THE WHISTLEBLOWER

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THE WHISTLEBLOWER

DISCUSSION

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1. Who is corporate counsel's client when an employee provides information about possible wrongdoing within the company in which he says he did not participate?

2. When in a discussion with an employee, should counsel make clear that she represents the company, and that the company holds any privilege that applies to the conversation with the employee?

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<u>Discussion</u>

1. Who is corporate counsel's client when an officer or employee provides information about possible wrongdoing within the company, in which he says he did not participate?

A key principle in-house counsel may want to keep in mind is that corporate counsel represents the corporate entity and not its officers or employees individually. ABA Model Rule 1.13(a) provides: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Depending on the situation and facts, the person with whom corporate counsel is dealing with may be authorized to speak for the corporation on a particular matter. If that is the case, corporate counsel has an obligation to follow that person's instructions – but because he or she speaks for the corporation, not for himself or herself individually.

The fact that an officer or employee insists that he or she did not participate in wrongdoing doesn't change the situation. If the person is telling the truth, there may be no conflict between him and the corporation, which can make life simpler for counsel. That does not mean, however, that the individual is corporate counsel's client. In some instances, the company may decide that there is sufficient alignment of interests between it and the individual that company counsel can represent both. That, however, is a judgment for management to make, and it requires that counsel furnish specific information to the individual so that he can provide informed consent to the dual representation. In the absence of such steps, counsel should regard the corporate entity as her only client.

2. When, in a discussion with an employee, should counsel make clear that she represents the company and the employee and that the company holds any privilege that applies to the conversation with the employee?

Because corporate counsel does not represent anyone individually, counsel may have the obligation to provide officers and employees with what is known as an *Upjohn* warning in certain circumstances. In *Upjohn v. United States,* 449 U.S. 383 (1981), the Supreme Court decision accepted the existence of an attorney-client privilege for corporations. Specifically, corporate counsel has a duty, when needed, to clarify to an individual that she represents the company and not the individual officer or employee.

When does the need arise to provide this warning? ABA Model Rule 1.13(f) says that, when dealing with an organization's constituents, "a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Even though this language suggests that adversity of interests already exists, Comment 10 to Rule 1.13 says that the lawyer should clarify her role "when the organization's interest may be or become adverse to those of one or more of its constituents." In light of the potential for serious consequences it may be best to provide an *Upjohn* warning at the point at which an adversity of interest is reasonably foreseeable.

Similarly, ABA Model Rule 4.3 states that when counsel is dealing with someone who is not represented by counsel, and the lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer shall make reasonable efforts to correct the misunderstanding."

What does corporate counsel have to say to satisfy ABA Model Rules 1.13(f) and 4.3? Comment 10 to Rule 1.13(f) says that the lawyer should advise the constituent "of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such persons may wish to obtain independent representation." Under Rule 4.3, if corporate counsel believes that the individual mistakenly assumes that she is their lawyer, counsel needs to correct this misimpression. If corporate counsel does not anticipate a conflict between the interests of the company and the employee, counsel may not be required to advise the employee that she may want to retain her own lawyer. Under both Rule 1.13(f) and Rule 4.3, counsel should accompany the clarification of their role with a reminder that the company, not the individual, holds the attorney-client privilege and retains the option to waive the privilege if it deems appropriate.

What are the consequences of failing to clarify that corporate counsel represents the corporate entity? When should corporate counsel do so? A court may later find that an attorney-client relationship was formed between corporate counsel and an individual. The test for whether a relationship has been formed is whether the individual has a reasonable expectation that corporate counsel was acting as their attorney. *See Westinghouse Electric Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311 (7th Cir. 1978); *United States v. Hart,* 1992 WL 348425 (E.D. La. 1992). *See also Restatement (Third) of the Law Governing Lawyers*

§14(1)(b) (lawyer-client relationship formed when person manifests to a lawyer person's intent that lawyer provide legal services, and lawyer fails to manifest lack of consent even though she knows or reasonably should know that person reasonably relies on her to provide services).

If such a relationship is deemed formed, corporate counsel has duties to the individual to keep confidential the communications that they had with counsel under the attorney-client privilege and ABA Model Rule 1.6. Under ABA Model Rule 1.7 Corporate Counsel would also have to avoid representing any other clients whose interest may conflict with the constituent's. If corporate counsel interviews the employee in the course of an internal investigation, this means that counsel would not be able to share what the employee tells her about the company without her consent. This would prevent corporate counsel from fulfilling their obligation under ABA Model Rule 1.4, to keep the company informed of all relevant information. In addition, if the employees' interests and the company's interests diverge, counsel will be precluded from representing the company.

As a practical matter, this scenario often plays out in the form of a motion by an employee to prevent an in-house attorney from sharing with the company any confidential information that the attorney gained from the individual. If the information already has been shared, the employee may move to prohibit the company from using it against him. In addition, the employee may move to disqualify the attorney from representing the company on the matter because such representation may be "directly adverse" to him under ABA Model Rule 1.7(a).

In the scenario under consideration, we have an additional wrinkle: Jim may believe that Chris is his lawyer in part because a.) he's been repeatedly told as a team member that Chris is the team's lawyer and that could lead to confusion about whether she represents the team members or the entity as a whole, and b.) it seems Chris has done a personal favor for Jim and reviewed some legal documents for his house sale. We don't know whether the context of either of these facts creates sufficient concern for a court later finding that Chris confused Jim about whom she represents. Would it be wise or unnecessary for Chris to start any conversation with Jim with an Upjohn warning once it's clear he's reporting a problem or seeking her advice?

What is the point at which either: (1) counsel would know that the company's and Jim's interests were adverse or (2) counsel would have realized that Jim was under the mistaken impression that Chris was acting as his lawyer?

Jim says that he didn't participate in falsifying the data, and is coming forward because he believes that other employees engaged in wrongdoing. This suggests that his interests may be aligned with the company's since he has taken the initiative to report wrongdoing by others that could harm the company. Corporate counsel's inclination at this point may be to conclude that Jim himself has not been involved in any wrongdoing, there is no adversity of interest between him and the corporation, and that counsel has no obligation to clarify to him that she represents the corporate entity.

Corporate counsel may, however, need to proceed more cautiously. First, how certain is counsel that Jim is honestly describing all the facts, including his absence of involvement? Despite his statement, there is still the possibility that he was in fact involved in the falsification of data and is pointing the finger at others in order to avoid blame. Second, even if he didn't actively participate in any falsification, it is possible that he still could be legally liable as a member of the project team who knew about it and stood by as it occurred. If so, the company may decided to seek lenient treatment in exchange for identifying all persons who may be legally culpable and waiving the privilege with regard to them. The company may also decide that its best interest lies in distancing itself as much as possible from any of the employees working on this project.

Furthermore, what Jim has told Chris is vital information. Chris may not want to risk a court later holding that she may not share it with the company or that the company cannot use it. In light of these considerations, it may be prudent for corporate counsel to provide Jim with an *Upjohn* warning to eliminate any risk to counsel's ability to convey and act on the information that he provides.

Even if corporate counsel does not believe that Jim and the company's interests are adverse at this point, counsel may also want to consider that under ABA Model Rule 4.3 Jim may likely believe that counsel represents him personally in this matter. The risk of this may be higher than with other employees because it seems Chris did some legal work for him in connection with the closing on his new house. In addition, Chris and Jim worked together on the Nolip team. Those experiences may have inclined him to think of Chris as a lawyer he can turn to for personal advice on the data falsification. In particular, Jim says "I feel I can trust you." All of these factors could lead a court to conclude that Jim reasonably believed that Chris was acting as his individual lawyer in this conversation, that a attorney would have recognized this, and that corporate counsel's failure to clarify their role to Jim resulted in the creation of an attorney-client relationship between Chris and Jim.

If a counsel determines that an *Upjohn* warning was necessary because there was an adversity of interest between Jim and the company, when did that point arise? What are the alternatives?

After Jim says, "I feel I can trust you." This certainly should raise counsel's curiosity, but in itself doesn't suggest any adversity of interest. Counsel may not have sufficient details to draw any conclusion on this question.

After Jim says, "We knew with this level of kidney side effects the FDA wouldn't approve the drug." Counsel presumably knows that the FDA did approve the drug and so may not have any reason yet, however, to believe that the approval was wrongfully obtained. Jim could be about to tell you, for instance, that subsequent tests indicated a level of side effects within the expected range. Counsel may want to be on high alert at this point, given Jim's secretive and concerned demeanor.

After Jim says, "He told us to fudge the data." Counsel may have a reason to believe that the FDA approval was fraudulently obtained. Counsel has an allegation of wrongdoing at least by Karl. Is there adversity between Jim and the corporation at this point? Jim is about to give counsel crucial information. Counsel does not want to take the risk that she will be prevented from disclosing that information to the company because Jim may reasonably believe that he was counsel's client. Yet, counsel may feel a need to get to the bottom of this matter and that only is possible with more information.

It is possible that an *Upjohn* warning at this point may inhibit Jim from saying anything more. His concern about the woman's death and demeanor may suggest that he's unlikely to stop telling counsel what he knows. Under the circumstances, it may make sense for counsel to now remind Jim that she represents the corporation; that the corporation, and not Jim, controls the privilege; and that the interests of Jim and the company could be adverse.

After Jim says that Bob and Karen falsified data, but he did not. By this point, Jim has accused Karl, Bob, and Karen of wrongdoing. He claims that he played no part in the scheme, but he may not be fully truthful about that. Furthermore, it is possible that Jim may face some liability under drug law simply for being a member of the team who knew of the wrongdoing and neither tried to prevent it nor disclosed it to the FDA. Rather than take him at his word and assume that he is the only Nolip project scientist whose interest is not adverse to the company, counsel may feel it is best to give him an *Upjohn* warning now to ensure that counsel can use all the information that he has given her.

No warning necessary at this point. This conclusion may be based on counsel's confidence that Jim is telling the complete truth in light of the natural tendency for joint wrongdoers to point the finger at each other. However, by the end of the interview, counsel may come to recognize the possibility of an adversity of interest between Jim and the company.

Will counsel be disqualified from continuing to represent the company because she failed to provide a timely *Upjohn* warning? In this case, it may have been wise for corporate counsel to give the employee an *Upjohn* warning relatively early because of the risk that the work that counsel did for him on his house purchase made the employee think that counsel was his lawyer. On the other hand, that work was outside the scope of the employee's work for the company, and, counsel can argue that it's not reasonable for the employee to assume that counsel represents him on matters related to his employment. The employee arguably said nothing that indicated any wrongdoing until just before counsel gave the warning. As soon as he did so, counsel stopped him and apprised him that she represented the company and that the company controlled the privilege.

3. How should counsel inform an employee that counsel represents the company and not the employee, and that the company holds any privilege that applies to the conversation with the employee?

Counsel has an obligation to impart the necessary information to the employee, but may want to do so in a way that does not undermine her own obligation to obtain information that the company needs. Counsel should make clear that she represents the company and not the employee, but may want to avoid being confrontational or suggesting that the company regards the employee as an adversary. If counsel genuinely believes that there does not appear to be any adversity between the company and the employee at this point, she may want to indicate that the company and the employee can cooperate as long as this is the case. Counsel also may need to make clear that the company holds the privilege and can decide to waive it. In doing so, however, counsel may want to emphasize that the company may not waive it automatically, and will give careful consideration to whether doing so would be beneficial under the circumstances.

In this situation, counsel may create an adversarial tone by immediately mentioning the possibility that the company might tell the government what the employee has told her. This is liable to make the employee wary of saying anything more, even if he has not been involved in wrongdoing, for fear that he somehow will be found guilty of something and maybe even sent to jail. When the employee responds that he has believed that counsel represents him personally, counsel becomes formal and cites the company manual to him. This reinforces the distance between the employee and the company, and is likely to make the employee defensive and unwilling to provide any more information.

4. How should counsel respond when an employee asks if he should retain his own lawyer?

Counsel should be careful in responding, to avoid any later claim that she is purporting to give legal advice to Jim. Comment 2 to ABA Model Rule 4.3 says that the Rule prohibits a lawyer from giving advice to any unrepresented person "apart from the advice to obtain counsel." However, a court may find that under these circumstances such a suggestion combined with other comments may have created confusion in the mind of the employee even though counsel is telling him to get a lawyer. It may be safer for counsel to say that he is entitled to obtain his own lawyer. If applicable, counsel may also want to explain the company's policy on paying for lawyer, and mention that the company can in fact recommend one if he likes.

Corporate counsel may also want to take the opportunity to tell Jim that retaining his own lawyer is not necessarily inconsistent with him cooperating with the company in investigating the alleged falsification of data. Some counsel would suggest that it is in the company's interests to recommend good defense counsel for him if he's going to be a key player since it may be easier to work with a well represented (even if potentially adverse) party than to work with one who's represented by a less talented and sophisticated lawyer who's not familiar with how the investigation process works or the options for cooperating with the company's investigation.

5. How should counsel respond when an employee says that he is going to disclose alleged wrongdoing to the government?

ABA Model Rule 3.4(f) says that a lawyer may not request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is an employee or other agent of a client and (2) the lawyer reasonably believes that the person's interest will not be adversely affected by not giving information.

Although Model Rule 3.4(f) may permit counsel to try to dissuade Jim from contacting the FDA as long as his interest would not be adversely affected, it may not be wise to do so. If Jim is telling the truth, he should not be in any danger of prosecution or other adverse action. If he was in fact involved in falsifying the data, however, and he did so at Karl's direction, his willingness to incriminate an executive such as Karl might allow him to reach a favorable immunity or plea agreement with the government. In that case, refraining from contacting the FDA could adversely affect his interests.

Moreover, counsel may also want to be careful in how she words what she says because of practical concerns about running afoul of an obstruction of justice charge against. For instance, 18 USC §1512(b) states that a person may not "corruptly persuade another person . . . with intent to hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense."

In addition, counsel should exercise particular caution where a whistleblower raises information that implicates potential securities law violations. SEC regulations prohibit any person from interfering with a whistleblower's efforts to communicate with the SEC. Under such circumstances, even threatening to enforce a confidentiality agreement qualifies as "interference." 17 C.F.R. 240.21F-17.

Thus, it may be most prudent to try to respond to Jim's fear that he is going to be made the scapegoat for wrongdoing committed by others. If he is telling the truth, counsel can say, the company will want to work with him, and his lawyer if he chooses to have one, to get to the bottom of things. That may be most effectively done without the glare of publicity from a government investigation, as well as the risk that political considerations may influence the direction that the investigation takes. Counsel should make clear that the company wants to know about the kind of misconduct that he's described, and that he did the right thing by coming to her.

Jim may not solely be motivated by fear. He may have financial motivations to contact the government. To the extent that the company obtained FDA approval of the drug through false statements, and subsequently received reimbursement from Medicare or Medicaid for the drug, the reimbursement may constitute a fraud on the government. *See* 31 U.S.C. § 3730. If Jim is the first individual to report the false statements to the FDA, he may bring a *qui tam* claim on the government's behalf under the False Claims Act, for which he could receive up to 30% of any amounts recovered by the government.

Under the Dodd-Frank Act, Jim may also be eligible for a financial reward for making a report to the SEC. *See* Dodd-Frank Act § 922; 17 C.F.R. 240 et seq. The company's false statements to the FDA may implicate the integrity of the company's SEC filings, which may now include false statements relating to the drug, FDA approval of the drug, and its prospects. If the SEC later prosecutes the company for securities fraud, Jim may be eligible for 10 – 30 % of any monetary sanctions imposed on the company.

Notably, Jim is not obligated to report the fraud internally before reporting to the SEC, although the date of Jim's internal disclosure to counsel is taken into account in determining whether he was the first to disclose the information. Moreover, reporting the information internally is not sufficient to render Jim eligible for a financial award. He must also report the information to the SEC within 120 days of his internal disclosure. 17 CFR 240.21F-4(c)(3).

Jim's motives – whether self-serving or altruistic – should not distract counsel from their duty to protect the company's interests, by treating the information Jim disclosed with the seriousness it deserves while protecting the company from any subsequent whistleblower claims from Jim. Jim's disclosure may be covered by various whistleblower laws, such as the False Claims Act, the Sarbanes Oxley Act, and state anti-retaliation statutes. Should Jim be terminated for his whistleblowing, he may also be able to bring a common law claim for wrongful discharge in violation of public policy. Accordingly, counsel should assure Jim that the company will not retaliate against him for bringing the information to light. It is also advisable for counsel to follow up with relevant stakeholders within the company to ensure that no such retaliation occurs.

6. Does counsel have an ethical obligation to report a whistleblower's disclosure internally?

Attorneys "appearing and practicing before" the SEC have an ethical obligation to make an internal report of any credible evidence that it is "reasonably likely that a material violation" of federal securities law has occurred, is ongoing, or about to occur. 17 C.F.R. § 205.2; Sarbanes Oxley Act of 2002 § 307. This definition includes any attorney who provides advice relating to US securities laws or SEC filings, as well as attorneys representing public companies before the SEC in investigations and administrative proceedings. 17 C.F.R. § 205.2.

If the company is publicly traded, Jim has provided information that could implicate the integrity of the company's SEC filings. Counsel reporting to a chief legal officer within the company has a legal duty to report the information to (i) the chief legal officer; (ii) to both the chief legal officer and the chief executive officer; or (iii) any pre-established legal compliance committee. 17 C.F.R. § 205.3. The chief legal officer has a duty to initiate an investigation that she or he reasonable deems appropriate, and report back. If counsel reasonably believes the investigation was insufficient, she must report the information to the audit committee or the board of directors. Failing to comply with these reporting procedures may subject counsel to civil penalties and remedies under federal securities law, as well as discipline from the SEC. 17 C.F.R. § 205.6.

References & Resources

Ethical Rules

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ABA Model Rule 1.6: Confidentiality of Information
ABA Model Rule 1.7: Conflict of Interest: Current Clients
ABA Model Rule 1.13: Organization As Client
ABA Model Rule 3.4(f): Fairness to Opposing Party and Counsel

Ethics Opinions

D.C. Bar Ethics Opinion 269: Responsibility of Lawyer for Corporation to Clarify Role in Internal Investigation

NY Bar Ethics Opinion: 650: Lawyer Participation in Corporate "Compliance With Law" Program; Conflict of Interest; Communication with One of Adverse Interest

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Statutes and Regulations
17 C.F.R. § 205: Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission in the Representation of an Issuer

Securities Exchange Act of 1934, 15 U.S.C. § 78u-6 (Securities whistleblower incentives and protection)

Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-64545

False Claims Act, 31 U.S.C. § 3730 (h) (Relief from retaliatory actions)

Sarbanes-Oxley Act, 18 U.S.C. § 1514A (Civil action to protect against retaliation in fraud cases)

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Restatement (Third) of the Law Governing Lawyers §60: A Lawyer's Duty to Safeguard Confidential Client Information

Restatement (Third) of the Law Governing Lawyers §68: Attorney-Client Privilege

Restatement (Third) of the Law Governing Lawyers §73: The Privilege for an Organizational Client

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  http://www.acc.com/legalresources/publications/topten/whistleblowing-scheme-in-europe.cfm

QuickCounsel:

- *An Overview of Federal Whistleblower Regulations* (Rachel Okolski, Esq. for ACC)
  http://www.acc.com/legalresources/quickcounsel/whistleblowing.cfm

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  http://www.acc.com/legalresources/resource.cfm?show=141604

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Webcasts:

- *Responding to the Dodd-Frank Whistleblower Program* (ACC's Corporate & Securities Law Committee)
  http://webcasts.acc.com/detail.php?id=511979&go=1

- *Understanding and Reporting to Whistleblower Reports* (ACC's New to In-house Committee and Sponsored by Bass, Berry, & Simms, PLC)
  http://webcasts.acc.com/detail.php?id=595050&go=1

- *SOX Whistleblower Claims: A Sixth Anniversary Survival Guide* (Greg Watchman, Richard Cino, and Stanley Keller)- Transcript of Webcast
  http://www.acc.com/legalresources/resource.cfm?show=139201

- *Whistleblower Anonymous Hotlines and SOX-Dealing with the French and German Decisions* (Carol Seaman, Paula Barrett, Christel Cacioppo, and Constanze Hewson)- Final transcript of Webcast
  http://www.acc.com/legalresources/resource.cfm?show=16412

ACC White Paper:

- *Lawyers as Whistleblowers: The Emerging Law of Retaliatory Discharge of In-House Counsel* (Lucian Pera and ACC), http://www.acc.com/legalresources/resource.cfm?show=16079-

American Bar Association (ABA) Model Rule:

Rule 1.13: Organization as Client

Client-Lawyer Relationship
Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

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

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ACC Association of Corporate Counsel

Top Ten Safeguards When Interviewing Employees During Internal Investigations

Oct 15, 2010

Keith Markel and Deborah Ringel, Dickstein Shapiro, LLP

1. Have a plan of action.

Having a script, outline, or list of questions before you meet with an employee aids in the entire process. It ensures that you do not veer from the issues at hand and that all pertinent questions are answered.

2. Provide the *Upjohn* Warning

Make sure you provide an *Upjohn* warning to the employee; that is, you remind the employee that:

A. you are the attorney for the company or that you work on behalf of the company;

B. you are not their lawyer or representative (unless otherwise stated); and

C. the discussion you are about to have is subject to the company's attorney-client privilege, which the company, and not the employee, can choose to waive (or disclose to third parties).

3. Be Clear

Make sure that you are clear at the beginning of the questioning as to the reasons for the interview. This protects you, the company as well as giving the employee no misgivings as to why they are in the interview.

4. Bear Witness

Make sure that you always have someone in the room with you to document the Upjohn warnings, and contemporaneously memorialize the substance of the interview and notes for potential follow-up with this employee or others. Sometimes you may want to have the employee acknowledge that his or her statements memorialized in writing are an accurate reflection of the interview and/or that the employee acknowledges that he or she received an *Upjohn* warning at the outset of the meeting.

5. Involve No Interested Parties

Make sure there is no conflict of interest or appearance thereof between the employee being questioned and either the person doing the questioning or the person acting as the witness/scribner.

6. Know the Rules

Make sure you are familiar with the company's policies and procedures, as well as the relevant EEO laws before conducting an interview. Besides knowing, be sure that company policies are current, updated and in-line with Federal and State legislation concerning Equal Employment Opportunity.

7. Stay On Topic

Make sure that your line of questioning is focused on the issues relevant to the investigation and is consistent with other employee interviews with respect to the same issues or investigation. Working from a script will help you achieve this.

8. Stay Away from Protected Class Questioning

Make sure you stick to the facts of the inquiry and do not ask questions that relate to extraneous matters. Do not ask questions that go into protected areas (age, marital status, etc.) unless it is required for legitimate business reasons or safety reasons.

9. Remain Professional

Do not retaliate against an employee who reports unlawful conduct in any fashion. Not only is it inappropriate, it's illegal.

10. Inform the Employee of the Company's Confidentiality Rules

Make sure the employee understands the company's policy on whether the interview is confidential. If the identity of the employee or the substance of the interview will be disclosed, make sure you and the employee understand the parameters of potential disclosure.

http://www.acc.com/legalresources/publications/topten/internal-investigations.cfm

STRATEGIES FOR KEEPING A WHISTLEBLOWER IN-HOUSE

By Susan Goetz Markel

30-SECOND SUMMARY

To qualify as a whistleblower, information provided to authorities must be voluntary and original, and related to a possible violation of the federal securities laws. While the concern of many companies is that a whistleblower will bypass the company and go directly to the SEC, the SEC has established incentives to reporting internally under whistleblower rules. Companies can encourage internal reporting in several ways. They can do so by demonstrating that they are committed to compliance (e.g., placing posters with hotline numbers or instructions such that they are visible to employees). It's important to ensure that employees are aware of the protections to which they are entitled and understand the process by which they may report a concern internally. Companies may also need to reassess their internal controls, training and response plans on a regular basis. Training will need to address anti-retaliation and appropriate handling of complaints or tips when they are received.

In 2012, the Securities and Exchange Commission issued its first whistleblower award under the new program ushered in by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The whistleblower provided "documents and other significant information" that helped the SEC stop a multi-million dollar securities fraud. The whistleblower's assistance led to the court ordering more than $1 million in sanctions, of which approximately $150,000 had been collected by the end of the SEC's fiscal year.[1] On Aug. 21, 2012, the whistleblower was paid nearly $50,000, or 30 percent of sanctions collected — the maximum reward allowed under Dodd-Frank. While not an eye-popping sum, the announcement reflected precisely what the SEC envisioned when they launched the program: protecting investors and markets by preventing the occurrence of fraud. While that amount has since been dwarfed by an announcement by the IRS that it awarded $104 million to an ex-banker for providing information related to an international tax case, it demonstrates that the SEC is ready to tap its $450 million Investor Protection Fund by issuing rewards to whistleblowers as part of its enforcement program.

While the SEC's announcement of its first whistleblower payout provides limited details about the related enforcement action, companies and their counsel may take a lesson from the first whistleblower case: Take a proactive role in identifying potential problems. If an employee reports a problem to the SEC before the company becomes aware of it, it may be too late to prevent potential enforcement action. Companies should encourage all staff (in effect, potential whistleblowers) to report alleged wrongdoing internally by establishing a culture of speaking up. This requires effective compliance programs and reporting mechanisms and a company-wide culture that fosters communication.

The SEC Whistleblower Rule of 2011

Whistleblower laws have existed for years, with protections given to informants under Section 806 of the Sarbanes-Oxley Act and in Qui Tam lawsuits, actions filed on behalf of the government under provisions of the False Claims Act. Yet unlike Sarbanes-Oxley, which encouraged whistleblowers to come forward through the provision of civil and criminal retaliatory protections, Dodd-Frank enhances retaliatory protections and, more significantly, provides a significant financial incentive to do so. Under Dodd-Frank, whistleblowers that provide voluntary, original information leading to a successful SEC enforcement action are eligible to receive rewards, provided that more than $1 million in sanctions is ordered. Those awards may range between 10–30 percent of the funds that are collected.

Dodd-Frank also established enhanced anti-retaliation protections and provisions to protect the identities of whistleblowers. The law prohibits discrimination against a whistleblower, in particular, adverse action such as demotion, discharge or suspension. In addition, the SEC may not disclose any information, including that which was provided to the SEC by the whistleblower that could reasonably be expected directly or indirectly to reveal her identity.

As part of the new program, the SEC established a new Office of the Whistleblower, staffed with professionals dedicated to investigating and processing whistleblower claims. Factor in the legions of lawyers trolling for whistleblower actions and it's easy to see why the environment is ripe for a spike in new cases. That dynamic has already begun to play out: In 2012, the SEC received more than 3,000 tips, or approximately eight per day.[2] The tips covered a wide range of subject areas, including financial reporting, insider trading and alleged violations of the United States Foreign Corrupt Practices Act (FCPA). Many of them came from overseas; the SEC fielded tips from nearly 50 countries, with the largest number coming from Venezuela, Canada, India and China. Over the past two years, the SEC has brought nearly 1,500 enforcement actions (a record number) and obtained orders for $5.9 billion in penalties and disgorgement.[3] The SEC has also issued more than 300 Notices of Covered Actions that identify cases that could be eligible for a whistleblower payout.[4] Claims related to these actions may still be processing.

What makes a whistleblower?

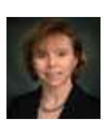
The whistleblower rules define who may qualify broadly; the sole requirement is that the information be voluntary and original, and related to a possible violation of the federal securities laws that has occurred, is ongoing or is about to occur. Companies should be mindful that current or former employees, customers, third-party vendors, competitors and even scorned ex-spouses all may qualify as whistleblowers. Tips may even be anonymously submitted through counsel. Companies must also recognize that an employee can claim whistleblower status even after the company is issued a subpoena by the SEC, as long as the SEC has not previously approached the individual seeking information. In certain instances, even compliance personnel can qualify as a whistleblower.

Counsel should make sure that the board receives periodic reports on the steps the company is taking to address code of conduct, whistleblower policies, hotline, communication and training.

Encouraging whistleblowers to report internally

While the concern of many companies is that a whistleblower will bypass the company and go directly to the SEC, a National Business Ethics Survey, "Inside the Mind of a Whistleblower," indicated that only 2 percent of 4,600 employees surveyed said they reported misconduct to officials outside their company first.

The SEC has established incentives to reporting internally under whistleblower rules. While not required to seek recourse through internal compliance systems prior to filing a complaint with the SEC, whistleblowers may earn a larger percentage of a



Susan Goetz Markel has more than 25 years of experience in a broad range of areas related to corporate financial reporting. She spent nearly 15 years in the Division of Enforcement at the Securities and Exchange Commission focusing on financial fraud and financial reporting investigations, the last five of which she served as the chief accountant in the Division of Enforcement. *smarkel@alixpartners.com*

bounty if they first report internally. Also, a potential whistleblower may remain eligible for a reward for 120 days (longer than the 90 days originally proposed) if she first reports an issue internally. While this window of time motivates companies to investigate complaints quickly, it may also enable them to address and resolve any problems on their own and maintain greater control over the situation.

Companies can encourage internal reporting in several ways. They can do so by demonstrating that they are committed to compliance. Both the board and senior management should take proactive steps to make sure that compliance is a priority, and they should continually review the effectiveness of the company's compliance program. Companies should create an environment that fosters coming forward. Companies may do so by placing posters with hotline numbers or instructions in an area visible to employees. It's important to ensure that employees are aware of the protections to which they are entitled and understand the process by which they may report a concern internally. As part of this program, companies may undergo periodic compliance audits, include internal reporting in performance reviews and solicit feedback on the compliance program from employees. Companies may also need to reassess their internal controls, training and response plans on a regular basis. Training will need to address anti-retaliation and appropriate handling of complaints or tips when they are received.

The need to react quickly

Companies should have plans in place for handling internal investigations when a complaint is received. Contingency plans should be in place for handling an investigation by the SEC or other regulatory body. These plans should address how to handle requests for documents and other information. If an issue surfaces, it's important for companies to respond in a timely fashion. In situations involving employee claims, companies should make sure that the employee feels appreciated and that a hostile environment does not exist or develop.

This can be achieved when companies commit adequate resources to compliance and develop an appropriate tone at the top. Multiple channels, such as hotlines and other mechanisms, for reporting internal concerns can be made available.

When an employee reports externally

There are great incentives for people to report outside of the company, including financial rewards and a moral responsibility. In addition, there may be a perception that external reporting is more likely to remedy the wrongdoing. In such instances, the steps a company may take are no different than what their normal compliance efforts would entail.

Companies that proactively deal with an issue, before an investigation occurs, are likely to be in a better position to handle a government case. By quickly determining the facts and disclosing them, companies may prevent or mitigate costly investigations, financial penalties and other sanctions. While the decision to self-report may not always be clear-cut, companies need to be prepared to provide the facts and discuss how they addressed the complaint, whether when self-reporting or when responding to a request by the government.

Communicating with stakeholders

Because a complaint may impact a variety of different stakeholders, including the board of directors, audit committee, senior management, employees and auditors, it's important for companies to have well-defined communication and reporting protocols in place. These protocols can serve both to assure the whistleblower that her claim is being addressed, and to also provide the audit committee and board with the confidence that the issue is being handled properly.

Counsel should make sure that the board receives periodic reports on the steps the company is taking to address code of conduct, whistleblower policies, hotline, communication and training. In addition, it may be necessary to revisit policies regarding how the company handles complaints to make sure its responses are still effective.

It's important for companies to be mindful of the new whistleblower rules, which, when combined with the SEC's ability to provide significant financial incentives, encourage a whistleblower-friendly environment.

How to reduce exposure to whistleblower allegations

There is no such thing as a "one size fits all" approach to addressing a whistleblower complaint. One thing is clear: Effective and consistent communication about the company's reporting mechanisms, and the actions taken by the company to identify and address any issues found, are critical. At the same time, if a claim is made, the company must also take action that provides a whistleblower with the confidence that the issue is taken seriously and is being addressed. Employees at each level of the organization should understand that retaliation is not appropriate and will not be tolerated. In 2013, one area of focus for the Office of the Whistleblower appears to be anti-retaliation. As a result, companies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TERRALEX

Companies should ensure that policies can achieve compliance with requirements of the new rules. Once they have, it is important to develop appropriate training programs to address the new requirements, while also ensuring that senior management, the board, the audit committee and other staff, are aware of whistleblower policies and the organization's internal reporting mechanisms.

should give due consideration to the protection of employees who report an issue and the related requirements by the SEC's whistleblower rules. A whistleblower-friendly environment within the organization should consist of the following:

- appropriate "tone at the top,"
- adequate resources dedicated to compliance,
- communication about internal reporting outlets/hotlines,
- timely response to claims,
- appropriate follow-up with a whistleblower,
- plans to address claims that are reported within the company,
- protecting against retaliation by dealing with the issue, rather than the messenger,
- an anti-retaliation process — "tone at the middle," and
- enforcement of training programs.

It's important for companies to be mindful of the new whistleblower rules, which, when combined with the SEC's ability to provide significant financial incentives, encourage a whistleblower-friendly environment. General counsel, along with chief compliance officers, are often the "closest" to a company's policies and well-equipped to measure whether they are sufficiently protecting whistleblowers. In meeting these challenges, counsel may initiate or assist a review of compliance and auditing practices to assure that a company is able to effectively identify and respond appropriately to reported violations. Companies should ensure that policies can achieve compliance with requirements of the new rules. Once they have, it is important to develop appropriate training programs to address the new requirements, while also ensuring that senior management, the board, the audit committee and other staff are aware of whistleblower policies and the organization's internal reporting mechanisms.

No silver bullet

Despite the existence of compliance programs that can facilitate internal reporting, it's difficult for companies with thousands of employees to be aware of every potential concern. There is no silver bullet or fail-safe way for counsel to defend against every potential claim. However, an effective internal reporting system can help demonstrate that a company is focused on identifying and addressing potential misconduct. To do so, the company should establish a culture that promotes speaking up and reminds employees that procedures are in place through which a complaint may be addressed. By dealing with these issues early on, companies may be better positioned to mitigate adverse impacts or protect against enforcement action by the SEC or other government entities. **ACC**

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ACC EXTRAS ON… Promoting internal reporting

Check Card
Securities Law Whistleblowing Checklist (Aug. 2013). *www.acc.com/checkcard/whistleblowing_aug13*

QuickCounsel
A Roadmap: How an End-User Prepares to Comply with Derivatives Reform under the Dodd-Frank Act (June 2012). *acc.com/quickcoun/Dodd-frank_jun12*

Presentation
Ethics and Internal Investigations – Dealing with the Whistleblowers (May 2013). *www.acc.com/ethics-invest_may13*

Quick Reference
Whistleblower Programs - Best Practices (June 2012). *www.acc.com/quickref/whistleblower-bp_jun12*

WeComply
WeComply's "Dodd-Frank Whistleblowing" online training course explains how employees may report observations or suspicions of securities fraud — internally, externally to the SEC, or both — as well as whistleblower awards and protection against retaliation. *http://bit.ly/15efhAn*

Resource Bundle
ACC's Compliance Portal. *www.acc.com/ethicsxchange*

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT *WWW.ACC.COM*, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

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NOTES

1 United States Securities and Exchange Commission Annual Report on the Dodd-Frank Whistleblower Program, Fiscal Year 2012, *www.sec.gov/about/offices/owb/annual-report-2012.pdf.*

2 SEC Annual Report on the Dodd-Frank Whistleblower Program, Fiscal Year 2012.

3 SEC Annual Report on the Dodd-Frank Whistleblower Program, Fiscal Year 2012.

4 SEC Office of the Whistleblower web site, *www.sec.gov/about/offices/owb/owb-awards/2013-nocas.shtml.*

American Bar Association (ABA) Model Rule:

Rule 4.3: Dealing with Unrepresented Person

Transactions With Persons Other Than Clients
Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ACC Association of Corporate Counsel

Newsstand

Potential circuit split creates an uncertain future for whistleblower protection of internal reporting

White & Case LLP
Gregory G. Little , **Gayle Argon** and **Owen C. Pell**

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July 25 2013

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***Asadi v. G.E. Energy (USA), LLC*, (5th Cir. Jul. 17, 2013) *versus Murray v. UBS Securities, LLC and UBS AG*, (S.D.N.Y. May 21, 2013)**

The Dodd-Frank Whistleblower Program

The Dodd-Frank Act amended the Securities Exchange Act of 1934 by creating protections and rewards for anyone who provides information that helps the SEC in enforcing the law.[1] Section 922 directs the SEC to provide monetary awards, ranging from 10 percent to 30 percent of the monetary sanctions collected, to individuals who voluntarily provide original information that leads to SEC enforcement actions resulting in sanctions in excess of US$1 million. The Office of the Whistleblower Program ("OWP") was established to administer this new program, using regulations put in place by the SEC as of August 2011.[2]

In fiscal year 2012, the first full year of OWP operation, 3,001 tips and complaints were received, mostly relating to corporate disclosures and financial statements as well as fraud relating to securities offerings, from 49 countries and all 50 states.[3]

As tips and complaints begin to add up and the number of enforcement actions increases, the number of monetary awards to whistleblowers probably will rise and this will likely encourage more whistles to be blown. As a corollary, suits by whistleblowers against current and former employers alleging adverse employment decisions as retaliation for whistleblowing will also likely increase. Anti-retaliation suits raise concerns for the whistleblowers, the employers and the SEC. As the OWP Chief has noted, "Quality information is the lifeblood of the [SEC whistleblower] program. If people think if they report wrongdoing they get fired or risk other retaliation, that well will dry up quickly."[4]

Now, a circuit split is looming as to whether individuals who report internally, **before** going to the SEC, can be protected by the anti-retaliation provisions. Just last week, the Fifth Circuit dismissed an anti-retaliation claim in which the employee reported suspected wrongdoing to his supervisor, not the SEC, finding that such an individual was not a "whistleblower" under the Act because that definition required reporting to the SEC. That decision is in direct conflict with last month's New York federal district court holding that the anti-retaliation provisions **do** apply to individuals who report internally, rather than to the SEC. The New York decision was the fifth in a line of district courts (involving courts in the Second, Sixth and Tenth Circuits) that have all refused to dismiss anti-retaliation claims on the ground that disclosure internally can render an employee protected under the antiretaliation protections.[5] *Asadi v. G.E. Energy (USA), LLC* and *Murray v. UBS Securities, LLC and UBS AG* analyzed the whistleblower-protection provision of Dodd-Frank and the application of the SEC's Final Regulation 21F.

Asadi: Limiting the Anti-Retaliation Protections to Those Reporting to the SEC

Khaled Asadi sued his former employer alleging a violation of the Whistleblower Incentives and Protection provision of Dodd-Frank. Asadi was the Iraq Country Executive for G.E. Energy. Upon being informed that G.E. had hired a woman closely affiliated with a senior Iraqi official to influence the negotiation of a lucrative joint venture agreement, Asadi reported this information to his supervisor and an ombudsperson for fear that this activity violated the Foreign Corrupt Practices Act. He was then given a surprisingly negative review and was pressured to step down. When he did not, he was fired. Asadi sued, alleging that his termination after an internal report of possible securities law violations (relating to potential FCPA issues) violated the whistleblower-protection provision of Dodd-Frank which states that "no employer may discharge…or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower."[6]

The Southern District of Texas dismissed Asadi's claim, holding that the whistleblower protection provision does not extend to extraterritorial whistleblowing activity and declined to reach the issue of whether Asadi qualified as a whistleblower because he reported internally instead of to the SEC. Last week, the Fifth Circuit affirmed the dismissal, but on the grounds that Asadi did not qualify as a whistleblower.[7]

Asadi argued that while he was not a whistleblower as defined by Section 78u-6(a)(6)[8], he should qualify for protection because his actions fell under Section 78u-6(h)(1)(A)(iii), which protects certain internal disclosures to supervisors required under Sarbanes-Oxley. The court conceded that the SEC's final regulation on the issue and various district courts agreed with his view. However, Judge Elrod held that the plain language of the whistleblower protection provision created a private cause of action **only** for individuals who provide information relating to a violation of the securities laws **to the SEC**.

The court rejected the prior decisions of other courts, finding that they had misread Section 78u-6. Applying canons of statutory interpretation, Judge Elrod found that the anti-retaliation provision should be read such that it applies, first and foremost, to certain protected individuals, namely, those who are "whistleblowers" under Section 78u-6(a) because they reported to the SEC, and only then does the provision lay out certain activities taken by those protected individuals that are entitled to protection. Thus, only whistleblowers as defined by the Act are entitled to protection under Section 78u-6(h)[9]. The court used the following example to illustrate how internal reporting under Section 78u-6(h)(1)(A)(iii) would only apply to those considered "whistleblowers": Suppose an employee reported suspected wrongdoing to his supervisorand the SEC on the same day but was immediately fired, before the supervisor could know about the report to the SEC. In that case, the employee is a whistleblower because he reported to the SEC, but would not be able to assert a retaliation claim on the first two grounds set forth in Section 78-6(h)(1)(A) because he would not be able to show that he was terminated because of his report to the SEC. The employee would, nonetheless, be protected under the third category in that section and could set forth a retaliation claim on the ground that he suffered retaliation for his internal disclosure.

Only at the end of the decision did the Court take up the SEC's Final Regulation 21F, to be explained further below. In the Court's view, the SEC regulation had redefined "whistleblower" and broadened it to include those who have taken the actions listed in Section 78u-6(h)(1)(A). This redefinition, according to Judge Elrod, flew in the face of Congress' unambiguous definition of the term and required rejection of the SEC's interpretation.[10]

Murray: Extending the Anti-Retaliation Protections to Internal Reporting

Like Asadi, Trevor Murray also sued his former employer for allegedly violating the anti-retaliation provision. Murray was a Senior Commercial Mortgage-Backed Security Strategist for UBS, responsible for researching and preparing reports about UBS's CMBS products. He complained to supervisors that others at UBS were influencing his reports and pressuring him to draft reports that were more favorable to UBS and in keeping with what the business line wanted regarding the lucrative mortgage-backed securities market. Shortly thereafter, he was terminated even though he had received a positive review. He claimed that his termination violated the anti-retaliation provision.

UBS moved to dismiss the claim arguing that because Murray made reports to his supervisors, not the SEC, he could not be considered a whistleblower under the statute. The Dodd-Frank definition of whistleblower, UBS AG argued, limits the term to those who provide to the SEC information relating to a violation of the securities laws.

In denying the motion to dismiss, the Court reasoned that to obtain protection under the anti-retaliation provisions, a plaintiff must show either that he provided information to the SEC or that his disclosures fell under categories set forth in the anti-retaliation provision, the last of which includes disclosures to supervisors under Sarbanes-Oxley. Significantly, the Court also found that Final Regulation 21F resolved an ambiguity in the statute by granting whistleblower status to individuals who report securities laws violations to persons other than the SEC.[11] The regulation provides that "for purposes of the anti-retaliation protections [under Section 78u-6(h)(1)], you are a whistleblower if…you provide that information in a manner described in [the list in Dodd-Frank which includes information provided to an employer under Sarbanes-Oxley]." SEC comments to Final Regulation 21F expressly noted that the anti-retaliation protections would apply to three categories of whistleblowers, the third of which includes individuals who report to persons other than the SEC.[12]

Looking Forward: Impacts on Clients

So now we have the Fifth Circuit on the one hand, finding no ambiguity or conflict within

Dodd-Frank and interpreting the anti-retaliation provision to narrowly apply to only those individuals who report to the SEC, and five district courts around the country on the other hand, who have found the statute ambiguous and have applied the SEC's Final Regulation 21F to resolve that ambiguity in favor of individuals who report internally. We are likely to see appeals from those district court cases that could lead to a circuit split which would be prime for Supreme Court review.

The Fifth Circuit decision seems to fall squarely on the side of the employers, in that it limits those who might bring anti-retaliation claims. There are those, then, who would claim victory for employers. However, that decision also incentivizes employees to go to the SEC directly, bypassing any internal reporting they might have done and denying companies the chance to correct suspected wrongdoing internally before being investigated by the SEC. Additionally, we are facing an uncertain legal landscape on this issue. As of yet, we do not know how those five district decisions will fare on appeal, and it could be that the 5th Circuit's opinion becomes the minority view.

In spite of that, these cases point to the same conclusion:

However the legal landscape shapes up over the coming months and years, companies should be doing what they can to limit anti-retaliation claims they will have to defend and to encourage employees suspicious of wrongdoing to whistleblow internally.

Since we don't know which way the Supreme Court would rule on this issue, one should not assume that employees will not be able to bring anti-retaliation claims if they report internally.

For instance, Murray could be seen as incentivizing employees to go "up the chain" before going to the SEC, thereby giving companies the opportunity to deal internally with issues before being embroiled in an investigation by the SEC. Thus, Murray may strengthen corporate codes of conduct that encourage or require employees to report issues internally as a first step. The ruling also is in line with Regulation 21F in which the SEC encourages whistleblowers to use internal compliance processes. First, if a whistleblower reports internally, that whistleblower has 120 days to report to the SEC, and if that deadline is met, the whistleblower is given the benefit of the earlier date for "first in line" purposes to determine potential rewards, **and** the whistleblower receives the benefit of any information collected from the internal investigation, which might increase the potential award.[13] Second, the fourth factor listed by the SEC that will increase an award is whether the whistleblower participated in, and assisted, an internal compliance process.[14] Indeed, obstructing an internal compliance process is grounds for decreasing the amount of an award.[15]

On the other hand, Asadi and Murray highlight the complicated dance that now surrounds how companies maintain a healthy and cooperative compliance culture while managing employee performance. Sarbanes-Oxley creates a web of compliance-related disclosure obligations on top of existing obligations that arise under the 1934 Act. Until the disagreement between Asadi and Murray is resolved, should an employee raise a disclosure issue, a compliance breakdown issue or a disagreement with the content of a company's disclosure, that may now raise a potential whistleblower issue to the extent that employee subsequently experiences a pay cut, fails to receive a promotion or is laid off.

Either way the law develops, companies should improve internal systems for documenting employee-raised issues and how they are handled. Process will be important, including building a record showing that employee concerns are taken seriously and considered by an appropriate person. In addition, internal compliance programs need to be reviewed and re-designed if necessary to encourage employees to use them. This also will involve changes in training and communication to make sure employees know the rules and processes. Finally, Murray and Regulation 21F highlight the need for companies to review their evaluation, promotion and exiting procedures to make sure that managers know how to deal with employees who have raised disclosure-related issues. Again, these functions must now consider how communications are handled with an employee who must be viewed as a potential whistleblower. In a retaliation case, the burden is on the company to show a non-discriminatory basis for the adverse employment decision.16 Being able to point toward an evaluation process that is well-designed, consistent and accurate will be of help in shouldering this burden.

Regardless of how the law on whistleblower anti-retaliation claims develops, the goal for employers should be the development of the strongest compliance cultures, processes and codes of conduct possible to create effective, trustworthy and transparent compliance programs that encourage internal reporting, without any fear of retaliation.

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Tags USA, Capital Markets, Employment & Labor, Litigation, White Collar Crime, White & Case LLP

What You Need to Know About the Attorney-Client Privilege

BY GUS PURYEAR IV, OVERTON THOMPSON III AND BRIAN R. IVERSON

To be effective, in-house counsel must have access to all the facts. Management must feel free to disclose information to in-house counsel, and free from the threat that the communication may later be disclosed against the company's wishes. In-house counsel must also be able to render full and complete legal advice to management without the threat of disclosure.

The attorney-client privilege provides the assurances necessary to facilitate robust communication concerning a situation with legal ramifications.

But how does in-house counsel make sure these privileges are preserved? To whom at the company may in-house counsel speak without risking unwanted disclosure? Are all of the conversations in-house counsel have with management protected? Does management preserve the privilege simply by copying in-house counsel on sensitive documents, or by ensuring that in-house counsel attend sensitive meetings? Who at the company has the authority to waive the privilege? May the privilege be waived inadvertently? Are there instances where a court may simply ignore the privilege?

These are all essential questions — and they are questions every in-house counsel should be prepared to answer.

The basics of the attorney-client privilege

The attorney-client privilege is the oldest common-law privilege for confidential communications, and is based on the policy that attorneys and their clients should have full and direct communications so that attorneys may provide fully informed legal advice. However, the privilege is in tension with the general principles that any person with knowledge of relevant facts may be called to testify, and that the public has a right to every person's testimony. The privilege is narrowly construed because it prevents relevant information from being presented to the finder of fact. Unfortunately, due to this narrow construction, many communications that both attorneys and clients believe to be privileged are not.

Each state in the United States has its own nuanced approach to the attorney-client privilege, and federal courts apply state privilege law in diversity cases. In federal cases based on federal question jurisdiction, the federal common law supplies the standard for the attorney-client privilege. While the precise elements obviously vary by jurisdiction, many courts have followed the iteration of elements contained in a 1950 decision from the District of Massachusetts:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[1]

Protected communications

Even within the context of a privileged relationship, not all communications will be privileged. The privilege extends to both oral and written communications, but it applies only to the contents of the communication and does not protect the facts communicated. While the often-cited policy for the privilege is to promote full and frank communications from the client to the attorney, most jurisdictions also provide some type of privilege to communications that an attorney directs to the client.[2] Jurisdictions are split, however, on how much of the communication from the attorney to the client is privileged. Under the strict view, which is followed by a majority of jurisdictions, the privilege extends to legal opinions and communications from attorneys only to the extent they reveal confidences made by the client to the lawyer. The broader minority view applies the privilege to all legal advice given by the attorney to the client. Based on these limitations on applying the privilege to communications from the attorney to the client, the best practice is for attorneys to confirm they are responding to a specific request for legal advice from the client.

The attorney-client privilege for corporate clients and in-house counsel

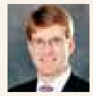
The attorney-client privilege always belongs to, and may only be waived by, the client. A corporate client is no different — the privilege belongs to the corporation. Because corporations are creatures of the law that operate only through their officers, directors and employees, determining the precise bounds of the attorney-client privilege can prove especially difficult for corporations. Courts in various jurisdictions have developed three tests for determining whether a communication between an attorney and an individual who can speak on behalf of the organization is privileged.

The control group test

In 1962, the District of Pennsylvania articulated the control group test. It applies the attorney-client privilege to communications between an attorney and an employee if the employee "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, or if he is an authorized member of a body or group which has that authority."[3] This test is based on the premise that members of the control group actually personify the corporation when they are communicating with counsel.

The subject matter test

Under the broader subject matter test, an employee's communications with an attorney are privileged if the subject matter is within the scope of the employee's corporate duties, the communication is made at the direction of the employee's corporate supervisor for the purpose of securing legal advice for the corporation, and the commu-



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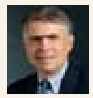

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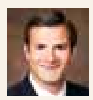

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nication is only disseminated within the corporation on a need-to-know basis.[4] This test essentially recognizes that employees outside of the control group may have information relevant to the attorney's legal analysis, or may be charged with implementing the legal advice.

The Upjohn test

In 1981, the United States Supreme Court addressed the attorney-client privilege in the context of corporate clients in *Upjohn Co. v. United States.*[5] In *Upjohn*, the Court clearly rejected the control group test but did not go so far as to adopt the subject matter test. While the Court held the communications at issue to be privileged, it declined to set forth any hard rule based on the statement in Federal Rule of Evidence 501 that "the recognition of a privilege based on a confidential relationship … should be determined on a case-by-case basis." Although the *Upjohn* decision has been criticized for not setting forth clearer standards, *Upjohn* makes plain that communications between in-house counsel and lower-level employees for the purpose of securing legal advice for the company can be privileged.

While the majority of states now follow the subject matter test, some jurisdictions continue to follow the control group test, and federal courts will apply *Upjohn* and Rule 501 in federal question cases. In the light of the various tests, it is recommended that the control group expressly request that corporate employees communicate with counsel so that counsel may render legal advice to the corporation.

In addition, counsel should provide "*Upjohn Warnings*" or "Corporate *Miranda*" when discussing sensitive, confidential legal matters with employees, officers or directors, such as when conducting an internal investigation. This series of admonitions should generally contain the following statements:

- I am the attorney for the corporation. I do not represent you. If you want your own attorney, you must hire one.
- Your communications with me are protected by the attorney-client privilege, but that privilege belongs solely to the corporation.
- The corporation may decide to waive the privilege and reveal your communications with me to third parties, including the government, at its sole discretion.

Depending on the personnel policies of the corporation, some attorneys also caution the employee that failure to cooperate in the investigation is grounds for discipline or dismissal. For documentation purposes, it is advisable to have the employee sign an acknowledgement that he received the *Upjohn* warnings.

> **Based on these limitations** on applying the privilege to communications **from the attorney to the client,** the best practice is for attorneys to **confirm they are responding to a specific request** for legal advice from the client.

The corporate employee as the client

Despite the fact that the attorney has been engaged to represent the corporation, he may also agree to provide legal advice to an employee in his individual capacity, rendering the employee a separate client. This presents thorny conflict of interest issues, but is not prohibited outright by the Model Rules of Professional Conduct. Under the Third Circuit's test from *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.,* corporate employees must establish five factors to claim individual privilege for communications with corporate counsel:

1. They must show they approached [counsel] for the purpose of seeking legal advice.
2. They must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than representative capacities.
3. They must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise.
4. They must prove that their conversations with [counsel] were confidential.
5. They must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.[6]

This is obviously a very high burden, and the fifth factor often presents a problem for employees attempting to claim individual privilege. The Third Circuit recently highlighted the importance of effective *Upjohn* warnings and clear communications on the nature of representation in *United*

Legal Protection Privilege in the European Union After *Akzo*

While a detailed survey of foreign privilege law is beyond the scope of this article, every in-house attorney should be aware of the status of the legal protection privilege in the European Union in light of the European Court of Justice's (ECJ) recent decision in *Akzo Nobel Chems., Ltd. v. European Comm'n*.[9] The September 2010 *Akzo Nobel* decision reviewed the high court's earlier ruling in *AM&S v. Commission*[10] that the legal professional privilege only applies to communications between "independent lawyers" and their clients.

In *Akzo Nobel*, the target of a European Commission investigation took the position that certain emails between its in-house attorney and its general manager were privileged, but the Commission disagreed and collected the documents. The ECJ first rejected the target's argument that the communications were privileged under *AM&S* because in-house counsel can be every bit as "independent" as outside counsel, reasoning that "the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that the legal professional privilege does not cover exchanges within a company or group with in-house lawyers." The ECJ also dismissed concerns of uncertainty, stating that the rule is a bright line restriction on applying the privilege to communications with in-house counsel. Moreover, while some member states have changed their laws since the 1982 *AM&S* decision, the ECJ could not identify any uniformity in the changes or a prevailing trend to justify a different rule.

The European Union's rule restricting the legal professional privilege to "independent lawyers" adds another layer of complexity for in-house attorneys attempting to preserve privilege in their communications. While a European Union member state's own privilege law will apply to proceedings within the state, the "independent lawyer" rule will apply to anti-competition investigations at the European Union level. Moreover, as discussed below, most US jurisdictions hold that selective disclosure to one third party operates as a waiver of the privilege to all third parties. As such, where a company is compelled to disclose materials in a European Union proceeding that would otherwise be privileged under the law of the applicable US jurisdiction, the company will likely be deemed to have waived the privilege in that US jurisdiction.

States v. Norris.[7] Applying the *Bevill* factors, the *Norris* court found that an attorney only represented the corporation and did not individually represent its CEO. Therefore, the court held that the attorney could be compelled to testify in criminal proceedings against the CEO after the corporation determined to waive its privilege in connection with a government investigation.

In-house counsel as an "attorney"[8]

Courts will not, however, extend the privilege to all communications between an attorney and the client. Instead, the client must establish that the communications were for the purpose of securing legal advice for the privilege to apply. This presents challenges in determining whether communications with in-house counsel are privileged, because in-house attorneys often perform several functions within the corporation and are often given business titles (e.g., executive vice president) in addition to their legal titles (e.g., general counsel). Communications on business matters are not privileged, and problems often arise with respect to the capacity in which in-house counsel is acting. The analysis is even more difficult where business advice is intertwined with legal advice.

The traditional test asked whether the communication would not have been made "but for" the fact that legal advice was sought. If the communication would have been made even if no legal advice were sought, the communication is not privileged. The restatement has set forth a broader test that renders a communication privileged if it is made to the lawyer whom the client consults for the purpose of obtaining legal advice "and not predominantly for another purpose."[11] When documents have both a business and a legal purpose, the issue often is whether the document would have been prepared in substantially the same form without the attorney. If so, the document is not privileged. Often-cited opinions from state and federal courts in New York state that if the advice is "not primarily of a legal character" and "expressed substantial non-legal concerns," then the communication is not privileged.[12] Nonetheless, where business and legal advice are intertwined, most courts will resolve doubt in favor of the privilege, on the grounds that the corporation is entitled to seek legal advice in conducting the client's business, and that such communications should remain confidential.

Corporations also often route sensitive documents to in-house counsel or invite in-house counsel to important meetings in an effort to cloak the documents or meetings in privilege. Again, the privilege analysis will depend on whether the corporation was seeking legal advice from the attorney. Reports of corporate or business decisions that are conveyed to attorneys to keep them generally informed are not privileged, and a document is not privileged merely because it has been through the hands of an attorney. Likewise, the mere presence of an attorney at a meeting does not necessarily transform the meeting into one where legal advice is sought or given. For example, the fact that an attorney attends board or committee meetings where he gives legal advice does not cloak with privilege those portions of meetings when the attorney participated in the discussion but was not giving legal advice. As with any assertion of privilege, the corporate client has the burden of affirmatively establishing that the attorney was sent a document or invited to a meeting for the purpose of providing legal advice to the corporation.

Business vs. Legal Advice

Questions over whether an in-house attorney is acting as a business advisor or filling a customary attorney's role will generally involve a detailed analysis of the facts. As such, it can be difficult for in-house attorneys and corporations to analyze prospectively whether certain communications will be privileged. While there are no hard and fast rules, in-house attorneys can implement several best practices to increase the likelihood that their sensitive legal communications will be protected:

- Be alert to the problem and take all possible steps to separate your roles.
- Where possible, do not mix legal advice and opinions with advice on business/commercial issues.
- Make it clear that the main purpose of a document is to provide legal advice and all other matters are incidental to legal advice.
- For communications related to your legal advice, mark as "Privileged and Confidential," "Prepared by In-house Counsel for the Purpose of Providing Legal Advice" or "Prepared by In-house Counsel for the Purposes of Litigation."
- Limit the circulation of legal advice.
- Maintain appropriate and current bar licensure in your jurisdiction and engage in continuing legal education.
- Where feasible, maintain documents related to your legal advice in files separate from commercial or business-related documents.

Waiver of the attorney-client privilege

The client holds the privilege and can elect to waive it. However, because a corporation acts solely through its officers, directors and employees, questions often arise as to which corporate representatives have the authority to voluntarily waive the privilege. Broadly, a waiver is effective if it is within the responsibility of the corporate representative, and the representative has no personal agenda. The board of directors may elect to waive the privilege, but an individual director may not. The authority generally runs to current corporate representatives and a corporation's successor in interest, even if the former representatives or predecessors disagree with the waiver. Former officers, directors and employees have no right to waive the privilege. Still, the corporation has the burden of proof to demonstrate that the corporation did not authorize a disclosure of privileged material.

Although the corporation may voluntarily waive the privilege, there is no requirement that a waiver of the attorney-client privilege be intentional and knowing. Instead, careless and unintentional waivers can also occur. For example, voluntarily complying with a subpoena, without exploring all avenues to quash the subpoena or protect the privilege, will generally constitute a waiver of any privilege. In addition, corporations often unintentionally or involuntarily waive the attorney-client privilege by selectively disclosing privileged communications to a third party, partially disclosing privileged communications, inadvertently producing privileged material in litigation, or affirmatively relying on the privileged material.

Limited waiver

Limited waiver is an umbrella term that encompasses the concepts of both selective and partial waiver. Selective waiver allows a client to disclose privileged communications to a third party but continue to assert the privilege against other third parties. Partial waiver allows the client to disclose a portion of privileged communications, while continuing to assert the privilege on the remaining portions of the same communications or other communications on the same subject matter.

While some jurisdictions recognize selective waiver, the majority of courts hold that a waiver of the privilege to a single third party results in an absolute waiver as to all third parties.[13] Some courts take a middle approach, recognizing selective waiver, but only where the client produces the privileged material to government agencies pursuant to a confidentiality agreement.[14] Selective waiver often appears in the context of government investigations. Corporations are faced with the dilemma of whether to cooperate with the government and risk a more expansive waiver than intended (with potentially profound civil liability consequences), or decline to produce documents and risk adverse consequences from the government.

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Evolution of the Selective Waiver

Over the past decade, the role of selective waiver in government investigations has evolved substantially because of the government's treatment of waiver. In January 2003, the United States Department of Justice set forth factors to consider in determining whether to charge a corporation with criminal offenses in the Thompson Memorandum (named for former Deputy Attorney General Larry Thompson).[15] Among other things, the Thompson Memorandum permitted federal prosecutors to consider whether the company agreed to waive the attorney-client privilege for communications among its employees. The Thompson Memorandum was heavily criticized. The Southern District of New York's scathing opinion found that the government violated certain criminal defendants' Fifth and Sixth Amendment rights, in part through its implementation of the Thompson Memorandum.[16]

In response to the criticism, Deputy Attorney General Paul J. McNulty distributed revised guidelines in the 2006 McNulty Memorandum.[17] The McNulty Memorandum required prosecutors to establish a "legitimate need" for attorney-client protected materials and then obtain the deputy attorney general's advance approval before requesting that companies waive the privilege. Moreover, under the McNulty Memorandum, a company's refusal to waive the privilege could not be used against it in charging decisions.

Most recently, in August 2008, Deputy Attorney General Mark R. Filip replaced the McNulty Memorandum with his own.[18] The Filip Memorandum directed federal prosecutors not to request that corporations waive the attorney-client privilege. Instead of measuring a company's cooperation by whether it waived the privilege, under the Filip Memorandum, federal prosecutors now look generally to the corporation's disclosure of relevant facts and evidence.

Partial disclosure often arises when an attorney locates a privileged document that is favorable to the company's position in a government investigation or litigation, and chooses to waive the privilege and produce the document. In this context, most courts take a fact-specific approach, focusing on the partial disclosure's effect on the adversary. Generally, a partial disclosure will only result in a waiver of the material actually disclosed, unless a partial waiver would be unfair to the adversary, in which case a partial disclosure will result in a privilege waiver for all communications on the same subject.[19]

Inadvertent disclosure

Inadvertent disclosure occurs most often during the discovery process in litigation as a result of an attorney's inadvertence, mistake or negligence. While inadvertent disclosure has always been a part of the privilege analysis, the likelihood of inadvertent disclosure has increased along with the number of documents in the current world of ediscovery. Courts have developed three approaches for analyzing waiver due to inadvertent disclosure. Few jurisdictions follow the most lenient approach, under which an attorney's inadvertent production cannot waive the privilege, because the privilege belongs to the client. Likewise, few jurisdictions follow the strict liability approach, under which any inadvertent disclosure results in waiver. The vast majority of jurisdictions take the middle ground, applying a balancing test that requires the court to make a case-by-case determination of whether the conduct is excusable. This approach, which allows for significant judicial discretion, generally looks at such factors as the reasonableness of the precautions taken to protect the privilege, the number of inadvertently produced documents, the promptness of actions to recover the privileged documents and fairness to the parties. Under the balancing test, courts are reluctant to find waiver and often focus on how much "inexcusable" carelessness was involved on the part of counsel.

Many corporations have now turned to incorporating "clawback agreements" into protective orders to mitigate the risk of inadvertent disclosure. A clawback agreement typically permits a party in litigation to preserve its privilege in inadvertently produced documents by notifying its adversaries and requesting that the documents be returned promptly upon learning of the inadvertent disclosure. These clawback agreements have a significant impact and may bleed over into the court's waiver decisions on inadvertently produced documents. Indeed, even in jurisdictions where the case law on inadvertent production is quite harsh, courts have permitted parties to use clawback agreements to avoid waiver.[20] Additionally, various state bar associations have been enacting rules that require attorneys who come into possession of privileged documents because of carelessness to refrain from reading the documents and to give notice of the disclosure to the other side.

Affirmative reliance

Waiver by affirmative reliance is based on the premise that the privilege may not be used as a sword and shield in the same litigation of the same issue. Affirmative reliance waivers often arise when the client raises an advice of counsel defense or brings a legal malpractice claim. Most courts hold that once any portion of a privileged communication is used to support a claim or defense, full discovery regarding the subject matter must be allowed. Courts have historically applied a three-factor test, holding that a party waived its privilege through affirmative reliance if:

1. Assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party;
2. Through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
3. Application of the privilege would have denied the opposing party access to information vital to his defense.[21]

However, in recent years, many courts have abandoned or modified this strict test in favor of a practical analysis of the policy behind waiver by affirmative reliance — i.e., that the client actually relied on the privileged material.[22]

Exceptions to the attorney-client privilege

As a matter of public policy, courts recognize certain exceptions to the attorney-client privilege, even where all other requirements to invoke the privilege are met. The most common exceptions are the fiduciary exception and the crime/fraud exception. Under the fiduciary exception, as set forth in *Garner v. Wolfinbanger*, a corporation's privilege may be pierced at the request of its shareholders on the basis that corporate officers are fiduciaries who must act in the shareholders' best interest. [23] The fiduciary exception attempts to balance competing concerns in the corporate context. On the one hand, the beneficiaries of a fiduciary relationship should have access to privileged communications made on their behalf. On the other hand, allowing shareholders unfettered access to privileged communications would discourage corporate officers from communicating openly with counsel. *Garner* sought to balance these competing concerns by holding that shareholders can access privileged communications if they demonstrate "good cause" based on balancing nine non-exclusive and non-determinative factors, such as the number of shareholders and the percentage of stock they represent; the nature, viability and seriousness of the shareholders' claims; the shareholders' need for the information and their ability to obtain it from other sources; the temporal and topical nature of the communication; whether the request seems to be a fishing expedition; and whether the company has independent confidentiality concerns in addition to the privilege claim. The fiduciary exception developed in *Garner* has been followed in shareholder

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- Navigating Common Ethical Issues of Loyalty, Confidentiality, Competency and Privilege in Canada (Sept. 2010). *www.acc.com/infopaks/ethics-canada_sep10*

QuickCounsel

- The Role of In-House Counsel: Global Distinctions (Sept. 2010). *www.acc.com/quickcoun/glbldstnct_sep10*

Form & Policy

- Privileged and Confidential Attorney-Client Communication (Oct. 2009). *www.acc.com/forms/attorney-client-comm_oct09*

Presentations

- Attorney-Client Privilege in Europe after Akzo-Nobel (May 2011). *www.acc.com/acp-europe_may11*
- Is This Communication Privileged? (Oct. 2010). *www.acc.com/comm-privileged_oct10*

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- Three Myths of Attorney-Client Privilege (May 2010). *www.acc.com/myths-acp_may10*

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derivative suits and has even been followed by some courts outside of the derivative context.

The crime/fraud exception applies where the client seeks an attorney's advice to help commit a crime, fraud or post-commission cover-up. Significantly, the crime/fraud exception only applies to future wrongdoing, and communications regarding a client's past wrongdoing remain privileged. To pierce the privilege under the crime/fraud exception, a party seeking to obtain the communications must make a prima facie showing that at the time the client sought legal advice from the attorney, he was engaged in or was planning criminal or fraudulent conduct, or that he engaged in such conduct after receiving counsel's advice. Then, the party seeking the communications must establish that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity, or was closely related to it.[24] However, an attorney is not permitted to disclose a communication simply because she believes (or even knows) that it is subject to the crime/fraud exception. Instead, the privilege vests in the client until a proper tribunal determines that the exception applies.[25]

Your part in keeping privilege

Many attorneys approach their daily communications with the mindset that everything is privileged. While this mindset can be problematic for private practitioners, it can be disastrous for in-house counsel, who may perform both business and legal functions. Compounding this risk is that most corporate employees enthusiastically embrace this mindset, too. Although it can be difficult to predict how a court will ultimately analyze privilege, by considering carefully whether communications are privileged, and if so, how to preserve the privilege, in-house counsel can increase the likelihood that sensitive communications remain confidential.

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NOTES

1 *United States v. United Shoe Mach. Corp.,* 89 F. Supp. 357, 358-59 (D. Mass. 1950).

2 If prepared in anticipation of litigation, these communications may also be protected by the work product doctrine.

3 *City of Philadelphia v. Westinghouse Elec. Corp.,* 210 F. Supp. 483, 485 (E.D. Pa. 1962).

4 *Diversified Indus., Inc. v. Meredith,* 572 F.2d 596, 609 (8th Cir. 1977).

5 *Upjohn Co. v. United States,* 449 U.S. 383 (1981).

6 *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.,* 805 F.2d 120, 123 (3rd Cir. 1986).

7 *United States v. Norris,* 722 F. Supp. 2d 632 (E.D. Pa. 2010), *aff'd, 419* Fed. Appx. 190 (3rd Cir. Mar. 23, 2011).

8 This section focuses on the attorney-client privilege in United States jurisdictions. Companies with an international presence should also consider foreign privilege laws, as some foreign jurisdictions do not extend any type of privilege to communications between in-house counsel and officers, directors or employees of the company. For example, as discussed in greater detail in the sidebar, the European Court of Justice has held that the legal professional privilege under European Union law does not extend to communications with

in-house counsel. French national law takes a similar approach, while the United Kingdom cloaks communications with in-house counsel in the legal protection privilege so long as the other elements of the privilege are met. Japan and China do not recognize the attorney-client privilege by name, but both countries require attorneys to maintain client confidences.]

9 Case C-550/07 P, *Akzo Nobel Chems., Ltd. v. European Comm'n,* 2010 E.C.R.

10 Case 155/79, *AM&S v. Commission,* 1982 E.C.R. 1575.

11 Restatement, Law Governing Lawyers § 72.

12 *Cooper-Rutter Assoc., Inc. v. Anchor Nat. Life Ins. Co.,* 168 A.D.2d 663, 663 (N.Y. App. Div. 1990); *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.,* No. 93 Civ. 5125, 1996 WL 29392 (S.D.N.Y. Jan. 25, 1996).

13 See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d 289 (6th Cir. 2002).

14 See *In re M&L Bus. Mach. Co., Inc.,* 161 B.R. 689, 695 (D. Col. 1993).

15 Memorandum from Larry D. Thompson to Heads of Department Components, United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at *www.justice.gov/dag/cftf/corporate_guidelines.htm.*

16 *United States v. Stein,* 495 F. Supp. 2d 390 (S.D.N.Y. 2007), *aff'd,* 541 F.2d 130 (2nd Cir. 2008).

17 Memorandum from Paul J. McNulty to Heads of Department Components, United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (2006), available at *www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.*

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19 *Westinghouse Elec. Corp. v. Republic of Philippines,* 951 F.2d 1414, 1426 n.12 (3rd Cir. 1991).

20 See *Minebea Co., Ltd. v. Papst,* 370 F. Supp. 2d 297, 300 (D.D.C. 2005).

21 *Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D. Wash. 1975).

22 See, e.g., *In re County of Erie,* 546 F.3d 222 (2nd Cir. 2008).

23 *Garner v. Wolfinbanger,* 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971), *on remand,* 56 F.R.D. 499 (S.D. Ala. 1972).

24 *In re Grand Jury Investigation (Schroeder),* 842 F.2d 1223, 1226 (11th Cir. 1987).

25 *Prudential Ins. Co. v. Massaro,* No. 972022, 2000 U.S. Dist. LEXIS 11985 (D.N.J. Aug. 14, 2000), *aff'd,* 38 Fed. Appx. 828 (3rd Cir. 2002), withdrawn, republished at 47 Fed. Appx. 618 (3rd Cir. 2002).