

**“Can We Talk?” Part Two**  
**When Does Outside Counsel Approach the GC or the Board With**  
**an Ethical Issue?**

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(Cite as: 449 U.S. 383, 101 S.Ct. 677)



Supreme Court of the United States  
UPJOHN COMPANY et al., Petitioners,  
v.  
UNITED STATES et al.

No. 79-886.  
Argued Nov. 5, 1980.  
Decided Jan. 13, 1981.

Corporation and in-house general counsel appealed from order of the United States District Court for the Western District of Michigan, Noel P. Fox, Chief Judge, enforcing an Internal Revenue summons for documents. The Court of Appeals, Sixth Circuit, 600 F.2d 1223, affirmed in part, reversed in part and remanded. Certiorari was granted, and the Supreme Court, Justice Rehnquist, held that: (1) District Court's test, of availability of attorney-client privilege, was objectionable as it restricted availability of privilege to those corporate officers who played "substantial role" in deciding and directing corporation's legal response; (2) where communications at issue were made by corporate employees to counsel for corporation acting as such, at direction of corporate superiors in order to secure legal advice from counsel, and employees were aware that they were being questioned so that corporation could obtain advice, such communications were protected; and (3) where notes and memoranda sought by government were work products based on oral statements of witnesses, they were, if they revealed communications, protected by privilege, and to extent they did not reveal communications, they revealed attorney's mental processes in evaluating the communications and disclosure would not be required simply on showing of substantial need and inability to obtain equivalent without undue hardship.

Judgment of Court of Appeals reversed, and case remanded.

Chief Justice Burger filed an opinion concurring in part and concurring in the judgment.

West Headnotes

**[1] Privileged Communications and Confidentiality 311H ↪106**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk106 k. Purpose of Privilege. Most Cited Cases

(Formerly 410k198(1))

Purpose of attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in observance of law and administration of justice. Fed.Rules Evid. Rule 501, 28 U.S.C.A.

**[2] Privileged Communications and Confidentiality 311H ↪106**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk106 k. Purpose of Privilege. Most Cited Cases

(Formerly 410k198(1))

Attorney-client privilege rests on need for advocate and counselor to know all that relates to client's reasons for seeking representation if professional mission is to be carried out. ABA Code of Professional Responsibility, EC4-1.

**[3] Privileged Communications and Confidentiality 311H ↪106**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk106 k. Purpose of Privilege. Most Cited Cases

(Formerly 410k198(1))

**Privileged Communications and Confidentiality 311H ↪132**

449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 47 A.F.T.R.2d 81-523, 30 Fed.R.Serv.2d 1101, 81-1 USTC P 9138, Fed. Sec. L. Rep. P 97,817, 1980-81 Trade Cases P 63,797, 1981-1 C.B. 591, 7 Fed. R. Evid. Serv. 785  
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311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk132 k. Communications from Client to Attorney and from Attorney to Client. Most Cited Cases

(Formerly 410k198(1))

Attorney-client privilege exists to protect not only giving of professional advice to those who can act on it but also the giving of information to lawyer to enable him to give sound and informed advice. Fed.Rules Evid. Rule 501, 28 U.S.C.A.; ABA Code of Professional Responsibility, EC4-1.

**[4] Privileged Communications and Confidentiality 311H ↪123**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk120 Parties and Interests Represented by Attorney

311Hk123 k. Corporations, Partnerships, Associations, and Other Entities. Most Cited Cases  
(Formerly 410k199(2))

District court's test, of availability of attorney-client privilege, was objectionable as frustrating very purpose of privilege, insofar as test restricted availability of privilege to those corporate officers who played "substantial role" in deciding and directing corporation's legal response. Fed.Rules Evid. Rule 501, 28 U.S.C.A.

**[5] Privileged Communications and Confidentiality 311H ↪123**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk120 Parties and Interests Represented by Attorney

311Hk123 k. Corporations, Partnerships, Associations, and Other Entities. Most Cited Cases  
(Formerly 410k199(2))

Where communications at issue were made by corporate employees to counsel for corporation acting as such, at direction of corporate superiors in or-

der to secure legal advice from counsel, and employees were aware that they were being questioned so that corporation could obtain legal advice, such communications, consistently with underlying purposes of attorney-client privilege, were protected against compelled disclosure. Fed.Rules Evid. Rule 501, 28 U.S.C.A.

**[6] Privileged Communications and Confidentiality 311H ↪143**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk143 k. Factual Information; Independent Knowledge; Observations and Mental Impressions. Most Cited Cases

(Formerly 410k198(1))

Attorney-client privilege only protects disclosure of communications, and it does not protect disclosure of underlying facts by those who communicated with attorney. Fed.Rules Evid. Rule 501, 28 U.S.C.A.

**[7] Privileged Communications and Confidentiality 311H ↪101**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk101 k. Nature of Privilege. Most Cited Cases

(Formerly 410k198(1))

Application of privilege, such as attorney-client privilege, is determined on case-by-case basis. Fed.Rules Evid. Rule 501, 28 U.S.C.A.

**[8] Internal Revenue 220 ↪4490**

220 Internal Revenue

220XX Examination of Persons and Records


220k4490 k. In General. Most Cited Cases  
(Formerly 220k1451)

Obligation imposed by tax summons remains subject to traditional privileges and limitations, and work-product doctrine does apply to IRS summonses. Fed.Rules Evid. Rule 501, 28 U.S.C.A.; Fed.Rules Civ.Proc. Rules 26(b)(3), 81(a)(3), 28 U.S.C.A.; 26

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U.S.C.A. §§ 7402(b), 7602, 7604(a).

**\*\*679 Syllabus** <sup>FN\*</sup>

**[9] Federal Civil Procedure 170A**  **1604(1)**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things


170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(1) k. In General. Most Cited Cases

(Formerly 170Ak1600(3), 170Ak1600.2)

Forcing attorney to disclose notes and memoranda of witness' oral statements is particularly disfavored, and rule accords special protection to work product revealing attorney's mental processes. Fed.Rules Civ.Proc. Rules 26, 26(b)(3), 28 U.S.C.A.

**[10] Federal Civil Procedure 170A**  **1604(1)**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(1) k. In General. Most Cited Cases

(Formerly 170Ak1600(3), 170Ak1600.2)

Notes and memoranda sought by government were work products based on oral statements of witnesses, and where, if they revealed communications, protected by attorney-client privilege, and to extent they did not reveal communications, they revealed attorney's mental processes in evaluating the communications, and disclosure would not be required simply on showing of substantial need and inability to obtain equivalent without undue hardship, and stronger showing of necessity and unavailability by other means than was made by government or applied by magistrate would be necessary to compel disclosure. Fed.Rules Evid. Rule 501, 28 U.S.C.A.; 26 U.S.C.A. § 7602; Fed.Rules Civ.Proc. Rule 26(b)(3), 28 U.S.C.A.

<sup>FN\*</sup> The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 288, 50 L.Ed. 499.

**\*383** When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner's attorneys sent a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by petitioner disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U.S.C. § 7602 demanding production of, *inter alia*, the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded, *inter alia*, that the attorney-client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work-product doctrine. The Court of Appeals rejected the Magistrate's finding of a waiver of the attorney-client privilege, but held that under the so-called "control group test" the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice ... for the simple reason that the communications were not the 'client's.'" The court also held that the work-product doctrine did not apply to IRS summonses.

*Held:*

1. The communications by petitioner's employees to counsel are covered by the attorney-client privilege insofar as the responses to the \*384 questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 682-686.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to \*\*680 those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. Middle-level-and indeed lower-level-employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. Pp. 683-684.

(b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. P. 684.

(c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. P. 684.

(d) Here, the communications at issue were made by petitioner's employees to counsel for petitioner

acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. P. 685.

2. The work-product doctrine applies to IRS summonses. Pp. 686-689.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language \*385 or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work-product doctrine. P. 687.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications they reveal attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney's mental processes, and Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 688.

600 F.2d 1223, 6 Cir., reversed and remanded. Daniel M. Gribbon, Washington, D. C., for petitioners.

Lawrence G. Wallace, Washington, D. C., for respondents.

\*386 \*\*681 Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address im-

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portant questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U.S. 925, 100 S.Ct. 1310, 63 L.Ed.2d 758. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

#### I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants, so informed petitioner, Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter \*387 began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the in-

vestigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments.<sup>FN1</sup> A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U.S.C. § 7602 demanding production of:

FN1. On July 28, 1976, the company filed an amendment to this report disclosing further payments.

"All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any \*\*682 political \*388 contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

"The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a-18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States

449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 47 A.F.T.R.2d 81-523, 30 Fed.R.Serv.2d 1101, 81-1 USTC P 9138, Fed. Sec. L. Rep. P 97,817, 1980-81 Trade Cases P 63,797, 1981-1 C.B. 591, 7 Fed. R. Evid. Serv. 785  
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filed a petition seeking enforcement of the summons under 26 U.S.C. §§ 7402(b) and 7604(a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F.2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice ... for the simple reason that the communications were not the 'client's.'" *Id.*, at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was \*389 within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U.S.C. § 7602." *Id.*, at 1228, n. 13.

## II

[1][2] Federal Rule of Evidence 501 provides that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S.

391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the \*390 \*\*683 law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation. *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915), and the Government does not contest the general proposition.

[3] The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, ... can be said to possess an identity analogous to the corporation as a whole." 600 F.2d at 1226. The first case to articulate the so-called "control group test" adopted by the court below, *Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483, 485 (E.D. Pa.), petition for mandamus and prohibition denied *sub nom. General Electric Co. v. Kirkpatrick*, 312 F.2d 742 (CA3 1962), cert. denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963), reflected a similar conceptual approach:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, ... then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the

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privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See Trammel, supra, at 51, 100 S.Ct., at 913; Fisher, supra, at 403, 96 S.Ct., at 1577. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts \*391 with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

“A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.”

See also Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385, 393-394, 91 L.Ed. 451 (1947).

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—“officers and agents ... responsible for directing [the company's] actions in response to legal advice”—who will possess the information needed by the corporation's lawyers. Middle-level-and indeed lower-level-employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (CA8 1978) (en banc):

“In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem ‘is thus faced with a ‘Hobson's choice’. If he \*\*684 interviews employees not having ‘the very highest authority’,\*392

their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with the ‘very highest authority’, he may find it extremely difficult, if not impossible, to determine what happened.’ ” *Id.*, at 608-609 (quoting Weinschel Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C.Ind. & Com. L.Rev. 873, 876 (1971)).

[4] The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, *e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1164 (DSC 1974) (“After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it”).

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, “constantly go to lawyers to find out how to obey the law,” Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus.Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, *e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 440-441, 98 S.Ct. 2864, 2875-2876, 57 L.Ed.2d 854 (1978) (“the behavior proscribed by the [Sherman] Act is \*393 often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct”).<sup>FN2</sup> The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying “test” will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the

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attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, *e. g.*, Hogan v. Zletz, 43 F.R.D. 308, 315-316 (ND Okl.1967), *aff'd* in part *sub nom. Natta v. Hogan*, 392 F.2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with Congoleum Industries, Inc. v. GAF Corp., 49 F.R.D. 82, 83-85 (ED Pa.1969), *aff'd*, 478 F.2d 1398 (CA3 1973) (control group includes only division and corporate \*\*685 vice presidents, and not two directors of research and vice president for production and research).

FN2. The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

\*394 [5] The communications at issue were made by Upjohn employees FN3 to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments.*" (Empha-

sis supplied.) 78-1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. FN4 The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." \*395 It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." *Id.*, at 165a-166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, *id.*, at 39a, 43a, and have been kept confidential by the company. FN5 Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

FN3. Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a-38a. Petitioners argue that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.

449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 47 A.F.T.R.2d 81-523, 30 Fed.R.Serv.2d 1101, 81-1 USTC P 9138, Fed. Sec. L. Rep. P 97,817, 1980-81 Trade Cases P 63,797, 1981-1 C.B. 591, 7 Fed. R. Evid. Serv. 785  
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FN4. See *id.*, at 26a-27a, 103a, 123a-124a. See also *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (CA3 1979); *In re Grand Jury Subpoena*, 599 F.2d 504, 511 (CA2 1979).

FN5. See Magistrate's opinion, 78-1 USTC ¶ 9277, p. 83,599: "The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel."

[6] The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

"[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different\*\*686 \*396 thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (q2.7).

See also *Diversified Industries*, 572 F.2d., at 611; *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 580, 150 N.W.2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the ques-

tionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U.S., at 516, 67 S.Ct., at 396: "Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary."

[7] Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S.Rep. No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship ... should be determined on a case-by-case basis"); *Trammel*, 445 U.S., at 47, 100 S.Ct., at 910-911; *United States v. Gillock*, 445 U.S. 360, 367, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980). While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-clientt \*397 privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals, in this case cannot, consistent with "the principles of the common law as ... interpreted ... in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

### III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a-28a, 91a-93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U.S.C. § 7602.<sup>FN6</sup>

FN6. The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attor-

449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 47 A.F.T.R.2d 81-523, 30 Fed.R.Serv.2d 1101, 81-1 USTC P 9138, Fed. Sec. L. Rep. P 97,817, 1980-81 Trade Cases P 63,797, 1981-1 C.B. 591, 7 Fed. R. Evid. Serv. 785  
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ney-client privilege does not apply to them.  
See n. 3, *supra*.

[8][9][10] The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In that case the Court rejected “an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties.” *Id.*, at 510, 67 S.Ct., at 393. The Court noted that “it is essential that a lawyer work with \*398 a certain degree of privacy” \*687 and reasoned that if discovery of the material sought were permitted

“much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.” *Id.*, at 511, 67 S.Ct., at 393-394.

The “strong public policy” underlying the work-product doctrine was reaffirmed recently in *United States v. Nobles*, 422 U.S. 225, 236-240, 95 S.Ct. 2160, 2169-2171, 45 L.Ed.2d 141 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).<sup>FN7</sup>

FN7. This provides, in pertinent part:

“[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by

other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

As we stated last Term, the obligation imposed by a tax summons remains “subject to the traditional privileges and limitations.” *United States v. Euge*, 444 U.S. 707, 714, 100 S.Ct. 874, 879-880, 63 L.Ed.2d 741 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26(b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable \*399 to summons enforcement proceedings by Rule 81(a)(3). See *Donaldson v. United States*, 400 U.S. 517, 528, 91 S.Ct. 534, 541, 27 L.Ed.2d 580 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78-1 USTC ¶ 9277, p. 83,605. The Government relies on the following language in *Hickman*:

“We do not mean to say that all written materials obtained or prepared by an adversary’s counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had.... And production might be justified where the witnesses are no longer available or can be reached only with difficulty.” 329 U.S., at 511, 67 S.Ct., at 394.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman*, however, did not apply to “oral statements made by witnesses ... whether presently in the form of [the attorney’s] mental impressions or memoranda.” *Id.*, at 512, 67 S.Ct., at 394. As to such material the Court did “not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.... If there should

449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 47 A.F.T.R.2d 81-523, 30 Fed.R.Serv.2d 1101, 81-1 USTC P 9138, Fed. Sec. L. Rep. P 97,817, 1980-81 Trade Cases P 63,797, 1981-1 C.B. 591, 7 Fed. R. Evid. Serv. 785  
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be a rare situation justifying production of these matters petitioner's case is not of that type." *Id.*, at 512-513, 67 S.Ct., at 394-395. See also *Nobles, supra*, 422 U.S., at 252-253, 95 S.Ct., at 2177 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U.S., at 513, 67 S.Ct., at 394-395 ("what he saw fit to write down regarding witnesses' remarks"); *id.*, at 516-517, 67 S.Ct., at 396 \*\*688 ("the statement would be his [the \*400 attorney's] language, permeated with his inferences") (Jackson, J., concurring).<sup>FN8</sup>

FN8. Thomas described his notes of the interviews as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." 78-1 USTC ¶ 9277, p. 83,599.

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78-1 USTC ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C.App., p. 442 ("The subdivision ... goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories ... of an attorney or other representative of a party. The

*Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories ...").

\*401 Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, *e. g.*, *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); *In re Grand Jury Investigation*, 412 F.Supp. 943, 949 (ED Pa.1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, *e. g.*, *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (CA3 1979) ("special considerations ... must shape any ruling on the discoverability of interview memoranda ...; such documents will be discoverable only in a 'rare situation' "); Cf. *In re Grand Jury Subpoena*, 599 F.2d 504, 511-512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we \*402 \*\*689 think a far stronger

449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 47 A.F.T.R.2d 81-523, 30 Fed.R.Serv.2d 1101, 81-1 USTC P 9138, Fed. Sec. L. Rep. P 97,817, 1980-81 Trade Cases P 63,797, 1981-1 C.B. 591, 7 Fed. R. Evid. Serv. 785  
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showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

*It is so ordered.*

Chief Justice BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Ante*, at 684. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See *ante*, at 685. Because of the great importance of the issue, in my view the Court should make clear now that, as a \*403 general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would

bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (CA8 1978) (en banc); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-492 (CA7 1970), *aff'd* by an equally divided Court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1163-1165 (DSC 1974). Other communications between employees and corporate counsel may indeed be privileged—as the petitioners and several *amici* have suggested in their proposed formulations <sup>FN\*</sup>—but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

FN\* See Brief for Petitioners 21-23, and n. 25; Brief for American Bar Association as *Amicus Curiae* 5-6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as *Amici Curiae* 9-10, and n. 5.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly \*404 before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," *ante*, at 686, neither minimizes the consequences\*\*690 of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

U.S.Mich., 1981.

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(Cite as: 583 F.3d 600)

**H**

United States Court of Appeals,  
Ninth Circuit.  
UNITED STATES of America, Plaintiff–Appellant,  
v.  
William J. RUEHLE, Defendant–Appellee.

No. 09–50161.  
Argued and Submitted Sept. 1, 2009.  
Filed Sept. 30, 2009.

**Background:** The United States brought criminal action against chief financial officer (CFO) of corporation and other defendants for charges arising from the corporation's stock option granting practices. Following evidentiary hearing, the United States District Court for the Central District of California, Cormac J. Carney, J., 606 F.Supp.2d 1109, issued an order excluding all statements the CFO made to corporation's attorneys regarding stock option granting practices at corporation. Government filed interlocutory appeal.

**Holdings:** The Court of Appeals, Tallman, Circuit Judge, held that:

- (1) district court committed legal error when it relied almost exclusively upon California law to define both the attorney-client relationship and the attorney-client privilege, and
- (2) CFO's statements to corporation's attorneys were not made in confidence.

Reversed and remanded.

West Headnotes

**[1] Privileged Communications and Confidentiality 311H ↪100**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege  
311Hk100 k. In general. Most Cited Cases

The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a

judicial proceeding of certain confidential communications between a client and a lawyer.

**[2] Criminal Law 110 ↪1139**

110 Criminal Law  
110XXIV Review  
110XXIV(L) Scope of Review in General  
110XXIV(L)13 Review De Novo  
110k1139 k. In general. Most Cited Cases

The district court's conclusion that statements are protected by an individual attorney-client privilege is a mixed question of law and fact which the Court of Appeals reviews independently and without deference to the district court.

**[3] Criminal Law 110 ↪1139**

110 Criminal Law  
110XXIV Review  
110XXIV(L) Scope of Review in General  
110XXIV(L)13 Review De Novo  
110k1139 k. In general. Most Cited Cases

Whether a party has met the requirements to establish the existence of the attorney-client privilege is reviewed de novo.

**[4] Criminal Law 110 ↪1139**

110 Criminal Law  
110XXIV Review  
110XXIV(L) Scope of Review in General  
110XXIV(L)13 Review De Novo  
110k1139 k. In general. Most Cited Cases

The Court of Appeals reviews de novo the district court's rulings on the scope of the attorney-client privilege.

**[5] Privileged Communications and Confidentiality 311H ↪173**

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311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk171 Evidence

311Hk173 k. Presumptions and burden of proof. Most Cited Cases

A party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication.

**[6] Privileged Communications and Confidentiality 311H ↪102**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk102 k. Elements in general; definition. Most Cited Cases

**Privileged Communications and Confidentiality 311H ↪132**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk132 k. Communications from client to attorney and from attorney to client. Most Cited Cases

The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, as well as an attorney's advice in response to such disclosures.

**[7] Privileged Communications and Confidentiality 311H ↪102**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk102 k. Elements in general; definition. Most Cited Cases

Typically, an eight-part test determines whether information is covered by the attorney-client privilege: (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose,

(4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

**[8] Federal Courts 170B ↪416**

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk416 k. Evidence law. Most Cited Cases

Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law.

**[9] Federal Courts 170B ↪416**

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk416 k. Evidence law. Most Cited Cases

In federal criminal action against chief financial officer (CFO) of corporation arising from corporation's stock option granting practices, in determining whether CFO's statements to corporation's attorneys would be admissible, the district court committed legal error when it relied almost exclusively upon California law to define both the attorney-client relationship and the attorney-client privilege; under federal law, as the party asserting the privilege, the CFO was obliged to establish the privileged nature of the communications.

**[10] Privileged Communications and Confidentiality 311H ↪156**

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk156 k. Confidential character of communications or advice. Most Cited Cases

Statements made by chief financial officer (CFO) of corporation to corporation's attorneys who were conducting internal investigation regarding propriety of corporation's stock option granting practices

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were not made in confidence, but were instead made for purpose of disclosure to outside auditors, and thus CFO's statements were not protected by attorney-client privilege; CFO admitted he understood the fruits of attorneys' inquiries would be disclosed to accounting firm in order to convince independent auditors of the integrity of corporation's financial statements or to take appropriate accounting measures to rectify any misleading reports and CFO was charged with primary responsibility for corporation's financial affairs.

**[11] Criminal Law 110 ↪ 392.7**

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k392.1 Wrongfully Obtained Evidence

110k392.7 k. State or federal law. Most

Cited Cases

(Formerly 110k394.1(2))

A state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible.

\*601 Daniel B. Levin (argued), Gregory W. Staples, Andrew D. Stopler, United States Attorney's Office, Los Angeles, CA; Robb C. Adkins, United States Attorney's Office, Santa Ana, CA; Thomas P. O'Brien, United States Attorney, for plaintiff-appellant United States of America.

Matthew D. Umhofer (argued), Richard Marmaro, Matthew E. Sloan, Skadden, Arps, Slate, Meagher & Flom LLP, Los Angeles, CA, for defendant-appellee William J. Ruehle.

Appeal from the United States District Court for the Central District of California, Cormac J. Carney, District Judge, Presiding. D.C. No. 8:08-CR-00139-cjc-2.

Before: RAYMOND C. FISHER, RONALD M. GOULD, and RICHARD C. TALLMAN, Circuit Judges.

TALLMAN, Circuit Judge:

We here explore the treacherous path which corporate counsel must tread under the attorney-client

privilege when conducting an internal investigation to advise a \*602 publicly traded company on its financial disclosure obligations. Defendant-Appellee William J. Ruehle is the former Chief Financial Officer ("CFO") of Broadcom Corporation, a California-based, publicly traded semiconductor supplier that came under intense scrutiny for its suspected backdating of company stock options. Following a government investigation, Ruehle was criminally indicted for his involvement in an alleged backdating scheme that ultimately resulted in Broadcom's re-statement of its earnings to account for approximately \$2.2 billion in additional stock-based compensation expenses. The district court held an evidentiary hearing and, after evaluating the extensive briefing and evidence presented, issued an order suppressing all evidence reflecting Ruehle's statements to attorneys from Irell & Manella LLP ("Irell"), Broadcom's outside counsel, regarding the stock option granting practices at Broadcom. The court found that at the initial stages of the inquiry by Irell (called the "Equity Review") an attorney-client relationship also existed with the CFO individually, and not just with Broadcom, and that the lawyers breached their ethical duties to their client Ruehle in disclosing what he had told them in a preliminary interview.

The government filed an interlocutory appeal. We have jurisdiction pursuant to 18 U.S.C. § 3731, and we reverse and remand for further proceedings.

**I**

In March 2006, the *Wall Street Journal* published the first of a series of articles called "The Perfect Payday," which suggested that a number of public companies were backdating stock options granted to their employees.<sup>FNI</sup> Shortly thereafter, in mid-May 2006, an investor rights group publicly identified Broadcom as one of the corporations that appeared to have engaged in backdating. As a result of the media attention and in anticipation of an inquiry from the Securities and Exchange Commission ("SEC"), Broadcom's Board of Directors and company management decided to bring in outside counsel to commence an internal review of the company's current and past stock option granting practices. Ruehle, as Broadcom's CFO, was among those intimately involved in that decision from the outset. On May 18, \*603 2006, Broadcom's Audit Committee engaged Irell, a private law firm with which it had longstanding ties, to conduct the Equity Review by investigat-

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ing the propriety of the measurement dates utilized by Broadcom in its option granting process and identifying those grants which failed to meet the measurement date requirements of generally accepted accounting principles.<sup>FN2</sup> Irell immediately commenced its review, which entailed collecting corporate documents and records and conducting interviews with past and current Broadcom employees.

FN1. Stock options give individuals the right to buy shares of stock on a future date at a set price, commonly known as the “exercise” or “strike” price. Typically, as was the practice at Broadcom, stock options granted to employees could not be exercised until the end of a fixed vesting period. Once an option vested, the holder could exercise it and purchase stock from the company at the strike price. Thus, options that have a strike price below the current trading price in the stock market are commonly referred to as being “in the money,” whereas options with a strike price above the current trading price are considered “underwater.”

The strike price is typically equal to the market price on the date that the option is granted. “Backdating” refers to the practice of recording an option’s grant date and strike price retrospectively. See *United States v. Reyes*, 577 F.3d 1069, 1073 (9th Cir.2009). The ability to manipulate the strike price maximizes the benefit to the option holders. Selection of an initial grant date when the share price, and thus the strike price, is at its lowest during a given period will increase the amount an option is “in the money” or, in some cases, may determine whether an option is “in the money” at all, rather than “underwater.” In either case, the employee may immediately exercise the options to buy shares at the optimally low strike price, sell the stock at the current market price, and pocket any gain. “Backdating is not itself illegal, provided that the benefit to the employees is recorded on the corporate books as a non-cash compensation expense to the corporation, in accordance with an accounting convention promulgated in 1972 referred to as Accounting

Principles Board Opinion No. 25.” *Id.*

FN2. The relationship between Broadcom and Irell runs deep, as Ruehle contends, and dates back to before 1998 when Irell assisted Broadcom in its initial public offering of stock (“IPO”), which led to its becoming an investor-owned public company. Irell itself acquired stock during the IPO and its partners profited handsomely when the stock price rose. Since then, Irell has represented Broadcom in relation to numerous acquisitions and the firm has handled several litigation matters for Broadcom and its officers and directors. At the time it was engaged to conduct the Equity Review, the firm was counsel of record for Broadcom and its management employees named as individual defendants in a then-unrelated securities class action, *Jin v. Broadcom Corp.*, pending in California state superior court. Moreover, Irell had recently represented Broadcom, as well as several of its officers and directors, including Ruehle, in an unrelated securities action referred to as the “warrants litigation.” The warrants litigation settled several months prior, in December 2005.

Broadcom representatives, including Ruehle, met with Irell lawyers on May 24 and 25, 2006, to discuss the scope of the Equity Review. It was agreed that Irell would report the results of its inquiries to the Audit Committee. It was also decided that the Board would not appoint a panel of independent, outside directors to oversee the Equity Review. On May 26, 2006, a formal meeting of the Audit Committee was convened. Ruehle and other senior Broadcom executives, several members of the Board, and Irell lawyers were among those present. During the hour-long meeting, Irell partner David Siegel explained the nature of typical “backdating” investigations and discussed the status of Irell’s internal review, including the necessary involvement of Broadcom’s outside independent auditors, Ernst & Young LLP, who would have to review and opine on the accuracy of the company’s audited financial statements and regulatory filings. Siegel also cautioned “that Irell can handle issues related to the proper accounting for option grants but that if an issue of self-dealing or management or Board integrity arose, a special committee of independent directors would need to be

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appointed and special independent counsel engaged to conduct that inquiry.” The Audit Committee and other representatives of Broadcom made clear that the intent was to turn over the information obtained through the Equity Review to the auditors, to fully cooperate with government regulators, and, if necessary, to self-report any problems with Broadcom’s financial statements.

As many within Broadcom had anticipated, civil lawsuits soon followed the media reports about the company’s back-dating of stock options. On May 25, 2006, a shareholder derivative suit captioned *Murphy v. McGregor* was filed in California federal court. The following day, on May 26, the plaintiffs in the ongoing securities class action in California state superior court, *Jin v. Broadcom Corp.*, filed an amended complaint. Both the *Murphy* action and the *Jin* amended class action now alleged wrongdoing in relation to Broadcom’s stock option granting practices; both suits named Broadcom and also personally named Ruehle, among other Broadcom officers and directors, as an individual defendant.

\*604 On May 30, 2006, Broadcom’s in-house General Counsel David Dull sent an e-mail to various Broadcom employees, including Ruehle, notifying them of the *Murphy* action and of the amended complaint filed in the *Jin* securities class action. Dull invited anyone with concerns to contact either him or Irell attorneys Siegel, Kenneth Heitz, or Dan Lefler. Shortly after receiving Dull’s message, Ruehle received a separate e-mail from Heitz, one of the Irell partners with whom Ruehle had already conferred as part of the Equity Review. Heitz’s e-mail updated Ruehle concerning the scheduling of interviews of three current or former Broadcom employees and, finally, inquired, “if you have open time on Thursday Dan Lefler and I would like to spend an hour or so with you....”

As arranged, Heitz and Lefler met with Ruehle in his office on Thursday, June 1, 2006, to discuss Broadcom’s stock option granting practices and his role as the company’s CFO.<sup>FN3</sup> Ruehle had subsequent, brief discussions with the Irell lawyers as the Equity Review continued and the lawyers reported back to the CFO their progress in unearthing the facts. At no point did the topic of the civil securities lawsuits arise as it might relate to Ruehle personally. Nor did Ruehle ever indicate to the lawyers that he

was seeking legal advice in his individual capacity. It is the substance of these June 2006 interactions that lies at the center of the present dispute.

FN3. At the evidentiary hearing the Irell attorneys testified that they provided Ruehle a so-called *Upjohn* or corporate *Miranda* warning. Such warnings make clear that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company’s attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure. See *Upjohn Co. v. United States*, 449 U.S. 383, 393–96, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Ruehle testified that he did not recall receiving any such warnings. As discussed *infra*, the district court seems to have disbelieved the Irell lawyers who took no notes nor memorialized their conversation on this issue in writing, and it apparently credited Ruehle’s testimony that no such warnings were given. We cannot say that this finding is clearly erroneous on the record before us.

In late June 2006, Irell advised Ruehle to secure independent counsel with respect to the investigations and the pending civil suits. Ruehle retained the law firm Wilson Sonsini Goodrich & Rosati to represent him individually. Nevertheless, Ruehle remained heavily involved in the company’s internal review and he was privy to Irell’s reports to the Audit Committee of its findings and ultimately the disclosures of the information gathered by Irell to Ernst & Young.

In August 2006, at Broadcom’s direction, Irell fully disclosed the information obtained from the Equity Review to the Ernst & Young auditors. Irell had a series of meetings with Ernst & Young in which the lawyers reported what they had found, which necessarily included the substance of Ruehle’s June 1, 2006, interview with Heitz and Lefler. Ruehle was present for at least some of these meetings between Irell and the Ernst & Young auditors. There is no dispute that the Irell lawyers regularly updated Ruehle and others in senior management about the progress of the Equity Review and their meetings and

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contacts with the auditors.

The Equity Review revealed several accounting irregularities with respect to certain stock option grants. In January 2007, on the advice of its outside counsel and auditors, Broadcom restated its earnings as reported in its financial disclosure statements to include a total of \$2.2 billion in \*605 previously undisclosed compensation expenses.

The SEC and the United States Attorney's Office commenced formal enforcement and grand jury investigations of several company executives in relation to Broadcom's stock option granting practices. In May and June 2007, with Broadcom's authorization, government investigators interviewed Irell attorneys Heitz and Lefler by telephone regarding their conversations with Ruehle in June 2006. The information they provided was summarized in FBI Form FD-302 reports of investigation, which are part of the sealed record. When he learned that the government intended to use this information against him in connection with possible criminal charges, Ruehle objected and claimed that any statements to the Irell attorneys were protected by his attorney-client privilege. Ruehle also insisted, after the fact, that whatever he said to Irell could not be disclosed without his prior written consent.

On June 4, 2008, a grand jury in the Central District of California indicted Ruehle and Henry T. Nicholas III—Broadcom's founder, and former President and Chief Executive Officer—on charges of conspiracy, securities and wire fraud, and various other violations of Title 15 of the United States Code. The indictment alleges that beginning in or around 1999 and continuing until at least in or around 2005, Nicholas and Ruehle, among others, engaged in a fraudulent scheme and conspiracy to disguise, conceal, understate, and mischaracterize compensation expenses Broadcom was required to recognize in connection with granting its stock options to various employees. Among the allegations of wrongdoing, the indictment claims that as part of the backdating scheme the defendants paid a former employee who threatened to expose the scheme, concealed the pay-off from Broadcom's Board and its independent auditors, and took various steps to create plausible deniability as to Broadcom's option backdating practices.

On January 12, 2009, the government moved *ex*

*parte* for a hearing to resolve whether the statements Ruehle made to Irell lawyers in June 2006 were privileged communications. Ruehle argued that he had an individual attorney-client relationship with Irell arising from the securities lawsuits, in which he was a named defendant. Beginning on February 23, 2009, the district court held a three-day evidentiary hearing at which Ruehle and Irell attorneys Heitz and Lefler testified. At Ruehle's request, a substantial portion of the testimony and evidence was received *in camera* outside the presence of the federal prosecutors. Both Irell attorneys insisted that Irell's individual representation of Ruehle in relation to the civil securities lawsuits did not commence until after the June 1, 2006, interview.<sup>FN4</sup> Among other things, the attorneys testified that they began the June 2006 meeting with a so-called *Upjohn* or corporate *Miranda* warning, which included notice that the Irell attorneys were acting as representatives of Broadcom—specifically, the Audit Committee—and that the privilege therefore rested only with the company. Ruehle, however, denied any recollection of receiving such cautionary warnings at the June 1, 2006, interview. Ruehle testified that at the time he spoke with Heitz and Lefler he believed Irell represented everyone named in the civil suits, including \*606 him, and that Heitz and Lefler were acting at least in part as his personal attorneys during the interview.

<sup>FN4</sup>. On June 8, 2006, Irell filed a Status Conference Report on behalf of all defendants in the *Jin* class action and shortly thereafter accepted service of the amended complaint in order to avoid the need for service of legal process on each person named therein, including Ruehle.

At the conclusion of the hearing, the district court rendered its oral ruling which strongly condemned the Irell attorneys' behavior with respect to the firm's handling of the Equity Review. The court then found that Ruehle "had a reasonable belief that Irell and Manella were his lawyers prior to the June 1, 2006 interrogation by Irell, and that he never gave informed written consent, either to the dual representation by Irell or the disclosure of privileged information to third parties, including Ernst & Young and the government." Based on this reasoning, the court ordered suppression. The district court subsequently issued a written order, which included an additional finding that Ruehle intended his statements to Heitz

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and Lefler to be confidential. The order stated that “all evidence reflecting Mr. Ruehle's statements to Irell regarding the stock option granting practices at Broadcom is suppressed.”<sup>FN5</sup> The court also referred Irell to the California State Bar for possible discipline in light of numerous perceived violations of state rules of professional conduct.

<sup>FN5</sup>. The order also directed the government to return all privileged documents within 14 days. That order is stayed pending the outcome of this appeal.

[1] The government interlocutorily appealed the district court's suppression order and we consider it on an expedited basis.<sup>FN6</sup>

<sup>FN6</sup>. The district court and the parties label this a matter of “suppression.” We will do so as well for the sake of consistency. However, analytically, the court's order is more accurately characterized as an order directing the exclusion of privileged evidence—akin to the grant of a motion *in limine*. Though courts in the past have used terms such as “suppress” and “exclude” interchangeably in similar contexts, *see, e.g., United States v. Plache*, 913 F.2d 1375, 1377, 1379–81 (9th Cir.1990), “suppress” is better confined to a narrower meaning that would not apply here. “The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer.” *United States v. Rogers*, 751 F.2d 1074, 1077 (9th Cir.1985). In contrast, “suppression” is generally understood to concern invocation of the judicially created exclusionary rule, which is intended to operate as a deterrent to governmental misconduct and, as a necessary corollary, may be invoked to exclude other evidence discovered as the “fruit of the poisonous tree.” *See Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009). There is no allegation of government misconduct in the instant case as the record reveals there was no governmental participation in the acts of Broadcom, the Audit Committee, or Irell's conduct of the Equity Review. Thus, the ex-

clusionary rule does not apply here and “suppression” in that sense is not at issue.

## II

[2][3][4] The district court's conclusion that statements are protected by an individual attorney-client privilege is “a mixed question of law and fact which this court reviews independently and without deference to the district court.” *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir.1997) (quoting *United States v. Gray*, 876 F.2d 1411, 1415 (9th Cir.1989)). That is, whether the party has met the requirements to establish the existence of the attorney-client privilege is reviewed de novo. *Id.* We also review de novo the district court's rulings on the scope of the attorney-client privilege. *Id.* Factual findings are reviewed for clear error. *See Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1196 (9th Cir.2007). A district court's credibility determinations are given “special deference.” *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir.2008) \*607 (citing *United States v. Nelson*, 137 F.3d 1094, 1110 (9th Cir.1998)).

## III

The government raises several arguments challenging the district court's order excluding Ruehle's statements to Irell attorneys. We begin with some basic premises. First, there is no dispute that Broadcom had an existing attorney-client relationship with Irell and, by electing to reveal the information gathered to Ernst & Young (and later to various agencies of the United States), deliberately waived any corporate attorney-client privilege it held with respect to all matters at issue. Second, the Equity Review and the civil securities suits, to which Ruehle was a party, both concerned the same general subject matter as of June 1, 2006—i.e., the stock option granting practices of Broadcom. Finally, the district court concluded as a fact that Ruehle reasonably believed that Irell represented him individually with respect to the ongoing civil lawsuits when the June 1, 2006, meeting took place. Because this factual finding is not clearly erroneous, we approach the parties' arguments from the perspective that Irell had attorney-client relationships with both Broadcom and Ruehle individually.

[5] We, however, must inquire further. After all, “[a] party asserting the attorney-client privilege has the burden of establishing the relationship *and* the privileged nature of the communication.” *Bauer*, 132

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F.3d at 507 (citing *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir.1995)) (emphasis added); accord *In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir.1998) (“In certain circumstances, reasonable belief may be enough to create an attorney-client relationship, but it is not sufficient here to create a personal attorney-client privilege.”). We must determine whether Ruehle’s communications to the Irell attorneys regarding Broadcom’s stock option granting practices are protected by a personal attorney-client privilege belonging to Ruehle.

[6][7] “The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, ... as well as an attorney’s advice in response to such disclosures.” *Bauer*, 132 F.3d at 507 (quoting *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir.1996)) (emphasis omitted). “The fact that a person is a lawyer does not make all communications with that person privileged.” *United States v. Martin*, 278 F.3d 988, 999 (9th Cir.2002) (citing *Chen*, 99 F.3d at 1501). “Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed.” *Id.* (quoting *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir.1981)); accord *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir.1990). “[T]he privilege stands in derogation of the public’s ‘right to every man’s evidence’ and as ‘an obstacle to the investigation of the truth,’ [and] thus, ... ‘[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.’ ” *In re Horowitz*, 482 F.2d 72, 81 (2d Cir.1973) (citations omitted). Typically, an eight-part test determines whether information is covered by the attorney-client privilege:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal adviser,
- (8) unless the protection be waived.

*In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n. 2 (9th Cir.1992) (quoting \*608 *United States v. Margolis (In re Fischel)*, 557 F.2d 209, 211 (9th Cir.1977)).<sup>FN7</sup> The party asserting the privilege bears the burden of proving each essential element. *United States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir.2000).

FN7. The government urges that the special problems presented by joint representation of a corporation and its individual officers counsel adoption of particularized requirements before the individual officer could assert an attorney-client privilege. The Third Circuit in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123–24 (3d Cir.1986), adopted a five-factor test intended to clarify that “any privilege that exists as to a corporate officer’s role and functions within a corporation belongs to the corporation, not the officer.” Several other circuits have adopted some form of tailored test for joint-representation scenarios. See *Ross v. City of Memphis*, 423 F.3d 596, 605 (6th Cir.2005); *In re Grand Jury Subpoena (Newparent)*, 274 F.3d 563, 571–72 (1st Cir.2001); *In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir.1998); *United States v. Int’l Bhd. of Teamsters*, 119 F.3d 210, 215–16 (2d Cir.1997). We do not decide the propriety of adopting the specialized test of *Bevill* because, given Irell’s longstanding representation of Ruehle as an individual before the instant case arose and in light of the planned disclosure of facts gained in the Equity Review investigation to the third-party independent auditor, this case can be resolved using our usual eight-part test. Accordingly, we leave for another day consideration of the extraordinary requirements of the *Bevill* five-prong test for establishing attorney-client privilege in a situation where both the executive and the corporation assert that they are dually represented. Similarly, we need not reach and decide in this case whether our circuit should adopt the rule of *Newparent*: that the corporation, without consent of an executive asserting privilege, can waive the attorney-client privilege in a dual-representation context where the subject matter of the waiver concerns matters of interest to the corporation. 274 F.3d at 572–74. We also need not reach *Newparent*’s further holding that the executive can control the assertion of attorney-client privilege only as to matters segregable from those of concern to the corporation. *Id.* at 573.

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#### A

[8][9] At the outset we note a fundamental flaw in the district court's analysis. "Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law." *Bauer*, 132 F.3d at 510 n. 4 (quoting *Clarke v. Am. Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir.1992)); see also *United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir.1995) ("[S]ince the adoption of the Federal Rules of Evidence, courts have uniformly held that federal common law of privilege, not state law applies." (citations omitted)). The district court, however, applied a "reasonable belief" standard without ever referencing the well-established eight-part test. Rather, in reaching its holding, the court relied almost exclusively upon California state law to define both the attorney-client relationship and the attorney-client privilege. Most significantly, the court cited *California Evidence Code section 917(a)* for the proposition that all "communications made in the course of an attorney-client relationship are presumed confidential."<sup>FN8</sup>

FN8. Ruehle insists that federal privilege law also creates a *prima facie* presumption of privilege, citing *Chen*, 99 F.3d 1495. He misreads that opinion. At issue in *Chen* was whether the defendants' attorneys were acting in the capacity of professional legal advisors—that is, whether the attorneys were providing legal advice, which is privileged, or non-legal business advice, which is not protected. *Id.* at 1500–01 (noting that "[i]f a person hires a lawyer for advice, there is a rebuttable presumption that the lawyer is hired 'as such' to give 'legal advice' "). Ruehle extrapolates from the unremarkable and narrow principle in *Chen* to argue that "[w]here an attorney-client relationship exists, communications made in the context of that relationship are *prima facie* subject to the privilege." This argument directly conflicts with our case law.

This legal error is critical in this case. The district court applied a liberal view of the privilege that conflicts with the strict \*609 view applied under federal common law, which governs here. See *Martin*, 278 F.3d at 999. By approaching the exclusion question with a presumption that the privilege attached, the district court inverted the burden of proof, im-

properly placing the onus on the government to show what information was not privileged. See *Gordon v. Superior Court of L.A. County*, 55 Cal.App.4th 1546, 65 Cal.Rptr.2d 53, 59 (1997) ("[C]ommunications between a lawyer and his client are presumed confidential, with the burden on the party seeking disclosure to show otherwise." (citations omitted)).

As the party asserting the privilege, Ruehle was obliged by federal law to establish the privileged nature of the communications and, if necessary, to segregate the privileged information from the non-privileged information. See *Bauer*, 132 F.3d at 507; see also 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 503.20[4][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.2009) (discussing rule that blanket claims of privilege are generally disfavored). With respect to the latter obligation, Ruehle has made no effort to identify with particularity which of his communications to the Irell attorneys are within his claim of privilege, in either his public or sealed filings before us. Under federal law, the attorney-client privilege is strictly construed. Ruehle's failure to define the scope of his claim of privilege weighs in favor of disclosure; in any event, his claim cannot support the overly broad, blanket suppression order entered here.

#### B

[10] With the burden properly on Ruehle, and after carefully reviewing and evaluating the record, we hold that Ruehle fails the fourth element of the traditional eight-part privilege test. Ruehle's statements to the Irell attorneys were not "made in confidence" but rather for the purpose of disclosure to the outside auditors. That he might regret those statements after later learning of the subsequent corporate disclosure to law enforcement officials is not material to the privilege determination as of June 2006.

The district court reached the contrary conclusion: "Mr. Ruehle intended his statements to be confidential, and he had no reason to suspect that his conversations with the Irell lawyers would be disclosed to third parties." We are unable to square this factual finding, which forms the linchpin of the suppression order, with the evidence presented at the evidentiary hearing. The notion that Ruehle spoke with Irell attorneys Heitz and Lefler with the reasonable belief that his statements were confidential is unsupported by the record. Of particular significance

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is what was said in the meetings he attended prior to June 1, 2006, with Irell attorneys, company management, and the Audit Committee, as acknowledged in Ruehle's own testimony. He frankly admitted that he understood the fruits of Irell's searching inquiries would be disclosed to Ernst & Young in order to convince the independent auditors of the integrity of Broadcom's financial statements to the public, or to take appropriate accounting measures to rectify any misleading reports. We reject the district court's contrary finding that an expectation of confidentiality was established because, upon review of the record, we are left with the "definite and firm conviction that a mistake has been committed" and thus we determine that this factual finding was clearly erroneous. United States v. Overton, 573 F.3d 679, 688 (9th Cir.2009) (quoting Easley v. Cromartie, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001)).

\*610 Ruehle was no ordinary Broadcom employee. He served as the public company's CFO—the senior corporate executive charged with primary responsibility for Broadcom's financial affairs. This was a sophisticated corporate enterprise with billions of dollars in sales worldwide, aided by accountants, lawyers, and advisors entrusted with meeting a multitude of regulatory obligations. The duties undertaken by Ruehle broadly encompassed not only accurately and completely reporting the company's historical and current stock option granting practices, but also Broadcom's strict compliance with reporting and record keeping requirements imposed through the Securities Exchange Act of 1934 and the Sarbanes–Oxley Act of 2002, among many other federal and state rules and regulations. *See, e.g.*, 15 U.S.C. §§ 7241, 7262(a). As the head of finance, Ruehle cannot now credibly claim ignorance of the general disclosure requirements imposed on a publicly traded company with respect to its outside auditors or the need to truthfully report corporate information to the SEC.

Ruehle was also intimately involved in all aspects of the Equity Review, including the planning, investigatory, and disclosure stages. Ruehle was a full participant in the initial May 2006 meetings with the Irell attorneys where the scope of representation and the details of the Equity Review were decided and agreed upon, even before convening the formal Audit Committee meeting. From the outset, it was settled and made widely known to senior management that Broadcom intended to fully cooperate with

the SEC and the auditors. Ruehle, as the primary contact with Ernst & Young over the years, personally introduced the Irell attorneys to the team of outside auditors. Thereafter, he repeatedly met with the Audit Committee, senior management, the Irell attorneys, and the auditors, and remained fully apprised throughout the summer of 2006 of the status of Irell's investigation and the flow of information.

In his testimony at the evidentiary hearing, Ruehle acknowledged the broad nature of the planned third-party disclosure, noting that Irell was directed, to his knowledge, to freely share "all factual information" gleaned through the Equity Review—whether "good, bad, or ugly." As he explained, at the time of the June 1, 2006, interview, he understood that nothing would be withheld from Ernst & Young:

Q: Did you think it was appropriate for Broadcom, represented by Irell ..., to withhold information from the auditors in connection with their work in early June of 2006?

A: We were not withholding information from the auditors.

Q: They were not withholding information from the auditors; is that correct?

A: That's correct.

Q: And you understood that to be the case at the time; correct?

A: That's correct.

Indeed, Ruehle confirmed over and over again his awareness that the substance of his June 2006 interviews with the Irell lawyers was not to be held in confidence:

Q: You understood that Irell was going to be sharing the factual information they gathered to third parties?

A: That's correct.

Q: And fair to say you understood that Irell was there, among other things, to gather facts; correct?

A: Correct.







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To dispel any doubt, Ruele also confirmed that the information he provided to Heitz and Lefler was largely factual in nature—the type of information he understood would be disclosed to third parties.

\*611 Q: To be clear, the information you provided to Irell was factual information; correct?

A: It was a combination of factual information and some assumptions and some recollections.

\* \* \*

Q: And you understood that Ernst & Young was going to be looking to you, among other people, to help them understand what had happened as part of Broadcom's historical options review; correct?

A: That's correct.

As Ruele anticipated when he met with the Irell attorneys in June 2006, the information obtained through the Equity Review, including his input, was passed on to Ernst & Young. He never raised any anxiety about the possible disclosure over what he now claims was intended to be confidential and thus privileged information. Ruele had ample opportunity to raise any concern he might have harbored. Ruele not only attended meetings where the Audit Committee directed Irell to disclose to Ernst & Young the fruits of the Equity Review, he was also present at meetings where disclosures to the auditors actually occurred. He did not object. Even after engaging independent counsel to apprise him of his legal rights, Ruele never claimed that he thought his statements to Irell during the Equity Review, later shared with the auditors, were confidential—until the specter of criminal liability arose in 2008.

On appeal, Ruele tries to minimize the damning evidence confirming his awareness that his interactions with Irell would not be held in confidence. He places much weight on the assertion that he only learned of the details of Irell's disclosures to Ernst & Young and the government in 2008 and that he was “shocked.” Ruele contends that, notwithstanding his obligation to fully cooperate in Broadcom's internal review, he would not have provided information as part of the Equity Review had he known it could be used in support of a criminal investigation or an SEC

enforcement action. The district court seems to have agreed with Ruele's analysis, noting:

The Government argues that Mr. Ruele knew that Irell would make some disclosure to Ernst & Young in connection with its investigation, and therefore Mr. Ruele knew that his statements were not confidential. This argument is unpersuasive. Mr. Ruele never understood that Irell might disclose statements adverse to Mr. Ruele's interests to the Government for use in a criminal case against him.

This analysis misses the mark. The salient point from a privilege perspective is that Ruele readily admits his understanding that all factual information would be communicated to third parties, which undermines his claim of confidentiality to support invoking the privilege. Ruele's subjective shock and surprise about the subsequent usage of the information he knew would be disclosed to third-party auditors—e.g., information subsequently shared with securities regulators and the Justice Department now used to support a criminal investigation and his prosecution—is frankly of no consequence here.

In support of his case for invocation of the privilege, Ruele also repeatedly points to attorney Heitz's testimony that he could not “split his mind” so as to distinguish between facts relevant to the Equity Review and those relevant to the defense of Ruele in the pending civil securities litigation, because they both had at their core Broadcom's stock option granting practices. But his efforts to make gold from lead are met with failure. The implicit concession on Ruele's part—\*612 that the information underlying the Equity Review and the lawsuits was largely inseparable, if not one and the same—is detrimental, not helpful, to his case. His admitted awareness that anything relating to the former would not be held in confidence but rather shared with at least one third party destroys the confidentiality essential to establishing the privilege as to both.

Ruele attempts to raise an exception to the full disclosure of all factual information, insisting that he anticipated the disclosure of only factual information “that was not otherwise privileged information.” In other words, Ruele now asserts an expectation of confidentiality only over statements that he claims were really given in confidence. He does not distin-

583 F.3d 600, Fed. Sec. L. Rep. P 95,365, 09 Cal. Daily Op. Serv. 12,338, 2009 Daily Journal D.A.R. 14,349  
(Cite as: 583 F.3d 600)

guish what those statements might be in his blanket invocation of the privilege. This circular reasoning is, analytically speaking, unpersuasive and cannot overcome the concrete evidence in the record before us. Even supposing he subjectively believed that *some* of the information he conveyed to the Irell lawyers was confidential, upon asserting the attorney-client privilege Ruehle was obliged to distinguish which particular statements should be afforded the privilege. He made no effort to do so before the district court and fares no better on appeal. His testimony at the evidentiary hearing, despite being held *in camera* at his request, due ostensibly to the sensitive subject matter to be discussed, did not delve into the details of his substantive contributions to the Equity Review and, frankly, entailed largely non-privileged matters. We are left guessing as to what particular facts Ruehle purportedly believed were disclosed in breach of confidence.

Ruehle's position is, at bottom, that some nebulous portion of his communications with Heitz and Lefler was intended to be confidential as to him personally and therefore everything said or not said to the attorneys should be protected by his individual attorney-client privilege. That is not the law nor, in our view, should it be. Having failed to better articulate his expectations regarding the scope of disclosure to Ernst & Young, he has failed to carry his burden with respect to any and all factual information arising from the Equity Review.

Moreover, Ruehle's argument runs squarely into the settled rule that *any* voluntary disclosure of information to a third party waives the attorney-client privilege, regardless of whether such disclosure later turns out to be harmful. *See* 3 Weinstein & Berger, *supra*, § 503.40. Ruehle freely and voluntarily disclosed the information in June 2006 and did not mention an individualized privilege until nearly two years later, after having sat in on the very meetings where his allegedly-privileged information was disclosed. Ruehle's assertion about his subjective intent in 2006 cannot sustain his privilege claim when he has freely admitted that the disclosure to Ernst & Young was planned. *See Weil*, 647 F.2d at 24 (holding subjective intent not dispositive and privilege waived).

In sum, the overwhelming evidence demonstrates that Ruehle's statements to Heitz and Lefler were not "made in confidence" but rather for the pur-

pose of outside disclosure. Accordingly, we hold that Ruehle has failed to meet his burden of establishing the existence of an individual attorney-client privilege with respect to the information provided to the Irell attorneys in the June 2006 time frame.

#### IV

A considerable portion of the district court's suppression order was dedicated to recounting perceived violations of the California Rules of Professional Conduct committed\*613 by Irell attorneys. This portion of the order, which relates to possible disciplinary action by the state bar, is not before us on appeal. Ruehle, however, asserts that clear breaches of professional duties warrant suppression in a criminal prosecution. We disagree and reject this novel argument, which stands apart from the attorney-client privilege determination.<sup>FN9</sup>

FN9. At the evidentiary hearing, Ruehle's counsel acknowledged that suppression was *not* a remedy for a breach of counsel's duty of loyalty. Ruehle reversed course and argued otherwise in his briefs on appeal. He appears to have abandoned the position at oral argument.

[11] "[A] state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible." *United States v. Lowery*, 166 F.3d 1119, 1124 (11th Cir.1999); accord *United States v. Keen*, 508 F.2d 986, 989 (9th Cir.1974) ("[E]vidence obtained in violation of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law." (citations omitted)). To be clear, in some cases, material protected by the attorney-client privilege may come to light as a result of counsel's breach of a duty of confidentiality. But it is the protected nature of the information that is material, not the ethical violation by counsel. *See Int'l Bhd. of Teamsters*, 119 F.3d at 217 (holding that an individual could not assert individual privilege even though the law firm failed to clarify that it represented only his employer, in violation of state rules of professional responsibility).

Contrary to Ruehle's contention, *United States v. Rogers*, 751 F.2d 1074 (9th Cir.1985), provides him no support. As the government correctly distinguishes it, *Rogers* involved government misconduct



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(Cite as: 583 F.3d 600)

in acquiring evidence. *Id.* at 1079 (holding that a federal agent's "inducement of a violation of an ethical obligation of confidentiality ... does not warrant dismissal of an indictment" where suppression is a possible remedy with respect to the improperly obtained evidence). Read properly, that case supports the government's position that the suppression order was in error. *Id.* at 1077 ("The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer."). There has been no allegation that the government encouraged, was complicit in, or was even aware of, any breach of ethical obligations on Irell's part. It learned of the information only after Broadcom made an intentional disclosure to the government in response to regulatory inquiries as evidence of the company's good faith efforts to comply with its financial reporting obligations. Irell's allegedly unprofessional conduct in counseling Broadcom to disclose, without obtaining written consent from Ruehle, while troubling, provides no independent basis for suppression of statements he made in June 2006.

#### V

The district court erred in forbidding the United States from calling Irell attorneys to testify to the information they learned from Ruehle in June 2006. Consistent with his admitted understanding that Broadcom would fully disclose what Irell learned as part of the Equity Review to Ernst & Young, Ruehle lacks an expectation of confidentiality to support a blanket invocation of his individual attorney-client privilege over *all* factual information he provided.<sup>FN10</sup>

<sup>FN10.</sup> We stress that our holding today should not be interpreted as *carte blanche* approval of all foreseeable testimony by the Irell attorneys as we read the proffer summarized in the FBI Form FD-302 reports. The district court remains responsible for determining the admissibility of any testimony that may extend beyond factual information, and, to the extent consistent with our opinion, appropriate evidentiary objections, of course, remain viable.

\*614 The district court's order suppressing the Irell evidence is reversed and the matter is remanded for trial.

**REVERSED and REMANDED.**

C.A.9 (Cal.),2009.  
U.S. v. Ruehle  
583 F.3d 600, Fed. Sec. L. Rep. P 95,365, 09 Cal.  
Daily Op. Serv. 12,338, 2009 Daily Journal D.A.R.  
14,349

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UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MARYLAND

-----x  
 UNITED STATES OF AMERICA, :  
 Plaintiff :  
 :  
 vs :Criminal Action: RWT-10-694  
 :  
 LAUREN STEVENS, :  
 Defendant. :  
 -----x

Tuesday, May 10, 2011  
Greenbelt, Maryland

The above-entitled action came on for a Jury Trial Proceeding before the HONORABLE ROGER W. TITUS, United States District Judge, in courtroom 2C, commencing at 9:24 a.m.

APPEARANCES:

On behalf of the Plaintiff:

SARA M. BLOOM, Esquire  
PATRICK G. JASPERSE, Esquire

On behalf of the Defendant:

REID H. WEINGARTEN, Esquire  
WILLIAM HASSLER, Esquire  
COLLEEN CONRY, Esquire

I N D E X

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1           THE COURT: Yesterday I heard very eloquent  
2 arguments on both sides in support of and in opposition  
3 to the Defendant's motion for judgment under Rule 29 of  
4 the Federal Rules of Criminal Procedure. Under that rule  
5 the Court has various options, as I previously reviewed,  
6 of either granting the motion, denying it, or deferring  
7 it as authorized by Rule 29(b).

8           Under Rule 29, the standard is whether any  
9 rational trier of fact could find the defendant guilty  
10 beyond a reasonable doubt, viewing the evidence in the  
11 light most favorable to the government, which is the  
12 standard I must and will apply.

13           During the government's case, which is now  
14 concluded, the Court heard extensive testimony of both  
15 FDA and GSK officials and, to put it mildly, a large  
16 volume of documentary evidence. Very significant  
17 portions of the documents placed before the Court were  
18 what would otherwise be privileged attorney-client  
19 documents. They were obtained by the United States as a  
20 result, as I've learned, of an order of a magistrate  
21 judge in the District of Massachusetts who ordered them  
22 produced under what's known as the Crime Fraud Exception.

23           There are, of course, profound implications for  
24 the free flow of communications between a lawyer and  
25 client when the privilege is abrogated, as it was in this

1 case. The Crime Fraud Exception is designed to overcome  
2 the privilege only when the evidence establishes that the  
3 client intended to perpetrate a crime or fraud and the  
4 communications at issue between the attorney and the  
5 client were made in furtherance of such crime or fraud.

6 The Crime Fraud Exception has been mentioned in  
7 some recent decisions in this circuit, including a recent  
8 decision from the District of South Carolina last month  
9 in *United States versus Giannini*. And the Court there  
10 observed that the Crime Fraud Exception exists when, 1),  
11 the client was engaged in or planning a criminal or  
12 fraudulent scheme when he sought the advice of counsel to  
13 further the scheme and, 2), the documents containing the  
14 privileged materials bear a close relationship to the  
15 client's existing or future scheme to commit a crime or  
16 fraud.

17 A similar ruling was handed down by the Western  
18 District of Virginia in *Billings versus Stonewall Jackson*  
19 *Hospital* in 2009, once again saying the two tests must be  
20 satisfied: 1), the client was engaged in or planning a  
21 criminal or fraudulent scheme when he sought the advice  
22 of a counsel to further the scheme and 2), the documents  
23 containing the privileged materials bear a close  
24 relationship to the client's existing or future scheme to  
25 commit a crime or fraud.

1           With the 20/20 vision of hindsight, and that's  
2 always the place to be in terms of wisdom, the  
3 Massachusetts Order was an unfortunate one, because I now  
4 have benefitted from a trial in which these documents  
5 that were ordered produced were paraded in front of me,  
6 and the prosecutors were permitted to forage through  
7 confidential files to support an argument for criminality  
8 of the conduct of the defendant.

9           What those records demonstrate to the Court is,  
10 first of all, that access should not have been granted to  
11 them in the first place. But that's not for me to  
12 decide. That's already been decided by a magistrate  
13 judge in Massachusetts. But they also show that this was  
14 a client that was not engaged to assist a client to  
15 perpetrate a crime or fraud. Instead, the privileged  
16 documents in this case show a studied, thoughtful  
17 analysis of an extremely broad request from the Food and  
18 Drug Administration and an enormous effort to assemble  
19 information and respond on behalf of the client.

20           The responses that were given by the defendant in  
21 this case may not have been perfect; they may not have  
22 satisfied the FDA. They were, however, sent to the FDA  
23 in the course of her bona fide legal representation of a  
24 client and in good faith reliance of both external and  
25 internal lawyers for GlaxoSmithKline.

1           Now, what are the consequences of that? As to  
2 Counts One and Two, the Safe Harbor Provision of Section  
3 15(c) is an absolute bar. GlaxoSmithKline did not come  
4 to Ms. Stevens and say, assist us in committing a crime  
5 or fraud. It came to her for assistance in responding to  
6 a letter from the FDA. I conclude on the basis of this  
7 record that no reasonable juror could conclude otherwise  
8 beyond a reasonable doubt.

9           As I included in my draft instructions that I had  
10 prepared in this case had it gone to the jury, on the  
11 role of lawyers and advice of counsel, the Safe Harbor  
12 Provision is designed specifically to protect an attorney  
13 who is acting in accordance with the obligation that  
14 every lawyer has to zealously represent his or her client  
15 and place their position in the most favorable possible  
16 light. That is the obligation of a lawyer as pointed out  
17 in the proceedings in Congress when 1515(c) was adopted.

18           The Subcommittee on Criminal Justice had received  
19 complaints of prosecutors harassing members of the  
20 defense bar, and that vigorously and zealously  
21 representing a client is no a basis for charging an  
22 offense under the Obstruction of Justice chapter. That  
23 addresses the Safe Harbor Provisions which only pertains  
24 to Counts One and Two.

25           As to all counts relating to the question of

1 advice of counsel, the evidence in this case can only  
2 support one conclusion, and that is that the defendant  
3 sought and obtained the advice and counsel of numerous  
4 lawyers. She made full disclosure to them. Every  
5 decision that she made and every letter she wrote was  
6 done by a consensus. Now, even if some of these  
7 statements were not literally true, it is clear that they  
8 were made in good faith which would negate the requisite  
9 element required for all six of the crimes charged in  
10 this case.

11           The government contends that some statements were  
12 false. For example, they point to the statement made by  
13 Ms. Stevens in a letter to the FDA in which she states  
14 that GlaxoSmithKline is not engaged in the promotion of  
15 Wellbutrin SR for weight loss. They seek to take that  
16 statement, however, in isolation, and the Court simply  
17 cannot do that and cannot permit a jury to do that.

18           It is clear that while that statement was made,  
19 the same or other communications clearly disclosed to the  
20 FDA that there had been -- speakers had been provided  
21 inadvertently with an off-label slide deck, that at least  
22 -- that approximately 75 speaker presentations had  
23 off-label topics; that Dr. Wolkowitz had used the  
24 presentation that contained phrases and information about  
25 the effect of the drug on body weight that some may

1 consider as outside the product's approved indication.

2 She also disclosed that the company became aware  
3 of certain activities that were inconsistent with the  
4 company's policies; took its responsibilities seriously  
5 and instituted appropriate and necessary corrective  
6 actions to address these activities. The same applies to  
7 activities of Dr. Hudziak that were disclosed. So, this  
8 is not a statement that can be taken as being false when  
9 you consider it in the context in which it was given.

10 I conclude on the basis of the record before me  
11 that only with a jaundiced eye and with an inference of  
12 guilt that's inconsistent with the presumption of  
13 innocence could a reasonable jury ever convict this  
14 defendant.

15 When a Rule 29 motion is made, she is not stripped  
16 of the presumption of innocence. And the government,  
17 while it gets the benefit of all inferences, they must be  
18 sufficient to overcome that presumption and permit a  
19 reasonable juror to find guilt beyond a reasonable doubt.

20 I take my responsibility seriously. I practiced  
21 law for a long time and made a number of Rule 29 motions  
22 that -- or in the state system equivalent of them. I  
23 don't have a very good track record with those motions.  
24 In my seven and a half years as a jurist I have never  
25 granted one. There is, however, always a first.

1 I conclude that I have an obligation when I find  
2 legally and sufficient evidence to sustain a conviction  
3 on any count that the motion must be granted. I believe  
4 that it would be a miscarriage of justice to permit this  
5 case to go to the jury.

6 Moreover, there are serious implications for the  
7 practice of law generated by this prosecution. Lawyers  
8 can never assist a client in the commission of a crime or  
9 a fraud, and that's well established. Lawyers do not get  
10 a free pass to commit crimes. I have presided over other  
11 trials of lawyers and have sent some to jail.

12 I was affirmed by Fourth Circuit this year for  
13 having sent a lawyer who was in his 60s to jail for seven  
14 years for commission of -- assisting a client in the  
15 commission of a fraudulent tax scheme. I have lawyers  
16 awaiting sentencing before me. Lawyers do not get a free  
17 pass in front of me. I'm more than happy to preside over  
18 their trials and where they're convicted, as appropriate,  
19 give them jail sentences if that's appropriate, and I  
20 wouldn't hesitate to do that.

21 However, a lawyer should never fear prosecution  
22 because of advice that he or she has given to a client  
23 who consults him or her, and a client should never fear  
24 that its confidences will be divulged unless its purpose  
25 in consulting the lawyer was for the purpose of

1 committing a crime or a fraud.

2           There is an enormous potential for abuse in  
3 allowing prosecution of an attorney for the giving of  
4 legal advice. I conclude that the defendant in this case  
5 should never have been prosecuted and she should be  
6 permitted to resume her career.

7           The institutional problem that causes me a great  
8 concern is that while lawyers should not get a free pass,  
9 the Court should be vigilant to permit the practice of  
10 law to be carried on, to be engaged in, and to allow  
11 lawyers to do their job of zealously representing the  
12 interests of their client. Anything that interferes with  
13 that is something that the court system should not  
14 countenance.

15           For those reasons, I am going to grant the  
16 Defense's motion for judgment of acquittal, and that will  
17 bring this case to an end.

18           What I will do now is to bring the jury in and  
19 advise them of what I have done and release them, and I  
20 will then meet with them privately to explain what I have  
21 done.

22           I want to again commend the attorneys in this  
23 case. I practiced law a long time and been a judge for a  
24 while, and it is pure pleasure to have great lawyering  
25 going on on both sides in this case. It's some of the

1 best lawyering I've seen in a long time. So it's a  
2 pleasure to have all the parties before me.

3 Not everybody can win the case. One person has to  
4 win or one person has to lose this. In this case, I  
5 conclude that justice wins by acquitting this lawyer of  
6 the charges brought against her.

7 (Bring the jury in.)

8 (Jury returns at 9:40 a.m.)

9 THE COURT: Please be seated. Good morning,  
10 ladies and gentlemen. As I advised you on Friday, the  
11 government had rested its case and the Federal Rules of  
12 Criminal Procedure authorize the defense to make a motion  
13 for a judgment of acquittal at the end of the government  
14 case, if the moving party believes and I conclude that  
15 the evidence is insufficient to support a conviction  
16 viewed in the light most favorable to the government.  
17 That is known as -- is what's called a Rule 29 Motion.

18 Those motions are routinely made and rarely, if  
19 ever, granted. This case is one -- is an exception, and  
20 I have granted a motion by the defense for judgment of  
21 acquittal of the defendant. She is acquitted, and there  
22 is nothing further for the jury to do.

23 You may be perplexed by that decision, and I will  
24 be glad to come back and talk to you about it. I'm sure  
25 you were probably looking forward the to spending the

1 next two weeks of your life in this courthouse, but you  
2 will not have to do that.

3 I would be happy to discuss this with you. So if  
4 you return to the jury room so I can release the parties,  
5 I'll be glad to come back and discuss the decision with  
6 you. Your service is at an end, and I thank you very  
7 much, for myself and for the whole court system.

8 (Jury excused at 9:42 a.m.)

9 THE COURT: All right. I will do the tradition in  
10 the Fourth Circuit of coming down and greeting counsel  
11 and thanking you for your work in this case.

12 (Off the record at 9:43 a.m.)

13

14

15

**CERTIFICATE**

16 I, Tracy Rae Dunlap, RPR, CRR, an Official Court  
17 Reporter for the United States District Court of  
18 Maryland, do hereby certify that I reported, by machine  
19 shorthand, the proceedings had in the case of UNITED  
20 STATES OF AMERICA versus LAUREN STEVENS, Criminal Action  
21 Number RWT-10-694 on May 10, 2011.

22 In witness whereof, I have hereto subscribed my  
23 name, this 10th day of May 2011.

24

25

\_\_\_/S/\_\_\_ Tracy Rae Dunlap\_\_\_  
TRACY RAE DUNLAP, RPR, CRR  
OFFICIAL COURT REPORTER

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For purposes of this part, the following definitions apply:

(a) *Appearing and practicing before the Commission:*

(1) Means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or

(ii) Is a non-appearing foreign attorney.

**(b) *Appropriate response*** means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

**(1)** That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

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**(2)** That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

**(3)** That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to § [205.3\(b\)\(3\)](#), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:

**(i)** Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or

**(ii)** Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

**(c) *Attorney*** means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

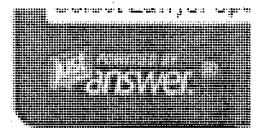
**(d) *Breach of fiduciary duty*** refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

**(e) *Evidence of a material violation*** means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

**(f) *Foreign government issuer*** means a foreign issuer as defined in 17 CFR [230.405](#) eligible to register securities on Schedule B of the Securities Act of 1933 ([15 U.S.C. 77a et seq.](#), Schedule B).

**(g) *In the representation of an issuer*** means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

**(h) *Issuer*** means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 ([15 U.S.C. 78c](#))), the securities of which are registered under section 12 of that Act ([15 U.S.C. 78l](#)), or that is required to file reports under section 15(d) of that Act ([15 U.S.C. 78o\(d\)](#)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 ([15 U.S.C. 77a et seq.](#)), and that it has not withdrawn, but does not include a foreign



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government issuer. For purposes of paragraphs (a) and (g) of this section, the term "issuer" includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

**(i)** *Material violation* means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

**(j)** *Non-appearing foreign attorney* means an attorney:

**(1)** Who is admitted to practice law in a jurisdiction outside the United States;

**(2)** Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

**(3)** Who:

**(i)** Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

**(ii)** Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

**(k)** *Qualified legal compliance committee* means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

**(1)** Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

**(2)** Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under § 205.3;

**(3)** Has been duly established by the issuer's board of directors, with the authority and responsibility:

**(i)** To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in § 205.3(b)(4));

**(ii)** To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

- (A) Notify the audit committee or the full board of directors;
  - (B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and
  - (C) Retain such additional expert personnel as the committee deems necessary; and
- (iii) At the conclusion of any such investigation, to:
- (A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and
  - (B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and
- (4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.
- (l) *Reasonable* or *reasonably* denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.
- (m) *Reasonably believes* means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.
- (n) *Report* means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

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CFR TOOLBOX

## 17 CFR 205.3 - ISSUER AS CLIENT.

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**(a) Representing an issuer.** An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

**(b) Duty to report evidence of a material violation. (1)** If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

**(2)** The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a

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report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

**(3)** Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

- (i)** The audit committee of the issuer's board of directors;
- (ii)** Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or
- (iii)** The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19) )).

**(4)** If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

**(5)** An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

**(6)** An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

**(i)** The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

- (A)** The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and
- (B)** Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or



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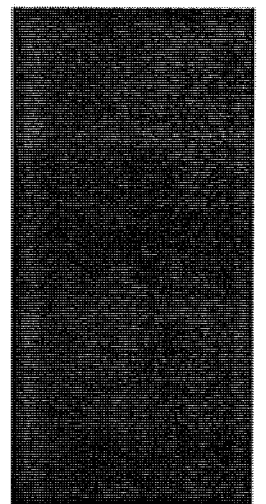
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(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

**(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee. (1)** If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material

violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under § 205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

**(d) Issuer confidences. (1)** Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

**(2)** An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

- (i)** To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
- (ii)** To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
- (iii)** To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

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## 17 CFR 205.4 - RESPONSIBILITIES OF SUPERVISORY ATTORNEYS.

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(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in § 205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in § 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under § 205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.



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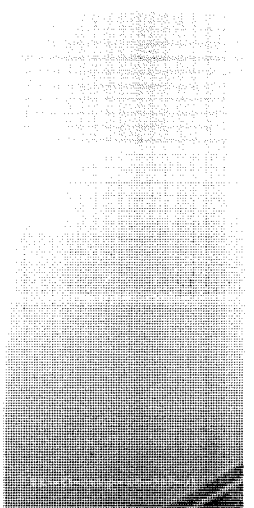
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## 17 CFR 205.5 - RESPONSIBILITIES OF A SUBORDINATE ATTORNEY.

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(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with § 205.3 if the subordinate attorney reports to his or her supervising attorney under § 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by § 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under § 205.3(b) has failed to comply with § 205.3.

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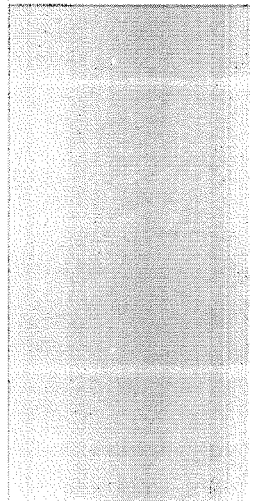
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