3.

committees are permissible or in pre-existence. For example, the Iowa State Bar Association (“ISBA”) has a special committee known as the Ethics and Practice Guidelines Committee that reports to the ISBA Board of Governors.<sup>198</sup> According to the ISBA Bylaws, the Ethics and Practice Guidelines “Committee shall issue advisory opinions on the proper interpretation of the Iowa Rules of Professional Conduct upon request and/or as appropriate.”<sup>199</sup> In-house counsel can also run for a position with the Board of Governors to have more of a say in the prioritization of ethics-related reforms. Additionally, in-house counsel can lobby to the ABA for changes to the Model Rules.<sup>200</sup> The incentive for in-house counsel to get involved in legal ethics reform includes increased clarification on handling the various unique situations dealt with on a daily basis without entering into ethical hot water. And, by participating in revising the Model Rules, counsel has a voice in shaping the rules towards his or her own practice concerns and needs.

#### D. MAINTAINING CANDOR AND FAIRNESS AT ALL TIMES

As with all attorneys, in-house counsel must maintain candor and fairness at all times. Pursuant to Model Rule 3.3, there are “special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.”<sup>201</sup> This obligation applies regardless of whether one is an in-house or private practice attorney. A lawyer should always balance client advocacy with candor—including the avoidance of false or misleading statements of law or fact—whether made to opposing counsel or to third-party auditors.<sup>202</sup> The pre-litigation EPLI audit is a key time for in-house counsel to maintain candor in representation of the employer, so that the carrier can also make an informed decision as to the scope of coverage. In addition, “in-house counsel is in the best position to promote legal compliance within his organization and to ‘guide [the employer] toward the adoption and consistent implementation of best practices that consistently ensure loyalty,

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198. IOWA STATE BAR ASS’N, BYLAWS OF THE IOWA STATE BAR ASSOCIATION 16 (2019), [https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/corporate\\_documents/isba\\_bylaw\\_s\\_3-27-19.pdf](https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/corporate_documents/isba_bylaw_s_3-27-19.pdf) [<https://perma.cc/278J-3DP4>].

199. *Id.*

200. Lobbying to the ABA for modification of the Model Rules to address the issues that in-house counsel face is not a new solution, but one that has picked up gradual traction in legal communities and needs continual advocacy. Legal scholar, David B. Wilkins notes that “[i]n the 1990s . . . the Association of Corporate Counsel (ACC) was a driving force behind the effort.” David B. Wilkins, *Is the In-House Counsel Movement Going Global? A Preliminary Assessment of the Role of Internal Counsel in Emerging Economies*, 2012 WIS. L. REV. 251, 253. In the end, the ACC was unsuccessful in changing the Model Rules, but it “has emerged as a force to be reckoned with within the [ABA] and is currently flexing its muscles in a variety of debates over the structure and ownership of law firms, professional regulation, and legal education.” *Id.*

201. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS’N 2020).

202. *See id.*

good faith, and due care.”<sup>203</sup> If there are employment practices that do not sufficiently hold members of the organization accountable for harassment or discrimination, in-house counsel is in the best position to promote internal change.

#### V. CONCLUSION

In conclusion, EPLI is a sound investment for employers seeking to protect themselves against the financial and reputational harms of employment-related litigation. However, there are particular ethical challenges faced by in-house counsel for the insured employer that deserve more attention. As this Note suggests, the Model Rules could help in-house counsel by developing clearer ethical guidelines for all lawyers who practice outside the traditional law firm setting. In the meantime, employment-related litigation is unlikely to decrease anytime soon, which means that in-house counsel must work closely with employers to develop protections for sensitive information exchanged during the EPLI audit process.

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<sup>203</sup> Nishizawa, *supra* note 112, at 861 (quoting E. Norman Veasey, *Separate and Continuing Counsel for Independent Directors: An Idea whose Time Has Not Come as a General Practice*, 59 BUS. LAW. 1413, 1417 (2004)).