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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Ethics at the Crossroads: Whistleblowers, Compliance, and Government Programs

October 30, 2025

Speakers

- **Diana Shaw:** Partner at Wiley Rein, who came to the firm following service as the Acting Inspector General of the State Department. Her practice areas include governance, compliance, and investigations.

- **Kathleen Cooperstein:** Special Counsel at Wiley Rein and former federal prosecutor. Her practice includes white collar investigations and litigation with a focus on the healthcare industry.

- **Shamir Patel:** Partner, Deputy General Counsel, and Chief Ethics & Compliance Officer at Guidehouse with 20 years of in-house and large law firm experience. His specialties include internal investigations and litigation.

Agenda

- Anatomy of a Whistleblower Program
- The Shroud of Privilege
- Joint Representations
- Inviting In the Government
- Tricks to Avoid WB Retaliation Claims
- Treats for Whistleblowers

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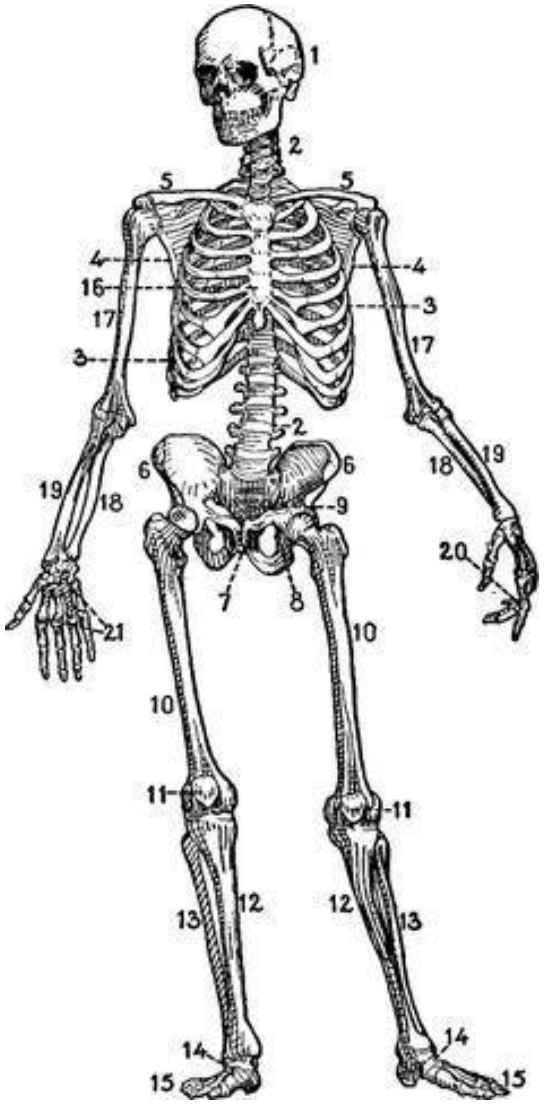

Anatomy of a Whistleblower Program

Anatomy of a Whistleblower Program

- Objectives of your whistleblower program:
  - Fix internal problems before they become external crises.
  - Create open and visible culture of compliance.
  - Comply with legal/contractual obligations (FAR 52.203-17, etc.).
- Components of your whistleblower program:
  - HR or efficiency/performance issues (non-legal)
  - Criminal acts, regulatory compliance issues (legal)
- OK, but why can't the Legal department do everything?

Anatomy of a Whistleblower Program

- Confidentiality is the cornerstone of any successful whistleblower program.
- Employees must trust that they will be protected and believed without exposure or retaliation.
- Tension between assuring confidentiality and fulfilling attorney's professional responsibility is one reason to **consider a non-attorney role at the front lines of a whistleblower program**.
- Confidentiality rules binding attorneys apply to client confidences, not employee confidences.

Anatomy of a Whistleblower Program

- VA Rule 1.6(a) Confidentiality: “A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation….”

Anatomy of a Whistleblower Program

- When conducting an internal investigation, the lawyer's client is the company (not the General Counsel, or the CEO, or the employees).

  - VA Rule 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
  - Rule 1.13 permits joint representation of an organization and its constituents, but any such dual representation is subject to the requirements of Rule 1.7 (Conflicts of Interest).

Anatomy of a Whistleblower Program

- Over-involvement of attorneys in the everyday administration of a whistleblower program creates risk of attorneys becoming witnesses in subsequent proceedings and potentially disqualified as advocates.
- VA Rule 3.7 Lawyer as Witness: “A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness,” BUT “If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.”

Anatomy of a Whistleblower Program

- Regardless of who is manning the phones, there will always be limitations on anonymity.
- Even non-attorney employees have mandatory reporting obligations in certain circumstances, and company has obligation to protect its employees from risks (dangerous conditions, harassment, etc.) once they are known.
- It is the employee's decision to report internally, but the company's decision how to proceed from there.
- Most importantly, be up front and transparent with employees about what can/will occur if they choose to make a report.

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The Shroud of Privilege

The Shroud of Privilege

- Once a whistleblower allegation has been received and determined to raise legal concerns, an internal investigation should be conducted.
- At this point, Legal personnel should be involved in directing the investigation, potentially with involvement of outside counsel if appropriate when considering resources and sensitivity of the allegations.
  - Outside counsel highly recommended if allegations relate to wrongdoing by person or people at the executive level, to avoid inference of bias.
  - Privilege could be at risk if investigation conducted by in-house counsel – business advice vs. legal advice.

The Shroud of Privilege

- Once the legal nature of investigation is established, take steps to create and maintain privilege.
  - Authorize in writing the investigation, noting it is undertaken for the purpose of obtaining legal advice and assessing legal risk.
  - Ensure that an attorney directs each stage of the investigation.
  - Inform your whistleblower and all witnesses that the investigation is undertaken for the purpose of obtaining legal advice.
  - Mark all communications and work product appropriately, and store securely.
  - Do not distribute communications or work product broadly to non-lawyers (pay attention to the “to” and “cc” fields).

The Shroud of Privilege

- Special care must be taken when directing contracted agents such as eDiscovery vendors, forensic analysts, or other third-party specialists.
  - The key is to ensure that their work is clearly within the scope of the legal engagement and performed *at the direction of counsel* for the *purpose of providing legal advice*. Here are some tips to consider:
    - Retain agents through outside counsel (engagement letter or SOW should make clear contractor is being retained by and is acting under direction of outside counsel).
    - Ensure engagement documents explicitly state work is being performed to assist counsel in providing legal advice/in anticipation of litigation.
    - Ensure outside counsel directs and oversees agents' work (e.g., deciding scope, methodology, and deliverables).
    - Ensure counsel is conduit for communication with agents and that all such communications and agent work product is/are clearly marked Attorney-Client Privileged/Attorney Work Product – Prepared at Direction of Counsel."

The Shroud of Privilege

- *Upjohn Co. v. United States*, 449 U.S. 383 (1981) established that company may assert privilege over communications between attorneys and employees during internal investigation.
- However, attorneys have a duty to ensure employees understand the privilege belongs to the company, *not* to the employee (typically by delivering an "*Upjohn* warning").
  - Goals:
    - (1) assert the attorney-client privilege and discourage the employee from disclosing communications with counsel;
    - (2) warn the employee that he or she **is *not*** the client; and
    - (3) warn the employee that the company may waive the privilege and disclose information from the interview to third parties without the employee's consent.
- Practice tip: document giving of warning in interview notes!

The Shroud of Privilege

- What does an *Upjohn* warning sound like?
  - We represent the organization. We do not represent any individual employees, and we do not represent you personally.
  - This conversation is confidential, so it is important that you do not discuss the contents of our conversation with anyone else, even with your colleagues.

  - The conversation is also protected by the attorney-client privilege. That privilege belongs to the company, meaning only the company can waive that privilege.
  - The company may choose to waive that privilege at some point and disclose the contents to outside parties (including the government).
  - After we finish today, if you remember something else or you want to discuss this conversation further, you should contact me or outside counsel.

The Shroud of Privilege

- VA Rule 1.13(d) Organization as Client
  - "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, **a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."** (emphasis added)

- VA Rule 4.3 Dealing With Unrepresented Persons
  - "(a) **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."** (emphasis added)

The Shroud of Privilege

- *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) established that the privileges recognized in *Upjohn* extend to conversations where the interviewer is not an attorney – as long as they are conducting the interview at the direction of attorneys as part of the internal investigation.
- D.C. Circuit notes there are no "magic words" to trigger *Upjohn* privilege protections, provided the employees understand they are speaking as part of a confidential investigation managed by Legal. BUT….

The Shroud of Privilege

- …VA Rule 1.13, Comment 10 arguably mandates something more than the vague understanding articulated in *Kellogg*:
  - "**When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent**, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, **that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.** Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged." (emphasis added)

The Shroud of Privilege

- VA Rule 5.3 Responsibilities Regarding Nonlawyer Assistants:
  - "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." (Rule 5.3(b))
  - Lawyer is responsible for rule-violating conduct of nonlawyer if they have managerial authority over the firm/department, or direct supervisory authority over the person, and "knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." (Rule 5.3(c)(2))

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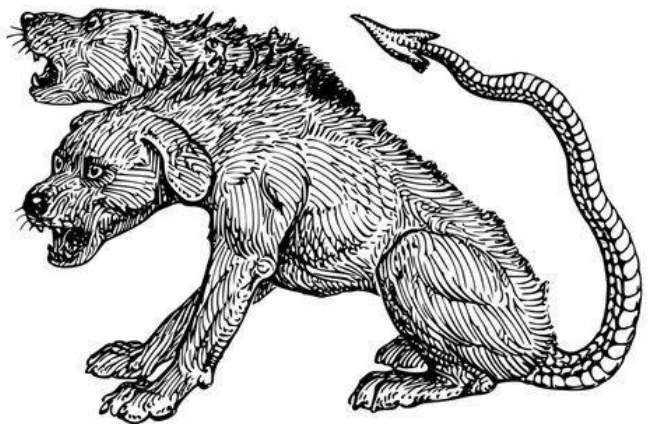
Joint Representations

Joint Representations

- Joint representation might arise by accident!
  - In the absence of an adequate *Upjohn* warning, corporate counsel could be found to jointly represent both the organization and the employee.
    - Consequences: inability for the organization to waive the attorney-client privilege unilaterally; disqualification if conflict later arises.
      - *See In re Grand Jury Subpoena*, 415 F.3d 333, 338 (4th Cir. 2005):
        - Employees who participated in internal investigation and later obtained personal counsel claimed they believed corporate counsel represented them and sought to quash waiver of privilege.
        - Court affirmed district court decision denying motion to quash, finding it was not objectively reasonable for the employees to believe they had an attorney-client relationship with corporate counsel because the attorneys explicitly stated they represented the organization and the privilege and right to waive it belonged to the company alone.

Joint Representations

- If joint representation is desired, ensure it is done with intention and in compliance with the Rules.
- VA Rule 1.7 Conflict of Interest: General Rule
  - A lawyer shall not represent a client if they are directly adverse to one another, OR there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.



Joint Representations

- VA Rule 1.7 Conflict of Interest: General Rule
  - "(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
    - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
    - (2) the representation is not prohibited by law;
    - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
    - (4) the consent from the client is memorialized in writing."

Joint Representations

- Joint representation may be more cost-effective than pool counsel but creates risk.
  - The purpose of conducting an internal investigation for the organization is to uncover all the facts—the good, the bad, and the ugly.
  - As such, during the course of the investigation, an attorney may discover incriminating or otherwise unfavorable information about an employee.
  - In that circumstance, the organization's and the employee's respective interests would likely diverge in that each would desire to shift blame to the other to reduce liability or obtain cooperation credit from the government.
  - It would thus be very difficult (if not impossible) to satisfy the joint representation requirements of VA Rules 1.13 and 1.7.

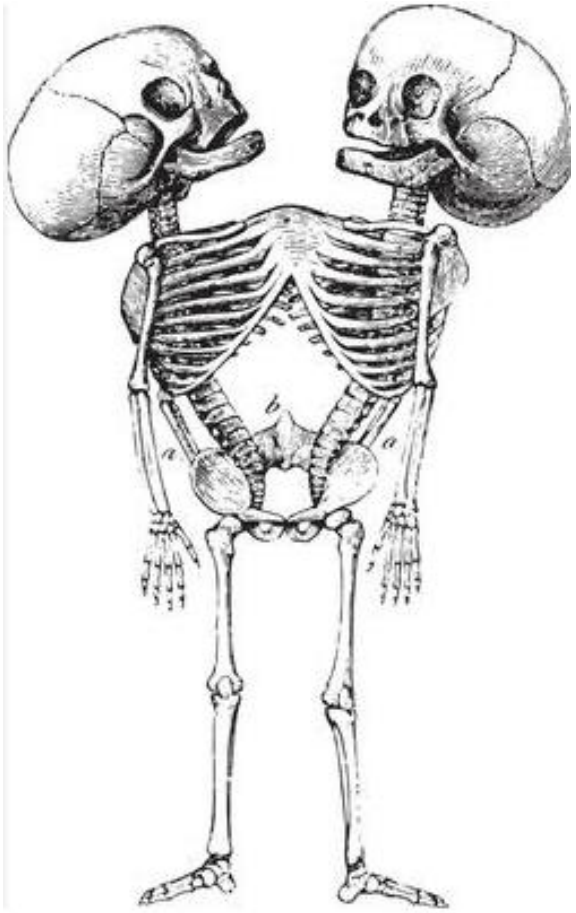
Joint Representations

- VA Rules are ***less protective*** of organizations than ABA Rules
- ABA Rule 1.13(b) Organization as Client: "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 a 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."

Joint Representations

- VA Rule 1.13(b) Organization as Client: "…. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others: (1) asking for reconsideration of the matter; (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law."

Joint Representations



- Joint representation limits the company's ability to make unilateral decisions about disclosure of wrongdoing.
- VA Rule 1.6 Confidentiality of Information
  - "(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client . . . "

Joint Representations

- Every new client under the joint representation umbrella creates additional points of entry to confidential information.
- In particular, employees may trigger exceptions if they engage in concurrent or subsequent litigation, or if a dispute arises with the attorney necessitating defense against that employee.
- VA Rule 1.6 Confidentiality of Information – Exceptions (below is not exhaustive)
  - (b) where a lawyer reasonably believes it is necessary to reveal:
    - (1) such information to comply with law or a court order;
    - (2) such information to establish a claim or defense on behalf of the lawyer . . .

Joint Representations

- If employees choose not to retain counsel and are not part of a joint representation, they must be treated as unrepresented persons subject to VA Rule 4.3.
  - Must not state or imply that you are disinterested and must make reasonable efforts to correct any misunderstanding on the part of the unrepresented person.
  - Must not give advice to an unrepresented person, other than the advice that the person may secure counsel, if the unrepresented person's interests are or reasonably possibly may be in conflict with the interest of the client (the company).

Joint Representations

- If employees obtain their own counsel rather than joint representation, they must be treated as represented parties.
- VA Rule 4.2 Communication With Persons Represented by Counsel
  - "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 by law** to do so." (emphasis added)
    - *See also* Va. Legal Ethics Opinion ("LEO") 1890 Communications With Represented Persons (Compendium Opinion) (2021):
      - "[T]he term 'knows' denotes actual knowledge of the fact in question . . . . However, [a] person's knowledge may be inferred from circumstances." (internal quotation marks omitted)
      - "[I]f the lawyer is without knowledge or uncertain as to whether the adverse party is represented, it would not be improper to communicate directly with that person for the sole purpose of securing information as to their current representation."

Joint Representations

- If the employee retains their own counsel, you are NOT obligated to treat them as co-counsel.
- Caution!
  - If no common interest agreement, no privilege when their attorney participates.
  - Asking/requiring employee to sit for interview without their counsel, or terminating if they refuse to do so, may be perceived as coercive or retaliatory, and reflect negatively on company's investigation.

Joint Representations

- In-house counsel can still interact with represented employees on matters *other than* the investigation for which they have retained counsel.
- VA Rule 4.2, Comment 4
  - "This Rule **does *not* prohibit communication** with a represented person, or an employee or agent of a represented person, **concerning matters outside the representation**." (emphasis added)
    - *See also* Va. LEO 1890 (2021):
      - **"To trigger Rule 4.2 the communication must be about the subject of the representation**—i.e., the lawyer's representation of his or her client." (emphasis added)
      - "The Rule **limits communications with represented persons only when the person is represented "in the matter,"** so **communication with a represented person about a different "matter"** than the one in which the person is represented **is permissible** even if the communication involves facts that also relate to the matter in which the person is represented." (emphasis added)

Joint Representations

- If employees are not part of an official joint representation, can third parties (law enforcement, e.g.) approach them as unrepresented?
- VA Rule 4.2, Comment 7
  - "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who **supervises, directs, or regularly consults with the organization's lawyer** concerning the matter or has authority to obligate the organization with respect to the matter or **whose act or omission in connection with the matter may be imputed** to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent or the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. In communicating with a current or former constituent or an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization."

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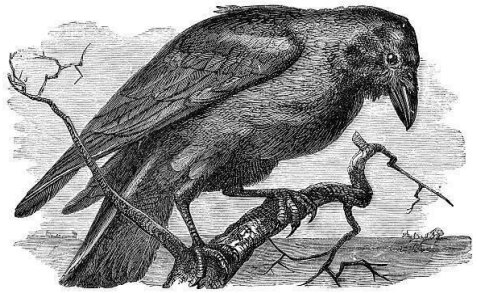
Inviting In the Government

Inviting In the Government



- If internal investigation reveals reportable information, a disclosure to the government may be in the company's best interest and/or required.
- Voluntary disclosure can bring potential benefits:
  - Organization can get ahead of a pending investigation, allowing it to frame the narrative and put the company in the best light possible.
  - DOJ prosecutors and SEC attorneys are directed to consider voluntary disclosure in determining whether and how to resolve a case (can result in more favorable outcomes).

Inviting In the Government

- In May 2025, DOJ revised its Corporate Enforcement and Voluntary Self-Disclosure Policy ("CEP") to provide companies with greater clarity on the outcomes they can expect from voluntary self-disclosure.
  - Companies that meet all voluntary self-disclosure criteria (i.e., that voluntarily self-disclose misconduct that is previously unknown to DOJ, fully cooperate, remediate in a timely and appropriate manner, and have no aggravating circumstances) will receive a declination (not just a presumption of a declination).
  - Companies that self-disclose but have aggravating circumstances can still be eligible for a declination based on a weighing of the seriousness of those circumstances against the company's cooperation and remediation efforts.
  - Companies that voluntarily self-disclose in good faith but have not done so quickly enough or before DOJ became aware of the misconduct, can still receive a non-prosecution agreement with a term of fewer than three years, a 75% reduction on the criminal fine, and no corporate monitor.

Inviting In the Government

- Voluntary disclosure also poses risks:
  - Can result in waiver of attorney-client privilege
  - May result in parallel proceedings (e.g., audit, investigation, or suspension and debarment proceedings)
  - Severity of disclosed misconduct could outweigh credit for disclosure

Inviting In the Government

- Preserve privilege by sharing factual summaries without disclosing protected materials.
- Justice Manual: Section 9-28.720
  - "Eligibility for **cooperation credit is *not* predicated upon the waiver of attorney-client privilege or work product protection.** Instead, **the sort of cooperation that is most valuable** to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is timely **disclosure of the relevant facts** concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys." (emphasis added)

Inviting In the Government

- Strategy for preserving privilege: limit disclosures to general conclusions; do not reveal substance of privileged communications.
  - The Fourth Circuit, in a per curiam, unpublished decision, has provided guidance on how companies can avoid waiving attorney-client privilege when making disclosures to the government after conducting a privileged internal investigation.
    - In *In re Fluor Intercontinental, Inc.*, 803 F. App'x 697, 701 (4th Cir. 2020), the appellate court reversed the district court's ruling that a government contractor waived privilege in making mandatory disclosures to the government.
    - The court refused to infer waiver merely because the "disclosure covered the same topic as the internal investigation or that it was made pursuant to the advice of counsel . . . ." *In re Fluor* , 803 F. App'x at 702.
    - The Fourth Circuit further drew a distinction between disclosures that "quote[] privileged communications or summarize[] them in substance and format" and "statements [that] do no more than describe . . . general conclusions about the propriety of . . . conduct[,]" explaining that only the former disclosures would give rise to waiver. *Id.*

Inviting In the Government

- Government cannot require waiver of privilege/AWP protections for cooperation credit. But remember…
  - Notes memorializing mere facts without incorporating any judgment or mental impressions may not qualify as work product.
  - AI summaries likely do not qualify as attorney work product.
  - Verbatim transcriptions or recordings do NOT qualify as work product.
- Always assume your notes, memos, etc. *may* end up in the hands of the government and craft them accordingly.

Inviting In the Government

- However, do NOT create limitations on accessibility of non-privileged factual information.
- VA Rule 3.4 Fairness to Opposing Party and Counsel
  - "A lawyer shall not:
    - (a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.
    - (h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the information is relevant in a pending civil matter; (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

Inviting In the Government

- VA Rule 4.1 Truthfulness in Statements to Others
  - "In the course of representing a client a lawyer shall not knowingly:
    - (a) make a false statement of fact or law; or
    - (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."

Inviting In the Government

- VA Rule 4.1, Comment 1
  - "**A lawyer is required to be truthful** when dealing with others on a client's behalf, but generally has **no affirmative duty to inform an opposing party of relevant facts**. A **misrepresentation** can occur **if the lawyer incorporates or affirms a statement** of another person that **the lawyer knows is false**. **Misrepresentations** can also occur **by failure to act or by knowingly failing to correct false statements** made by the lawyer's client or someone acting on behalf of the client." (emphasis added)

Inviting In the Government

- Risk of parallel proceedings
  - Simultaneous — or sometimes successive — conduct of separate civil, criminal, and administrative investigations or cases.
  - In addition to potential risk of privilege waiver, big risk of collateral use of information – i.e., that one government agency will share disclosed information with others (including foreign authorities)
    - Safe to assume that civil regulators will almost certainly share information amongst themselves and with criminal prosecutors; criminal prosecutors unlikely to share all information with civil side (e.g., grand jury materials)
    - Disclosure made in one proceeding, could end up an admission in another

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Tricks to Avoid Whistleblower (WB) Retaliation Claims

Tricks to Avoid WB Retaliation Claims

- What is whistleblower retaliation, generally?
  - Adverse employment action in response to complaint.
  - Not just termination or suspension—can include denial of promotion, unjustified negative reviews, harassment, constructive discharge, etc.
- Fear of retaliation is a natural, human instinct. Compliance programs must be open and affirmative in disavowing retaliatory practices.
- Having an anti-retaliation policy is a good start, but strong tone from the top, consistent messaging, training, and follow-through are critical.

Tricks to Avoid WB Retaliation Claims

- False Claims Act anti-retaliation provision: 31 USC § 3730(h)
  - Grants relief if "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against ... because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter."
- 41 USC § 4712 (federal contractor/grantee protection)
  - Prohibits the discharge, demotion, or other discrimination of an employee of a federal contractor, subcontractor, grantee, subgrantee, or personal services contractor as reprisal for whistleblowing.

Tricks to Avoid WB Retaliation Claims

- Dodd-Frank anti-retaliation provision: SEC Rule 21F-17(a):
  - "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."
- SEC can itself bring an action for retaliation against a whistleblower
- Section 21F(h)(1)(A) of the Securities Exchange Act permits a whistleblower to directly sue in federal court for retaliation based on:
  - Providing information to SEC as part of its whistleblower program
  - Testifying or assisting in an investigation
  - Making disclosures "required or protected" under various laws, rules, or regulations under SEC jurisdiction

Tricks to Avoid WB Retaliation Claims

- Communicating with a whistleblower:
  - Show appreciation for the whistleblower bringing concerns to the organization's attention.
  - Indicate that the organization is taking the allegations seriously and conducting a thorough investigation.
  - Resource appropriately so investigation can be completed in timely fashion.
  - At the conclusion of the investigation, to the extent possible/advisable, report back to the whistleblower, highlighting corrective actions or basis for not taking any corrective actions.
- Make sure employees and supervisors at all levels are trained not to retaliate.

Tricks to Avoid WB Retaliation Claims

- Pitfalls of trying to keep issues too confidential:
  - Overly restrictive confidentiality agreements that may chill whistleblower reporting pose a risk
    - In September 2024, SEC announced settlements of more than $3M combined in civil penalties against 7 public companies allegedly using employment, separation, and other agreements that violated rules prohibiting actions to impede whistleblowers from reporting misconduct.
      - Each company had employment or separation agreements permitting participation in whistleblower programs but included language that the employees waive their right to “damages,” “monetary or equitable relief,” or a “monetary award” from reporting.

Treats for Whistleblowers

- Various federal agencies have set up whistleblower award programs that offer whistleblowers a financial incentive to report misconduct (typically 10-30% of sanctions/fines collected as a result of information provided) – e.g.,
  - SEC program for securities violations
  - IRS program for tax fraud
  - CFTC program for commodities and futures violations
  - Several DOJ programs for antitrust, corporate, and other financial crimes (e.g., healthcare fraud, foreign or domestic corruption, etc.)
- Makes it all the more important to have a strong compliance culture and effective internal whistleblower mechanisms & protections

Questions?

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Legal Ethics Opinions

- LEO 1749: Propriety of attorney asking questions about advice provided by corporate counsel when questioning former employee of opposing party
- LEO 983: Corporations – Client confidences and secrets where former in-house counsel knows of a fraud perpetrated by former employer
- LEO 1800: Are non-attorney staff support subject to the conflicts of interest prohibition?