

Maintaining Privilege and Avoiding Ethical and Legal Traps in Investigations

**Brandon Fox
AnnaMarie Van Hoesen**

JENNER & BLOCK



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Click **Ethics in Investigations**

Practice Question

Why are you here this evening?

- a) To hear this wonderful presentation by Brandon and AnnaMarie
- b) For the wine and cheese
- c) Already near downtown and I'm just waiting out the bad traffic
- d) Any excuse to leave the house and see people

Program Overview

1. Setting the Stage
2. Preserving the Attorney-Client and Work Product Privileges
3. Ethical and Legal Traps



1. Setting the Stage

When to Conduct a Privileged Internal Investigation?

- Organization learns it may be focus of governmental investigation
 - Search warrant or non-trivial government subpoena
 - Employee approached by law enforcement to talk about organization
- Allegations of misconduct committed by senior leadership
- Compliance review, whistleblower complaint, or hot-line tip raises serious concerns that could expose organization to criminal and/or civil liability
- Scoping potentially large civil liability
- Failure to investigate may increase chances of future liability
- Employee conduct may present headline risk
 - Cultural, sensitivity issues



Why Should Investigation Be Set up to Be Privileged?

- Witnesses may be open to speaking
- Flexibility of whether to keep it privileged
 - Can shield from discovery, public view if later desired
 - Cannot retroactively make it privileged if not intended to be privileged at outset



When to Hire Outside Law Firms?

- Allegations implicate senior leadership or member of general counsel's office
- Higher-risk investigations or additional resources needed
- Privilege is important to maintain
- If government involved, choose firm that has credibility with authorities
- If independence is needed, don't use your "go to" firms
 - Auditor concerned about issue
 - Allegations against senior leadership
 - "Go to" firm advised conduct at issue





2. Preserving Privilege and Work Product

Elements of Attorney-Client Privilege

- **Client:** Who is/should be the client?
- **Lawyer :** Who is a lawyer?
- **Communication:** Between lawyer and client
- **Legal Purpose:** Not business purpose
- **Confidentiality:** Both intended and maintained

What Law Applies?

- Federal: FRE 501
 - Federal common law in federal question cases
 - Including pending state law claims
 - State law in diversity cases
 - Choice of law issues can be complex
- California:
 - California Evidence Code §§ 954 to 962
 - The State Bar Act (Cal. Bus. & Prof. Code §§ 6000 et seq.)
 - Rules of Professional Conduct (new rules adopted in 2018)
- Other jurisdictions?

Who Does the Privilege Extend To?

- The privilege generally extends to all privileged persons, including:
 - The client or prospective client
 - The client's lawyer
 - Agents who facilitate communications or the representation
- Be mindful of potential third parties
 - PR firms
 - Accounting firms

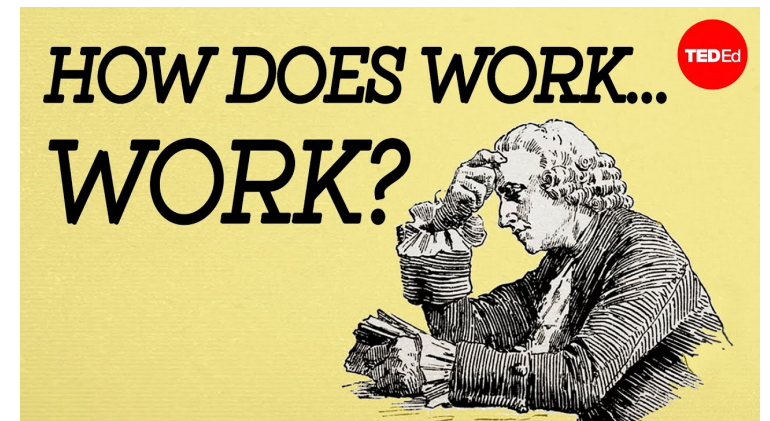


Attorney Work Product Protection

- Generally protects an attorney's written impressions, conclusions, opinions, etc.
- Absolute protection vs. qualified protection
- Cal. Civ. Proc. Code § 2018.030:
 - (a) A writing that reflects an **attorney's impressions, conclusions, opinions, or legal research or theories** is not discoverable under any circumstances.
 - (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

What is Attorney Work Product?

- Witness statements obtained through an attorney-directed interview are entitled to at least qualified work product protection, and possibly absolute protection. A court may conduct in camera review to determine if work product protection applies to all or part of the document.
 - *Coito v. Superior Court*, 54 Cal. 4th 480 (2012).
- Work product protection extends to an attorney's written notes about a witness's statements.
 - *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (2007)





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Hypothetical 1

You completed your investigation, which did not uncover any wrongdoing but revealed some potentially embarrassing facts. Your client wants to publicize the good result as widely as possible, while maintaining attorney-client privilege and work product protection.

What can you do with the results of your investigation?

- a) Give an oral presentation of your results at the next company-wide meeting.
- b) Give an oral presentation of your results and legal advice to the Board of Directors that supervised your investigation.
- c) Prepare a detailed written report of your factual findings, but omit any legal advice.
- d) Prepare a detailed written report of your factual findings and legal advice, but limit distribution to the witnesses you interviewed, their supervisors, and company executives.
- e) Prepare a summary report for the marketing department to prepare a press release.

Hypothetical 1: Answer

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Written Reports and Work Product Protection

- Notes and written summaries should include attorney's thoughts and impressions, including:
 - Paragraph summarizing most important statements at beginning
 - Significance of statements witness made to investigation/litigation
 - Witness's demeanor and credibility (be judicious on making credibility calls, especially early in investigation)
 - Follow-up items
- Thoughts and impressions should be included in all written communications disclosing what witness stated

2. Preserving Privilege

a. Who is the Client?

The Engagement Letter

- When retaining outside counsel, a formal engagement letter is best practice even if not strictly required
- If allegations potentially implicate members of Board of Directors or executives, client should be:
 - Audit committee
 - Special committee made up of independent members of Board
- To create and maintain privilege, describe investigation as being done to provide legal advice



Corporate Clients

California Rule of Professional Conduct 1.13: Organization as Client

- a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the **client is the organization itself**, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- b) If a lawyer representing an organization knows* that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows* or reasonably should know* is (i) a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization, **the lawyer shall proceed as is reasonably* necessary in the best lawful interest of the organization...**



May impute a duty to investigate

Corporate Clients

Rule 1.13 (cont'd)

- f) In dealing with an organization's constituents, a lawyer representing the organization shall **explain the identity of the lawyer's client** whenever the lawyer knows* or reasonably should know* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.
- g) A lawyer representing an organization **may also represent any of its constituents**, subject to the provisions of rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.



Joint representation of organization and individuals as part of internal investigation should rarely take place.

California: 11-Factor Natural Person Test

D.I. Chadbourne, Inc. v. Superior Court, 60 Cal.2d 723 (1964)

1. If the employee is also a defendant or party, the conversation is privileged.*
2. If the employee is the “***natural person to be speaking for the corporation,***” the communication is privileged.
3. When an employee is a ***witness to matters*** that require communications to counsel and has ***no connection to the matter*** other than as a witness (***and not as an employee***), the communication is ***not privileged***.
4. If the employee’s communication grows out of his employment with the corporation and is within the corporation’s regular course of business, the communication is privileged.
5. If the corporation requires an employee to ***make a report to an attorney***, and the ***purpose*** of the report is to further a particular ***legal interest*** of the corporation, the report may be privileged.

* May not be applicable for investigations

California: 11-Factor Natural Person Test (cont'd)

6. If the report has multiple purposes, the ***dominant purpose*** will control in determining the privilege of the report.
7. A privileged communication does not lose its privilege if it is obtained by an agent of the corporation with the corporation's knowledge and consent.
8. Unless the agent is an insurance company, in which case an additional body of law applies.
9. The ***intent of the originator*** of the information controls when determining confidentiality.
10. When an employee communicates with an insurance company at the direction of the corporation, the intent of the corporation controls the confidentiality of this communication.
11. To the greatest extent possible, all legal restrictions on attorney-client privilege that apply to individual clients should apply to corporate clients.

Other States: May Use Subject Matter Test

Subject Matter Test (e.g. New York)

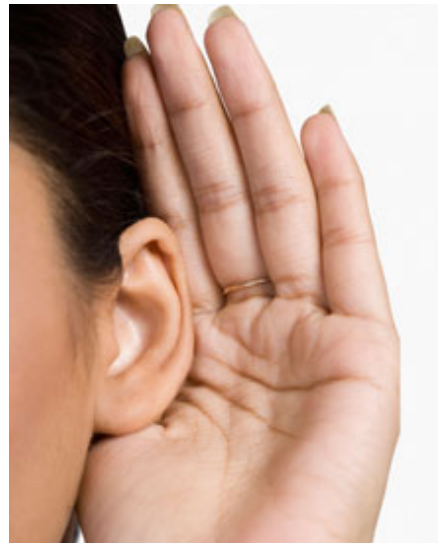
1. The communication was for the purpose of securing ***legal advice*** for the corporation;
2. The communication was made at the ***direction of corporate superiors***;
3. The superior made the request so that the corporation could secure ***legal advice***;
4. The ***subject matter*** of the communication was within the ***scope*** of the employee's corporate duties;
5. The communication must have ***been and kept confidential***, with distribution limited to those in the corporation with a ***need to know***.

Federal Common Law: *Upjohn* Test

- In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court expanded attorney-client privilege, which previously only covered senior management, to **cover mid- and low-level employees** in limited situations, protecting the internal investigations between outside counsel and corporate employees from disclosure to the IRS.
- *Upjohn* protects communications when:
 1. The **information is necessary** to supply the basis for legal advice to the corporation and was ordered to be communicated by superior officers;
 2. The information **was not available from “control group”** management;
 3. The communications concerned **matters within the scope of employees’ duties**;
 4. The **employees were aware** that they were being questioned in order for the corporation to secure legal advice; and
 5. The communications were considered **confidential** when **made** and **kept** confidential thereafter.

Be Careful Communicating with Former Employees

- Presume attorney-client privilege will not apply to communications with former employees.
- Consider work product protections.



Hypothetical 2

Your investigation uncovers criminal conduct by the CEO. The FBI has asked to interview her. The CEO asks for your advice and for you to represent her at the interview.

Which of these can you do?

- a) Represent CEO, advise her to answer the FBI's questions.
- b) Represent CEO, advise her not to answer FBI's questions.
- c) Do not represent CEO at interview, provide no advice.
- d) Do not represent CEO, but suggest it would be best for CEO to assert her Fifth Amendment right to remain silent.
- e) Advise CEO to book an AirBnB and not appear for interview.

Hypothetical 2: Answer

Your investigation uncovers criminal conduct by the CEO. The FBI has asked to interview her. The CEO asks for your advice and for you to represent her at the interview.

Which of these can you do?

- a) Represent CEO, advise her to answer the FBI's questions.
- b) Represent CEO, advise her not to answer FBI's questions.
- c) Do not represent CEO at interview, provide no advice.**
- d) Do not represent CEO, but suggest it would be best for CEO to assert her Fifth Amendment right to remain silent.
- e) Advise CEO to book an AirBnB and not appear for interview.

Advising Non-Client to Assert Fifth Amendment

- Interests not aligned between your client and the CEO, so advice to speak or not to speak could have ethical consequences under Rule 1.7 (Conflict of Interest: Current Clients)
- While rare, attorneys have been convicted for obstruction of justice for advising individuals to assert Fifth Amendment right
 - *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987)
 - Advice occurred after judge compelled witness to testify
 - Hired by target to represent witness; attorney was protecting target, not fulfilling duty
 - *United States v. Cioffi*, 493 F.2d 1111 (2d Cir. 1974)
 - Attorney convicted of obstruction after telling non-client to either: (a) remain silent; (b) lie to SEC; or (c) “visit” target of investigation (witness believed this was a threat)
 - *But see Arthur Anderson*, 544 U.S. at 703-04 (dicta)
 - Mother’s act of persuading son to invoke right would be “innocuous”

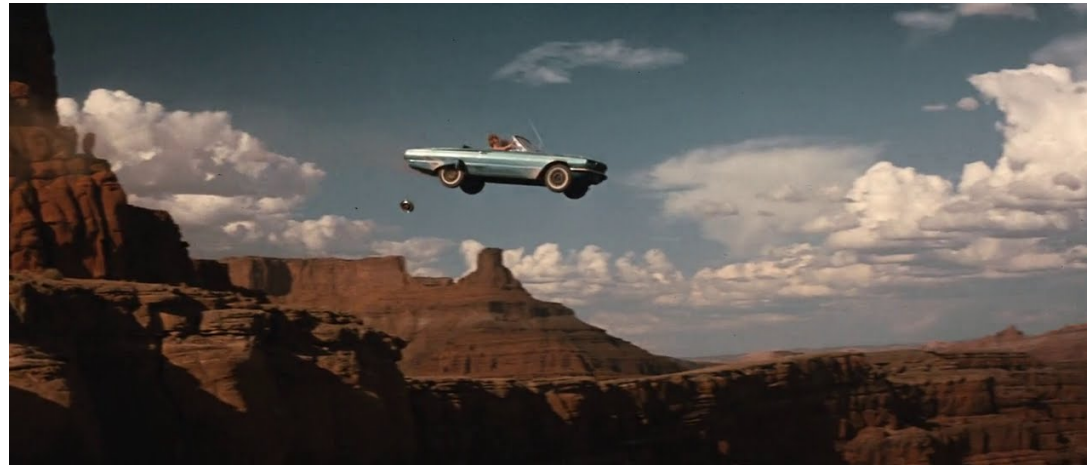


Advising Witness to Make Themselves Unavailable

California Rule of Professional Conduct 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

(e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

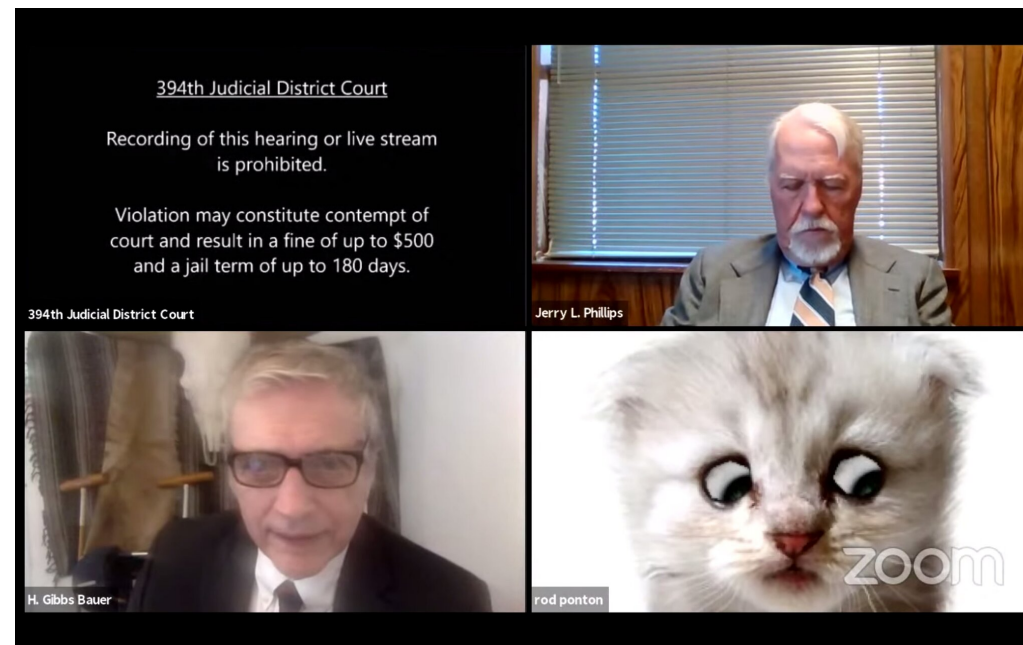


2. Preserving Privilege

- a. Who is the Client?**
- b. Who is the Lawyer?**

In-House Counsel

- In-house counsel may wear multiple hats, be careful of business vs. legal roles



Conducting a Privileged Investigation

Good: Investigation supervised by attorney but conducted by non-attorney

- Courts may find it to be attorney-client privileged if goal was to gather facts for attorney to provide legal advice
- Courts may find work product privilege to apply if acting as agent of attorney and reports contain thoughts and impressions to aid in litigation

Better: Investigation conducted by in-house attorneys

- Courts should find it to be privileged if goal was to gather facts for attorney to provide legal advice
- Stronger claim of work product privilege if attorney's thoughts and impressions are contained in report

Best: Investigation conducted by outside counsel

- Most likely scenario for court to find it privileged if goal was to provide legal advice
- Strongest claim of work product privilege if attorney's thoughts and impressions are contained in report



- 2. Preserving Privilege**
 - a. Who is the Client?**
 - b. Who is the Lawyer?**
 - c. What is the Purpose?**

In-House Counsel: Dual Purpose Communications

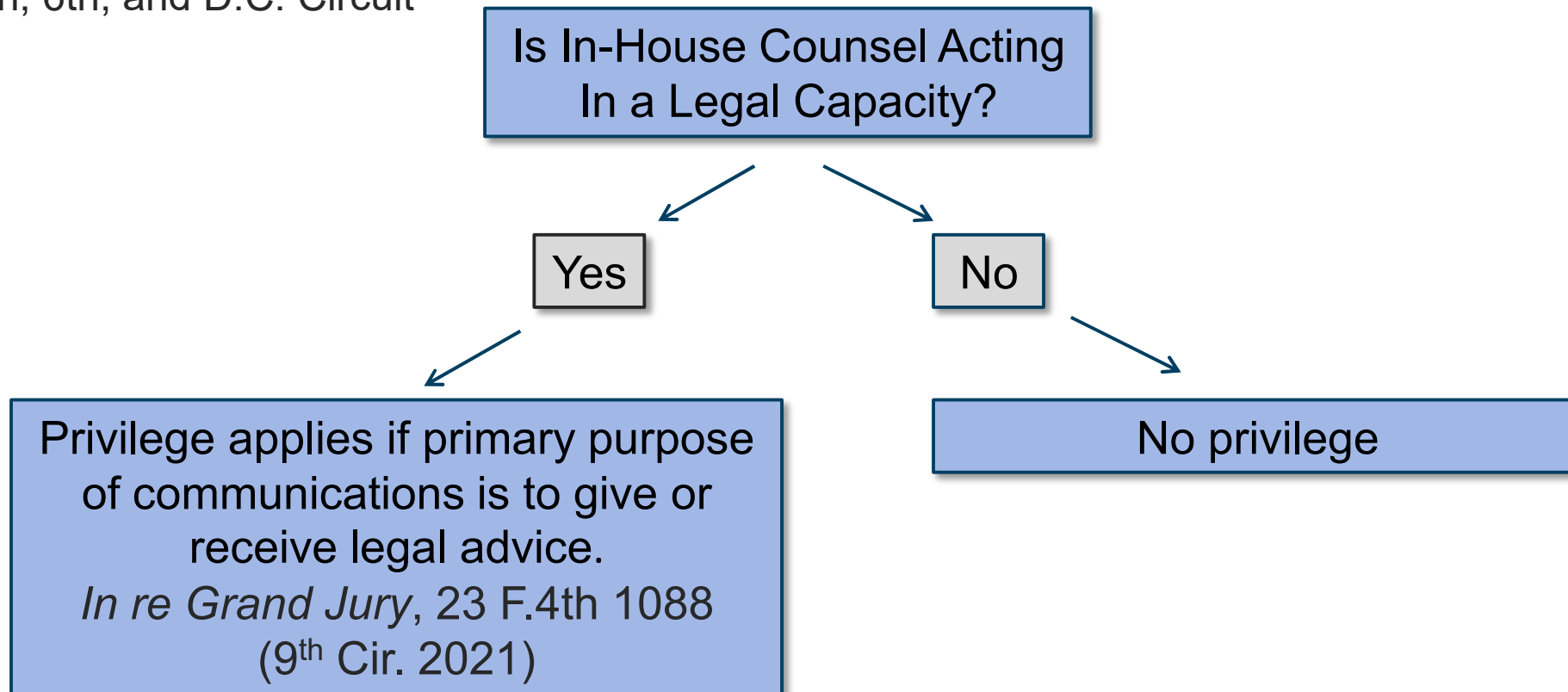
California: Predominant Purpose

- *Travelers Ins. Companies v. Superior Ct.*, 143 Cal. App. 3d 436, 452 (1983):
"Where it is clear that the communication has but a single purpose, there is little difficulty in concluding that the privilege should be applied or withheld accordingly. If it appears that the communication is to serve a dual purpose, one for transmittal to an attorney 'in the course of professional employment' and one not related to that purpose, the question presented to the trial court is as to which purpose predominates."

In-House Counsel: Dual Purpose Communications

Ninth Circuit: Primary Purpose Test

*Also 2nd, 5th, 6th, and D.C. Circuit



3. Ethical and Legal Traps

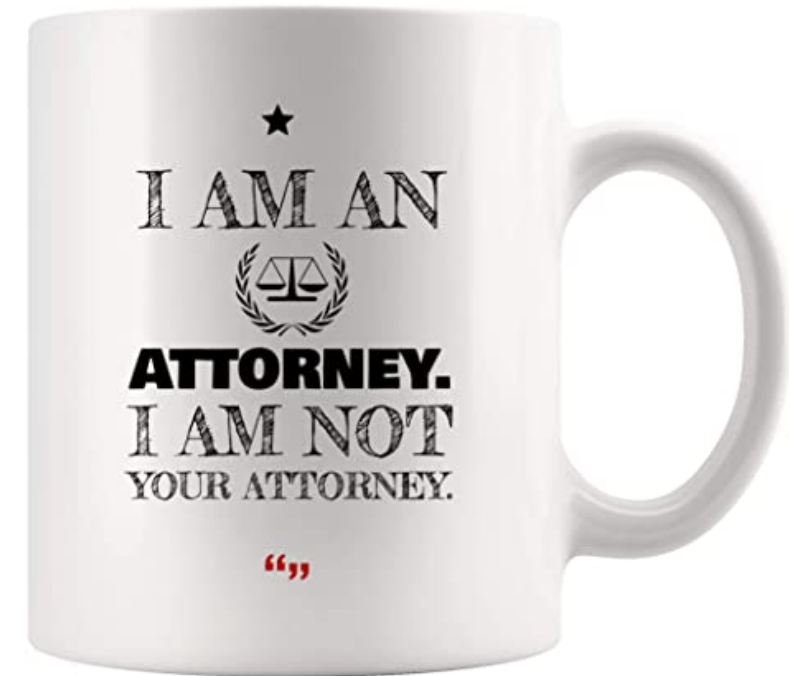
When Speaking to and Interviewing Witnesses

- Keep the investigation confidential
- Conversation with witnesses limited to the legal interest of the company
 - Do not discuss your reactions to allegations
 - Do not discuss what other witness have stated
 - Do not discuss findings of investigation
 - Do not say anything that could cast a negative light on whistleblower or government
 - Do not provide legal advice to the witness



When Speaking to and Interviewing Witnesses

- Give complete *Upjohn* warnings at the beginning of an interview
 - Written in advance
 - Provided orally to witness
 - Use even with sophisticated employees
 - Explain in nice, non-scary way
 - Provide even if witness has separate counsel who is present
 - Ask witness if they understand warnings
 - Document warnings and witness's understanding
 - Failure to give adequate warnings can have ethical consequences



Upjohn Warnings

- Introduce yourself as attorney for organization
- Explain subject matter of investigation and purpose is to provide legal advice to company
- State you do not represent witness
- Conversation privileged; belongs to organization, not witness
- Up to organization, not witness, whether statement will be shared with others, including government
- Organization may elect to share statements w/o providing notice to witness
- Instruct witness not to disclose conversation because:
 - Helps maintain privilege, confidentiality of statements
 - Ensures the integrity of the investigation

Sample *Upjohn* Warning

- We are attorneys conducting an investigation for [company].
- The purpose of our investigation is to learn facts so we can provide legal advice to [company] related to the [subject matter of investigation].
- We are not your personal attorneys and cannot give you legal advice.
- We are speaking with you because we believe you have information that is relevant to our investigation.
- [If witness is a union member and collective bargaining agreement allows for representative: You have the right, but are not required, to have a union representative with you today during this interview. If you want a union representative to be here, we will stop the interview to make those arrangements.]

Sample *Upjohn* Warning

- Your communications with us are confidential and are protected by the attorney-client privilege.
- Because [company] is our client, the attorney-client privilege belongs solely to [company].
- Only [company] may decide to waive the privilege and reveal our communications to third parties [including the government or law enforcement].
- If [company] decides to disclose these communications, it may do so in its sole discretion and without providing you with notice.
- Because our communications are confidential, and for the integrity of the investigation, we ask you not to disclose them to anyone other than a lawyer who represents [company] or you personally.

Ethical Issues with Failure to Give *Upjohn* Warning

- *U.S. v. Ruehle*, 583 F.3d 600 (9th Cir. 2009):
 - District court excluded statements made by CFO to company’s outside counsel.
 - CFO did not recall receiving *Upjohn* warning.
 - Counsel had not taken notes or memorialized the interview.
 - District court found that the lawyers breached ethical duties by disclosing CFO’s statements because attorney-client relationship existed between CFO and outside counsel.
 - Ninth Circuit reversed:
 - Discussed “treacherous path” for corporate counsel conducting internal investigations, especially with CFO’s role.
 - Found CFO’s statements could be disclosed because they were not made in confidence, but instead made to disclose to outside auditors.
 - Did not reject district court’s holdings with respect to possible breach of ethical duties by company’s counsel.

Responding to Common Questions

1. Can I discuss this with my personal attorney?
2. Do I need my own lawyer, and will the company provide me with one?
3. Do I need a union representative present for this interview?
4. Can I record this interview?
5. Do I have to talk to you?
6. Will HR be involved, and will I face discipline or termination?
7. Will I be compensated for my time?

Hypothetical 3

Your company received a subpoena from a government agency, seeking documents from 7 years ago to the present. The subpoena is very broad and you do not believe the company has done anything wrong. The company has a preservation policy that requires employees to keep documents for 5 years.

What should you do?

- a) Tell the government that there are no responsive documents.
- b) Collect and produce only documents that show the company has done nothing wrong.
- c) Send out a reminder of the company's document preservation policy to keep documents for at least 5 years.
- d) Send out a document preservation notice for all documents dating 7 years ago to the present.

Hypothetical 3: Answer

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What should you do?

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- b) Collect and produce only documents that show the company has done nothing wrong.
- c) Send out a reminder of the company's document preservation policy to keep documents for at least 5 years.
- d) Send out a document preservation notice for all documents dating 7 years ago to the present.**

Dealing with the Government

- Failure to appropriately respond to government investigation can have serious consequences.
 - Former in-house lawyer at GlaxoSmithKline indicted for obstruction, false statements, for her role in responding to request by FDA.
 - Indictment's allegations:
 - Attorney failed to produce potentially incriminating documents
 - She falsely denied GSK had promoted off-label uses, aware of evidence to contrary
 - Falsely represented that document production was complete
 - Attorney acquitted at trial.

Other Pitfalls

- Role of potential subject of investigation
 - Potential subject's involvement in investigation has consequences
 - Puts credibility of investigation at risk
 - Witnesses might not be as truthful
 - Government might be suspicious
 - Cannot supervise investigation
 - Should not receive updates of investigation
 - Cannot make decisions about investigation
 - Principle is extended to those who supervise or report to potential subjects
- Suspected whistleblowers
 - No actions or communications that could be considered retaliation



Hypothetical 4

Your organization is the subject of a federal grand jury investigation. You learn some members of your organization are cooperating with the FBI.

What should you do?

- a) Tell a cooperating witness that the FBI is manipulating him and that he should not speak to the FBI
- b) Go to court to seek an order to have the FBI turn over all records of its investigation of your organization
- c) Threaten to have the lead FBI agent arrested
- d) All of the above and record everything
- e) None of the above



Hypothetical 4: Answer

Your organization is the subject of a federal grand jury investigation. You learn some members of your organization are cooperating with the FBI.

What should you do?

- a) Tell a cooperating witness that the FBI is manipulating him and that he should not speak to the FBI
- b) Go to court to seek an order to have the FBI turn over all records of its investigation of your organization
- c) Threaten to have the lead FBI agent arrested
- d) All of the above and record everything
- e) None of the above**

Pitfall Example

- FBI investigating corruption in LA County jails
- LA Sheriff's Department makes FBI the enemy
 - Sheriff comments publicly and in private
 - Second in command's vulgarity toward FBI
 - Deputies hide FBI informant
- LA County Sheriff's Department tampers with deputy witnesses
 - LASD Deputy 1 
 - LASD Deputy 2 
 - 



Pitfall Example

- Deputies threaten arrest of lead FBI agent



Example

- FBI supervisor calls LASD Sergeant

FBI Supervisor: This is the last question, Sergeant Long. Do you have any idea when the warrant is going to come out, do you?

Sergeant 1: It could be tomorrow, sir. You're gonna have to talk to the Undersheriff.

- - -

Sergeant 1: ...they're scared! They're like, do you know when...is the warrant...

Sergeant 2: You're still rolling.



Questions?



Thank You



**Brandon
Fox**



**AnnaMarie
Van Hoesen**

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