

# FINDING THE PEA

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## Who Holds the Privilege in Corporate Investigations?

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**Ballard Spahr**  
LLP

**April 24, 2019 In-House Counsel Conference**

# Presenters:

- Julie Laine
  - Senior Vice President & Chief Compliance Officer for Comcast Cable
  - Vice President, Chief Transaction Compliance Officer and Senior Deputy General Counsel for Comcast Corporation
- Kelly L. Gibson
  - Associate Regional Director for Enforcement, U.S. Securities and Exchange Commission
- M. Norman Goldberger
  - Practice Leader, Securities Enforcement and Corporate Litigation, Ballard Spahr LLP
- John C. Grugan
  - Partner, Ballard Spahr LLP

# Dual Role

- Courts apply more scrutiny to communications between in-house counsel and business
- Communications from in-house attorney must “clearly demonstrate that the communication in question” was made for the express purpose of securing or giving legal not business advice
  - *Faloney v. Wachovia Bank, N.A.*, 254 F.R.D. 204, 208-12 (E.D. Pa. 2008).



*"You seem to know something about law. I like that in an attorney."*

# Privilege

- The scope and nature of privilege is directly linked to what role the lawyer is performing
- Hybrid communications?
- Who are you communicating with?
- Meeting minutes?



*“And cc the rest of the food chain.”*

# Protecting Privilege

- You take on additional risk when you act as a negotiator
  - Hard to limit role to a legal advisor role
- Mark communications as privileged (and only those communications)



# Privilege

- Privileged only where the communication's primary purpose is to gain or provide legal assistance
- No protection if communications are:
  - Merely directed to an attorney
  - From meetings attended or directed by attorneys
    - *Faloney v. Wachovia Bank, N.A.*, 254 F.R.D. 204, 208-12 (E.D. Pa. 2008).

# Privilege Across the Pond

- EU does not recognize in-house counsel privilege
  - “Legal professional privilege serves to protect communications between a client and a lawyer who is independent of that client.”
    - *Akzo Nobel Chemicals, et al. v. Commission*, C- 550/07 P (2010).
- UK and Wales in-house counsel privilege is the same as the U.S.
  - Privilege attaches when communication is made for the purpose of giving or seeking legal advice

# COMMUNICATING WITH REPRESENTED PARTIES: THE “NO-CONTACT RULE”

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*"That, my friends, is a hot potato."*



# The “No-Contact” Rule

- Rule regarding communications with represented parties
- Pa. Ethics Rule 4.2 states:
  - In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
- Applies even if represented parties initiate contact
  - Lawyer must terminate immediately

# The “No-Contact” Rule

- All states have some form of Rule 4.2; differs slightly:
  - NY requires “prior consent”
  - CA prohibits “direct or indirect” communications
- PA requires just “consent”
- PA does not specify “direct or indirect” communication
  - Rule 8.4(a) prohibits a lawyer may not make a communication prohibited by this Rule through the acts of another.

# The “No-Contact” Rule

- Who is a “represented party” in an organization?
  - Anyone who supervises, directs or regularly consults with the organization’s lawyer concerning the matter; or
  - High-level employees who can bind the organization in the matter; or
  - Anyone whose act or omission in connection with the matter may be imputed to the organization
- Who is not a represented party?
  - A former employee; or
  - Employees represented by his or her own counsel, if such counsel has consented to communications

# The “No-Contact” Rule

- Express Consent
  - New York statute requires “prior consent,”
    - Cannot send simultaneous communications to client and counsel
      - NY Bar Opinion Formal Opinion 2009-01
  - ABA and PA does not require “prior”
    - Cannot send settlement offer directly to the represented party absent consent
      - See ABA Informal Op. 1348 (offering party’s lawyer not permitted to send opposing party carbon copy of settlement offer sent to opposing party’s lawyer).
- Implied Consent
  - Implied from lawyer’s presence at a meeting and observing the communication
  - Implied if direct contact occurs routinely as a matter of custom between the same individuals at the same parties, without objection
    - Rest. (Third) of Law Governing Lawyers § 99 cmt. j.

# The “No-Contact” Rule

- Even with consent, be careful:
  - Pa Ethics Rule 4.1 requires all lawyers to apply a duty of candor to negotiations
  - Can give rise to privilege concerns



# Duty of Candor

- Lawyers' duty of candor applies to negotiations
  - True whether or not the other side is a lawyer
- Pa Ethics Rule 4.1(a)
  - “In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person...”
- Ultimately impose a higher standard of ethical obligation in a negotiation than a business person

# Duty of Candor

- Pa Ethics Rule 4.1(a) prohibits:
  - Knowing/reckless false statements
  - Partial truths
  - Omissions
  - Possibly literally true statements made with an intent to mislead
  - Implicit misrepresentations

# Duty of Candor: “Knowingly”

- Knowingly = actual knowledge of the fact in question
- False Statement/Omissions
  - Gathered from circumstances
  - “willfully ignorant” = no investigation into facts despite circumstances that would trigger a reasonable person to investigate
- Balance truthfulness vs. doing the other side’s diligence





# Duty of Candor: Material Statement of Fact

- Does statement influence a reasonable person's actions in the transaction in question ?
- Certain statements NOT considered material, such as statements that go to:
  - Price or value,
  - Intent to settle at a specific amount, and
  - Sometimes, the existence of an undisclosed principal.
    - Generally, statements about the above are considered opinions or generally accepted conventions of negotiation
      - Comment 2 to Pa Ethics Rule 4.1.
    - BUT Restatement of Torts (Second) suggests that quality, value, or price may be material statements if parties aren't on equal footing or have access to equal information.

# Duty of Candor: Omissions and Half-Truths

- Omissions and Half -Truths
  - No affirmative duty to inform opposing counsel of relevant facts, unless she has caused a misunderstanding
  - A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false
    - See Comment 1 of Pa Ethics Rule 4.1



**"You call it 'lying'. I call it 'perfecting the truth'!"**

# Protecting Privilege

- *Upjohn Co. v. United States*
- Consequences when Upjohn Warnings are not provided:
  - *United States v. Ruehle*

# Work Product

- Two categories:
  - opinion work product (counsel's mental impressions and strategies)
    - Typically protected from disclosure
  - fact work product (e.g., counsel's summaries of facts)
    - Also protected, although it can be discovered if the facts contained therein are relevant, not available from other sources, and the party seeking access shows a substantial need
- Waiver
  - *Wadler v. Bio-Rad Labs*
  - *SEC v. Herrera*

# Hypothetical

- The Company receives a whistleblower complaint through the internal hotline. The complaint alleges that the operations teams are given numbers to hit each quarter, and that certain executives have arrangements with key longstanding clients that they can date product orders at the beginning or end of a quarter, depending on the Company's needs. The complaint alleges that the amounts at issue are material to the Company's financials.

# Hypothetical Continued

- Investigating counsel reports to the Audit Committee that, based on its interviews and review of relevant documents, it concludes the following:
  - The Company regularly overstated revenues through the use of a scheme under which contracts were dated advantageously
  - The Company is required to restate financials for several prior periods
  - As an inducement for the clients' participation in this scheme, the Company offered 25% “give-backs” in the form of product that is marked as returned, but is not actually received by the Company.
  - The Company has engaged in this scheme as a result of the tone at the top set by the CEO and CFO, both of whom knew of the scheme.

# Hypothetical Continued

- As a result of the whistleblower complaint, the Audit Committee retained outside counsel that is not the Company's regular corporate counsel. Counsel conducting the investigation requests the interviews of, among others, the CEO and CFO, who, in turn, insist on being advised by personal counsel. The Company also decides to provide counsel for all employees central to the inquiry.

# Hypothetical Continued

- As a result of the report to the Audit Committee, the Company decides it should self-report to the SEC.



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