Privilege and Ethical Issues Encountered in Corporate Investigations

Carrie H. Cohen, Esq. (Moderator)
Morrison & Foerster LLP, NYC

Evan T. Barr, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP, NYC

Jillian B. Berman, Esq.
Levine Lee LLP, NYC

Parvin D. Moyne, Esq.
Akin Gump Strauss Hauer & Feld LLP, NYC

Jay Shapiro, Esq.
White and Williams LLP, NYC

THE ATTORNEY-CLIENT PRIVILEGE IN CORPORATE CRIMINAL INVESTIGATIONS IN THE UNITED STATES

CARRIE H. COHEN
MORRISON & FOERSTER LLP
ccohen@mofo.com/212-468-8049

For attorneys and corporate clients undertaking internal investigations in the United States, the application of the attorney-client privilege is a critical and significant issue. Set forth below are some basic guidelines for consideration.

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is designed to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[1] The privilege applies to communications between attorney and client if such communication was intended to be and was in fact kept confidential, and was made for the purpose of obtaining or providing legal advice to the client. Accordingly and in general, the attorney-client privilege is well safe guarded in America and courts are reluctant to interfere with it.

THE ATTORNEY-CLIENT PRIVILEGE IN CORPORATE INVESTIGATIONS

As soon as a potential issue arises that requires an internal investigation of any sort, companies should think carefully about how best to structure the investigation to ensure that the attorney-client privilege is protected. To that end, companies need to make clear from the outset that the investigation is being conducted by counsel -- either in-house or outside -- for the purpose of obtaining or providing legal advice.[2] Additionally, companies should make clear that the investigation is being conducted for the purpose of providing legal advice to the

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1 *Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).*

2 *In re Kellogg Brown & Root, 756 F.3d 754, 757 (D.C. Cir. June 27, 2014) ("KBR's assertion of the privilege in this case is materially indistinguishable from Upjohn's assertion of the privilege in that case . . . KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity. The same considerations that led the Court in Upjohn to uphold the corporation's privilege claims apply here."); id. at 758-59 ("So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.").*

company. As in-house counsel wear dual hats – as providers of both legal advice and business advice – engaging outside counsel at the outset may help to protect the attorney-client privilege and promote a fulsome investigation without fear of disclosure.

Of course, outside counsel need not be engaged in every stage of the investigation to ensure protection of the privilege.[3] However, as explained by the D.C. Circuit in *In re Kellogg Brown & Root*, this does mean that the investigation should be "conducted under the auspices of" counsel.[4] In light of this, where non-attorneys conduct interviews, it should be clear that it is being done at the behest of either in-house or outside counsel. Ultimately, it is best for attorneys to guide the investigation, including deciding whom to interview, which documents to collect and review, and determining the ultimate scope and decisions to be made.

OUTSIDE CONSULTANTS AND EXPERTS

If the investigation requires outside consultants and/or experts, they should be engaged by counsel under the term of a detailed engagement letter that clearly indicates that the consultant is being retained to assist in the provision of legal advice. The engagement letter should avoid any stated purpose that can be deemed solely a business purpose.

Moreover, both the attorneys and the third parties should take steps to protect the privilege in their communications, for example, by indicating when appropriate that the communications are privileged and are being prepared under the direction of counsel.

UPJOHN AND INTERNAL INVESTIGATIONS

The seminal case in the United States for the application of the attorney-client privilege in the corporate internal investigation context is *Upjohn Company v. United States*.[5] *Upjohn* holds that communications between counsel and non-management employees are privileged but that such privilege belongs to the company not the employee. Company witness interviews are usually protected by the privilege if the interview is necessary for the representation, relevant to the employee's duties, and confidential.

The *Upjohn* case led to what are known as "*Upjohn* warnings," which take a variety of forms but should be carefully adhered to in order to protect the privilege. In general, *Upjohn* warnings should be given at the start of an interview and should cover the following topics:

1. The attorney represents the company and not the individual employee;
2. Any findings from the interview will be reported to the company;
3. The interview's contents are privileged, but that privilege belongs to the company;
4. The company may elect to waive the privilege thereby disclosing the contents of the interview to third parties, including government regulators; and
5. The employee must keep the interview and its contents confidential.

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3 *Id. at 758 ("Upjohn does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel 'does not dilute the privilege.'") (quoting In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984)); id. ("[T]he investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege.").*

4 *Id. at 757.*

5 *449 U.S. 383 (1981).*

Even though not best practice, courts in the United States have upheld less formal versions of these warnings as valid so long as employees do not reasonably believe that they have an attorney-client relationship with company counsel.[6] Attorneys are well advised to memorialize the provision of *Upjohn* warnings in their contemporaneous post-interview notes and memoranda to avoid subsequent waiver of the privilege in the event that someone seeks their disclosure. It also may be advisable to require the employee to date and sign a form acknowledging receipt of the warning prior to continuing the interview. This written evidence of the warning will be useful in subsequent proceedings, and it also provides the employee an opportunity to read the warning himself to better understand the risks and benefits before proceeding.

ETHICAL CONSIDERATIONS

The Model Rules of Professional Conduct ("the Model Rules") for attorneys in the United States provide guidelines for understanding an attorney's ethical duties to corporate clients and individual employees within the company.[7] Under Model Rule 1.13, "the organization acting through its duly authorized constituents" is the client.[8] In light of that, "[i]n 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."[9]

As in other instances in which an attorney interacts with an unrepresented individual, corporate counsel should be clear that they are not the individual employee's counsel. To that end, attorneys must clearly communicate that they represent the interests of the company – their client – not the individual, and therefore, the company owns the privilege. A failure to provide a sufficient warning has negative implications for the attorney's obligations to both the unrepresented individual and the organization. The importance of providing a sufficient warning may be particularly important where the interests of the company and the unrepresented individual employee may not align, either at the time of the interview or in the future. In these situations, if the attorney has failed to provide adequate warnings to the employee, there is a risk of creating an accidental attorney-client relationship with said employee whose interests are adverse to the client company, which may result in additional violations of the attorney's ethical obligations.[10]

CONSIDERATIONS IN INTERNAL INVESTIGATIONS

Employee interviews are a necessary component of internal investigations and can shape the outcome of the investigation, including the advice of counsel to the client. As the Supreme Court explained in *Upjohn*, "full and frank communication between attorneys and their clients . . . promote[s] broader public interests in the observance of law and administration of justice."[11] But the very privilege that is designed to promote "full and frank" discussions often can have a chilling effect in witness interviews because employees may be concerned that

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6 *See, e.g., United States v. Ruehle, 583 F.3d 600, 609 (9th Cir. 2009) (finding that a warning that an employee was being interviewed "on behalf of" the company was sufficient because subsequent actions by the employees indicated that they understood that the privilege belonged to the company).*

7 *State-level ethical rules may differ from the Model Rules.*

8 *Model Rule 1.13.*

9 *Model Rule 1.13.*

10 *See, e.g., N.Y. Rules of Professional Conduct Rule 1.7.*

11 *Upjohn, 449 U.S. at 389.*

they lack the benefit of attorney-client privilege and thus will be unable to invoke the benefits of the privilege later if necessary (*i.e.*, in seeking an advice of counsel defense to avoid liability). Moreover, attorneys should be cognizant that as the interview and/or investigation proceeds, new developments may change the dynamics. For example, it may later become apparent that the interests of the individual employee and the company are adverse, which may require advising the individual to retain separate counsel.

THE ADVICE OF COUNSEL DEFENSE

Privilege considerations may become particularly important in the litigation context. A company may wish to invoke the advice of counsel defense to defend itself in litigation. While such defense may provide broad protections in certain proceedings (*i.e.*, False Claims Act and criminal cases), it also can have certain risks. These risks include a waiver of the attorney-client privilege for all communications regarding the alleged misconduct and not just those specific communications necessary to make the defense.[12] The potential waiver also can extend to work product, including materials never provided to the client, such as attorney interview notes.

With respect to individual employees seeking to invoke the advice of counsel defense, the defense may not be available to them. Recently, a federal judge in the Southern District of New York held that an employee could not disclose the privileged information necessary to support his advice of counsel defense.[13] This decision emphasizes the fact that the privilege may only be waived by the holder of the privilege even where the advice of counsel defense may be the primary defense available to an individual employee to guard against liability.

CONCLUSION

Attorneys and companies undertaking internal investigations in the United States must be cognizant from the beginning on how to conduct the investigation to ensure protection of the attorney-client privilege where applicable. In interactions with individual employees, attorneys need to be mindful of their ethical duties to their corporate clients and provide sufficient warnings to the individual interviewees to protect the client and the attorney, as well as to properly instruct the interviewee.

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12 *United States ex rel. Lutz v. Berkeley Heartlab Inc., 2017 BL 111755, D.S.C., No. 9:14-cv-230 (Apr. 5, 2017).*

13 *United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d. 558 (S.D.N.Y. 2015).*

Sample[1] *Upjohn* Warning

During witness interviews as part of an internal corporate investigation, attorneys and investigators working at their direction usually give an "*Upjohn* warning." *See Upjohn v. United States*, 449 U.S. 383 (1981). Employees are told whom the attorney represents (the corporation, and not the employee individually), that the attorney-privilege belongs to the corporation, and that the corporation may waive the privilege and disclose the substance of the interview to third parties. If such a warning is not given, the employee may believe the attorneys represent him or her, and that they will not reveal anything the employee says. This can result in litigation if the company later decides to disclose the employee's testimony. Interview notes should reflect that the warning was given, and that the employee agreed to keep the interview confidential.

Sample *Upjohn* warning:

[Greeting / Introductions]

The company has retained our law firm to investigate **[the matter].** We are meeting with you to learn more of the facts about **[the matter]** so we can give legal advice to the company, and to prepare for potential litigation.

In our role as attorneys, we represent the company only. We do not represent you or any other employees personally. If you want a lawyer, you will need to hire your own.

Our interview is confidential and subject to the "attorney client privilege." This generally means that no one can force you or me to disclose in court what we tell each other today. Understand, however, that the privilege belongs to the company, not to you personally. In the future, the company may decide to waive the privilege and disclose the information we learn in the investigation. If the company chooses to waive the privilege, it can do so without your consent and without telling you.

For the company to maintain its attorney client privilege over the information from this interview, it is important that you not share the substance of our interview with anyone. Keeping this interview confidential also will protect you if **[the government / litigation opponent]** ever decides to interview you again about what happened.

The company will not tolerate any retaliation or reprisals against you for cooperating with our investigation and telling the truth. On the other hand, failure by employees to cooperate with the investigation may result in company discipline, including possible termination of employment.

Do you understand? Do you agree to keep this interview confidential? Do you have any questions before we begin?

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[1] This "Sample" is not intended to be legal advice for any specific situation, nor does use of this form in any way create any attorney-client relationship.

449 U.S. 383 (1981)

UPJOHN CO. ET AL.
v.
UNITED STATES ET AL.

No. 79-886.

Supreme Court of United States.

Argued November 5, 1980.
Decided January 13, 1981.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

385 *385 *Daniel M. Gribbon* argued the cause and filed briefs for petitioners.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief were *Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith,* and *Robert E. Lindsay.*[*]

William W. Becker filed a brief for the New England Legal Foundation as *amicus curiae.*

386 *386 JUSTICE REHNQUIST delivered the opinion of the Court.

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

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers"
387 over the Chairman's signature. The letter *387 began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments.[1] A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the

investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U. S. C. § 7602 demanding production of:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to
388 employees of foreign governments and any political *388 contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a-18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U. S. C. §§ 7402 (b) and 7604 (a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F. 2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the `client's.'" *Id.*, at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the
389 Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was *389 within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U. S. C. § 7602." *Id.*, at 1228, n. 13.

II

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel* v. *United States*, 445 U. S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher* v. *United States*, 425 U. S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt* v. *Blackburn*, 128 U. S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the
390 privilege arise when the client is a corporation, which in theory is an artificial creature of the *390 law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, *United States* v. *Louisville & Nashville R. Co.*, 236 U. S. 318, 336 (1915), and the Government does not contest the general proposition.

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

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision

about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, *he is (or personifies) the corporation* when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

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

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

See also *Hickman v. Taylor,* 329 U. S. 495, 511 (1947).

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

> "In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem `is
392 thus faced with a "Hobson's choice". If he interviews employees not having "the very highest authority", *392 their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with "the very highest authority", he may find it extremely difficult, if not impossible, to determine what happened." *Id.,* at 608-609 (quoting Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B. C. Ind. & Com. L. Rev. 873, 876 (1971)).

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

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, *e. g.,* *United States v. United States Gypsum Co.,* 438 U. S. 422, 440-441
393 (1978) ("the behavior proscribed by the [Sherman] Act is *393 often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct").[2] The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, *e. g.,* *Hogan v. Zletz,* 43 F. R. D. 308, 315-316 (ND Okla. 1967), aff'd in part *sub nom.* *Natta v. Hogan,*

392 F. 2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with *Congoleum Industries, Inc. v. GAF Corp.*, 49 F. R. D. 82, 83-85 (ED Pa. 1969), aff'd, 478 F. 2d 1398 (CA3 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research).

394 *394 The communications at issue were made by Upjohn employees[3] to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments.*" (Emphasis supplied.) 78-1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas.[4] The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the
395 subject of this investigation." *395 It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." *Id.*, at 165a-166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, *id.*, at 39a, 43a, and have been kept confidential by the company.[5] Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

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

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a
> 396 communication concerning that fact is an entirely different *396 thing. The client cannot be compelled to answer the question, `What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communications to his attorney." *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (ED Pa. 1962).

See also *Diversified Industries*, 572 F. 2d, at 611; *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 580, 150 N. W. 2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U. S., at 516: "Discovery was hardly intended to enable a learned profession to perform its functions. . . on wits borrowed from the adversary."

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

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a-28a, 91a-93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U. S. C. § 7602.[6]

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

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

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in United States v. Nobles, 422 U. S. 225, 236-240 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26 (b) (3).[7]

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

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

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman,* however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." *Id.*, at 512. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters, petitioner's case is not of that type." *Id.*, at 512-513. See also Nobles, *supra*, at 252-253 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U. S., at 513
400 ("what he saw fit to write down regarding witnesses' remarks"); *id.*, at 516-517 ("the statement would be his [the *400 attorney's] language, permeated with his inferences") (Jackson, J., concurring).[8]

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

processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U. S. C. App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

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

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

402 While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we *402 think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

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

It is so ordered.

CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Ante,* at 393. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See *ante,* at
403 394-395. Because of the great importance of the issue, in my view the Court should make clear now that, as a *403 general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, *e. g.*, *Diversified Industries, Inc. v. Meredith*, 572 F. 2d 596, 609 (CA8 1978) (en banc); *Harper & Row Publishers, Inc. v. Decker*, 423 F. 2d 487, 491-492 (CA7 1970), aff'd by an equally divided Court, 400 U. S. 348 (1971); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1163-1165 (SC 1974). Other communications between employees

and corporate counsel may indeed be privileged—as the petitioners and several *amici* have suggested in their proposed formulations[*] —but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of
404 privileges properly *404 before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," *ante,* at 396, neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

[*] Briefs of *amici curiae* urging reversal were filed by *Leonard S. Janofsky, Leon Jaworski,* and *Keith A. Jones* for the American Bar Association; by *Thomas G. Lilly, Alfred F. Belcuore, Paul F. Rothstein,* and *Ronald L. Carlson* for the Federal Bar Association; by *Erwin N. Griswold* for the American College of Trial Lawyers et al.; by *Stanley T. Kaleczyc* and *J. Bruce Brown* for the Chamber of Commerce of the United States; and by *Lewis A. Kaplan, James N. Benedict, Brian D. Forrow, John G. Koeltl, Standish Forde Medina, Jr., Renee J. Roberts,* and *Marvin Wexler* for the Committee on Federal Courts et al.

[1] On July 28, 1976, the Company filed and amendment to this report disclosing further payments.

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

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

[4] See *id.,* at 26a-27a, 103a, 123a-124a. See also *In re Grand Jury Investigation,* 599 F. 2d 1224, 1229 (CA3 1979); *In re Grand Jury Subpoena,* 599 F. 2d 504, 511 (CA2 1979).

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

[6] The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attorney-client privilege does not apply to them. See n. 3, *supra.*

[7] This provides, in pertinent part:

"[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

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

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

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Privilege and Ethical Issues Encountered in Corporate Investigations

NYSBA Spring Meeting
May 5, 2018

Evan T. Barr

Overview

- What corporate counsel needs to consider in dealing with individuals in the context of an internal and/or law enforcement/regulatory investigation.
  - *Upjohn* Warnings
  - Separate Representation for Individuals
  - Considerations After Separate Counsel has Been Engaged

Ethical Considerations When Meeting with Employees

- **New York Code of Professional Conduct Rule 4.3 – Communicating with Unrepresented Persons**
  - A lawyer shall not state or imply that the lawyer is disinterested.
  - When unrepresented person misunderstands the lawyer's role, the lawyer shall make reasonable efforts to correct the misunderstanding.

Ethical Considerations When Meeting with Employees

Rule 1.13(a) – Organization As Client

- Lawyer employed or retained by an organization must explain that s/he is lawyer for the organization and not the employee if "it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing[.]"

In re: Grand Jury Subpoena (4th Cir 2005)

- **In meetings with employees AOL's Attorneys said:**
  - They represented the company but that they "***could***" represent him as well, "as long as no conflict appeared"
  - They "***can*** represent [him] until such time as there appears to be a conflict of interest"
  - "We represent [the company], and ***can*** represent [you] too if there is not a conflict"

Sample *Upjohn* Warning

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- I am a lawyer for Corporation A. I represent only Corporation A, and I do not represent you personally.

AMERICAN BAR ASSOCIATION
Criminal Justice Section

Sample *Upjohn* Warning

- I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.

Sample *Upjohn* Warning

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- Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

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Criminal Justice Section

Sample *Upjohn* Warning

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- In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.

AMERICAN BAR ASSOCIATION
Criminal Justice Section

Other Considerations

Can say interview should be kept confidential,
but can't restrict ability to be a whistleblower

Should you also tell employees that:

- Information that they provide may or will go the government/regulators
- False information provided to company counsel can be basis for a criminal obstruction charge

Computer Associates

Counsel Reps Company- Now What?

- Employee knows that company counsel does not represent him/her.
- ***But***:
  - Can company counsel represent them?
  - Should the employee have separate counsel?
  - If they get separate counsel, how do you manage process?

Do I Need My Own Attorney

- **Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2004-02**
  - Prudent Precaution: Reiterate that you represent the company, and you cannot advise the employee about obtaining separate counsel.
  - Appropriate Reluctance:
    - Rules permit attorney to advise unrepresented party to secure counsel,
    - *but* affirmatively advising an employee to secure counsel could be against the company's interest,
    - *so* appropriate for corporate counsel to be reluctant to render that advice, absent client consent.

Concurrent Representation

- **New York Code of Professional Conduct, Rule 1.13 (d) – Organization as Client**
  - A lawyer representing an organization may also represent any of its employees, subject to the conflict of interest rules.

Conflict of Interest

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New York Code of Professional Conduct, Rule 1.7 – Conflict of Interest: Current Clients

- Lawyer shall not represent a client if a reasonable lawyer would conclude that either:
  - (1) the representation will involve the lawyer in representing differing interests; or
  - (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

Conflict of Interest

- **New York Code of Professional Conduct, Rule 1.7 – Conflict of Interest: Current Clients**
  - Except, a lawyer may represent a client if:
    - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
    - ...and
    - (4) each affected client gives informed consent, confirmed in writing.

Dual Representation v. Separate Counsel

- Dual representation – pros and cons
- Is there a conflict
- What will the government think
- Separate counsel for individuals
- How will the employee act

Benefits of Pool Counsel

- Increased Efficiencies
  - Fewer firms
  - Can have familiarity with company/business lines
  - Increased familiarity with facts benefits individuals

Relationship with Separate Counsel

- Joint Defense Agreements?
- Sharing of Information?
- Sharing of Privileged Information?

Effective Management of Third-Party Agents

- Counsel must often engage services of third-party consultants, accountants, investigators, public relations firms.
- Care must be taken to preserve privilege and avoid ethical lapses

Third-Party Agents: Privilege Concerns

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- United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) is the seminal case which held that the attorney-client privilege could be extended to apply to non-lawyers working on behalf of a law firm.
- Kovel involved an accountant but the principle has been applied to investigators, jury consultants, public relations firms, etc.

Third-Party Agents: Privilege Concerns

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- Not automatic – where privilege has been challenged, courts have looked to whether the third-party agent's retention was truly necessary to facilitate the provision of legal advice to the client.
- To maximize chance of maintaining privilege, use a well-crafted Kovel letter.

Third-Party Agents: Privilege Concerns

FRIED FRANK

- The Kovel letter should set forth:
  a) third-party being retained to assist in a specific legal matter.
  b) the third-party is acting under the direction and supervision of the law firm and all communications are confidential
  c) third-party bills should be submitted to the law firm

Cases Applying the Kovel Principle

- *In re Grand Jury Subpoena Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003) (Communications between Martha Stewart's lawyers and public relation firm protected by privilege where PR effect clearly linked to overall defense strategy.)
- *Scott v. Chipotle Mexican Grill, Inc.*, 94 F. Supp. 3d 585, (S.D.N.Y. 2015) (In FLSA case, court denied company's claim of privilege over report prepared by human resources consultant for business purposes.)

Cases Applying the Kovel Principle

- Gottwold v. Sebert, 58 Misc. 3d 625 (Supr. Ct. N.Y. Co. 2017) (Rejecting privilege claim over documents reflecting communications with public relations firm).

Ethical Issues with Third-Party Agents

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- The basic rule:

  ABA Model Code of Professional Responsibility rule 5.3(b) (2016) states: "With respect to a nonlawyer employed or retained by or associated with a lawyer: a lawyer having direct supervisory authority over the non lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

Ethical Issues with Third-Party Agents

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- Pretexting:

  NYCLA Comm. Prof'l ethics, Formal Op. No. 737 (2007)

  a) "A plain reading of New York's Code of Professional Responsibility supports the view that it is generally unethical for a non-government lawyer to utilize and/or supervise an investigator who will employ dissemblance in an investigation

Ethical Issues with Third-Party Agents

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- Meyer v. Kalanick: Plaintiff brought antitrust claim against Uber and its then-CEO.

  Uber hired an unlicensed private investigator to conduct secret personal background investigations of both the plaintiff and its counsel even worse, the investigators lied to friends and acquaintances of the plaintiff and counsel in an effort to obtain derogatory information.

Ethical Issues with Third-Party Agents

After hearing, Judge Rakoff enjoined Uber from making use of the information and Uber agreed to pay fees and costs of plaintiff in relation to the matter.

The Harvey Weinstein "Army of Spies" Scandal

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- Boies Schiller retained an entity called black cube to gather intelligence to help their client Weinstein block publication of an article in The New York Times discussing allegations of sexual harassment and misconduct.
- Boies says he didn't select black cube or draft the engagement letter although he did sign it. He also has said he didn't direct or control their work.

Ethical Issues with Third-Party Agents

- In a nutshell, as counsel you should never condone the use of deception or falsehoods or pretexting by your investigators in dealing with unrepresented persons or potential witnesses, including through friending on facebook or connecting on linked in.

Akin Gump
STRAUSS HAUER & FELD LLP

Akin Gump Strauss Hauer & Feld LLP

Parvin Moyne

DOJ Remedies

- Range of outcomes for both individuals and entities:
  - Declination
  - Non-Prosecution Agreement ("NPA")
  - Deferred Prosecution Agreement ("DPA")
  - Indictment or Information
- Before imposing sentence, court is required to consider the U.S. Sentencing Guidelines.
  - The Guidelines manual is a complex document with detailed provisions to calculate recommended ranges for sentences of imprisonment and fines as well as (limited) eligibility for non-custodial sentences.
  - Under *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines are advisory rather than mandatory. However, in particular cases the Guidelines can be extremely important in determining the sentence.
- The court is also required to consider statutory factors such as "the nature and characteristics of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553.

DOJ Remedies for Individuals

- Non-financial remedies
  - Imprisonment, 18 USC §§ 3551(b)(3) & 3581 *et seq.*
  - Supervised Release, 18 USC § 3583
  - Probation, 18 USC §§ 3551(b)(1) & 3561 *et seq.*
- Financial remedies
  - Fines, 18 USC §§ 3551(b)(2) & 3571 (maximum fine per offense or twice the gross pecuniary gain or loss)
  - Criminal Forfeiture, 18 USC § 982
  - Restitution, 18 USC §§ 3556, 3663, & 3663A
- Collateral consequences
  - Extensive potential collateral consequences including ineligibility for government benefits, debarment from government programs, loss of voting rights, and loss of immigration status for non-citizens. *See United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016)

DOJ Remedies for Entities

- Financial remedies
  - Fines, 18 USC §§ 3551(c)(2) & 3571 *et seq.*
  - Criminal Forfeiture, 18 USC § 982
  - Disgorgement (no express statutory authority)
  - Restitution, 18 USC §§ 3556, 3663 & 3663A
- Non-financial remedies
  - Probation 18 USC §§ 3551(c)(1) & 3561 *et seq.*
  - Obligation to cooperate and commit no further crimes
  - Monitor and other remedial undertakings
- Collateral consequences
  - Statement of Facts and private litigation
  - Reputational harm

SEC Remedies for Individuals and Entities

- Range of outcomes from closure to settlement to litigation
- Forum: Administrative Proceeding or Federal District Court
- Financial remedies
  - Penalty (3 tiers), 15 USC §§ 77t(d) & 78u(d)(3)
  - Disgorgement (no express statutory authority for federal court actions; 15 U.S.C. §§ 78u-2(e), 78u-3(e), 77h-1(e), and provisions of Investment Advisers Act and Investment Company Act for administrative proceedings)
  - Prejudgment interest, 26 USC § 6621(a)(2)
- Non-financial remedies
  - Injunction, 15 USC §§ 77t(b) & 78u(d)
  - Bar or Suspension, 15 USC §§ 78(o)(b)(5) & (6) and 78(u); Advisers Act § 203(e)
  - Remedial undertakings (not provided by statute)
- Collateral consequences
  - Ineligibility for well-known seasoned issuer ("WKSI") treatment and PSLRA safe harbor, Rule 405 and 15 USC § 78u-5(b)(1)(A)
  - Rule 506(d) "Bad Actor" disqualification
  - Admissions vs. No-Admit/No-Deny and impact on private litigation

SEC Remedies: *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)

- Holds disgorgement constitutes a penalty subject to 5-year statute of limitations in 28 USC § 2462
- As applied by the SEC, disgorgement:
  - is a public remedy sought on behalf of U.S. not an aggrieved individual
  - is punitive and imposed for its deterrent effect
  - has exceeded the amount of profits gained
  - is imposed regardless of whether investors are repaid
- Footnote 3: "Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."

CFTC Remedies for Individuals and Entities

- Range of outcomes from closure to settlement to litigation
- Forum: Administrative Proceeding or Federal District Court
- Financial remedies
  - Civil penalties, 7 USC § 13a-1(d)(1) (two tiers/triple the monetary gain)
  - Disgorgement, 7 USC § 13a-1(d)(3)(B)
    - Because CEA contains statutory authority for disgorgement, footnote 3 from *Kokesh* is inapplicable. *CFTC v. Reisinger & ROF Consulting* (N.D. Ill. 2017)
  - Restitution, 7 USC § 13a-1(d)(3)(A)
  - Prejudgment interest, 26 USC § 6621(a)(2)
- Non-financial remedies
  - Injunction, 7 USC § 13a-1(a) & (b)
  - Revoking or limiting registration, 7 USC § 12a(2)
  - Trading ban (typically imposed as part of injunction; see also 7 USC § 12a(2)(F))
  - Associational bar (typically imposed as part of injunction)

THE END

Westlaw Journal
COMPUTER & INTERNET
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 33, ISSUE 23 / APRIL 22, 2016

EXPERT ANALYSIS

Reasonable Expectations of Privacy in a Not-So-Private Electronic World

By Jay Shapiro, Esq.
White and Williams

In this time of ubiquitous electronic communication, the boundaries of privacy rights in the workplace have become a moving target. Important issues have arisen concerning an employee's right to privacy in those communications when they occur in and around the workplace.

Searches of a public employee's workspace by an employer are governed by the Fourth Amendment's "reasonable expectation of privacy" standard along with a balancing of the need for the search and the reasonableness of the search itself.

This principle was reiterated in the U.S. Supreme Court's ruling in *City of Ontario v. Quon*, 560 U.S. 746 (2010), which addressed the legality of a public employer's review of an employee's text messages that were sent to and from his mobile pager.

Jeff Quon was a police sergeant in Ontario, California. In 2001 the department supplied Quon and others with pagers that could be used to send and receive text messages. The use was constrained by Ontario's "computer usage, internet and email policy." The policy gave the city "the right to monitor and log all network activity including email and Internet use, with or without notice." It also said "users should have no expectation of privacy or confidentiality when using these resources."

Quon agreed to the policy in writing, but his use exceeded what was anticipated by the department when it entered into its agreements with its cellular carrier. At first, the city told him that he was exceeding his monthly budget of messages and allowed him to pay for the excess usage. But after his excessive usage continued, the police department asked the wireless carrier for transcripts of his text messages over a two-month period.

The transcripts revealed many personal messages, including some that were sexually explicit. Quon's activities were referred to the department's internal affairs division, and he was disciplined.

Quon and three other employees who had been communicating with him sued the city, the department, the chief and the city's wireless provider. They alleged violations of their civil rights as well as federal and state laws protecting the privacy of electronic communications, including the federal Stored Communications Act, 18 U.S.C.A. § 2702(a)(1).

A jury found that the defendants did not violate the Fourth Amendment. The 9th U.S. Circuit Court of Appeals reversed, finding that Quon had a reasonable expectation of privacy in the communications and the search was not reasonable because the city could have utilized less intrusive means to conduct its investigation.

The Supreme Court acknowledged that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer," citing *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion). But it also found "reasonable grounds" for supporting the search, which it said was performed "for a noninvestigatory work-related purpose."

The Supreme Court determined that there was no Fourth Amendment violation because the search of the text messages was reasonable. To support this conclusion, it found that the city had a "legitimate work-related rationale" and noted that the department limited its review to transcripts of messages outside of work hours over a period of just two months.

Justice Anthony Kennedy recognized the high court's precedents in the context of workplace searches of public employees when he wrote: "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."

In a concurrence, Justice Antonin Scalia chose to bring private employee rights into the discussion. Justice Scalia said "the proper threshold inquiry should be not whether the Fourth Amendment applies to messages on public employees' employer-issued pagers, but whether it applies in general to such messages on employer-issued pagers."

The Supreme Court has acknowledged that the nature of the data kept on and accessible through cellphones has significant implications for privacy

How does the ruling apply in the private workplace?

Unless an employer is acting as an agent of law enforcement, the Fourth Amendment is not applicable to employee searches. Instead, an employee's reasonable expectation of privacy is generally circumscribed by employer policies and not the Constitution. However, some courts addressing searches involving nonpublic employees have demonstrated a willingness to apply Fourth Amendment precedent as it was used in fashioning the court's analysis in *Quon*.

Courts frequently use the framework set forth in *In re Asia Global Crossing Ltd.*, 322 B.R. 247, 256 (Bankr. S.D.N.Y. 2005). In general, that decision said courts should consider four questions:

- Does the corporation maintain a policy banning personal or other objectionable use?
- Does the company monitor the use of the employee's computer or email?
- Do third parties have a right of access to the computer or emails?
- Did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

The *Asia Global* decision drew from the 7th U.S. Circuit Court of Appeals' ruling in *Muick v. Glenayre Electronics*, 280 F.3d 741 (7th Cir. 2002). In *Muick* the court wrote that the employee "had no right of privacy in the computer" provided by his employer "for use in the workplace." Interestingly, although *Muick* considered the concept of right of privacy, it did not dress it in reasonableness.

Rather, the court maintained that because the laptops in question were the employer's property, "it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions; but the abuse of access to workplace computers is so common ... that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible."

Clearly, then, in the context of devices provided by employers, businesses commonly issue policies that announce the absence of privacy protections. For example, the following policy was found in *Mintz v. Mark Bartelstein & Associates*, 885 F. Supp. 2d 987 (C.D. Cal. 2012), to clearly provide notice that employees had only a limited expectation of privacy:

> The personal use of [the employer's] equipment or property should be kept to an absolute minimum. ... Any personal or other information placed on [the employer's] email, voice mail, telephones, blackberries, or any computer system shall be the property of [the employer], and shall not be considered the private or confidential property of the employee. Indeed, [the employer] has the ability and right to review email, voice mail, and telephone messages.

There are other considerations relevant to the analysis. In particular, beyond the policies and procedures that are established in the workplace, it is important to add personal behaviors to the equation. Courts examine whether an employee claiming a privacy right to electronically stored communications has, by his conduct, undercut that assertion.

The concept of expectation of privacy has changed drastically since the Supreme Court wrote that a person who enters a telephone booth, "shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz v. United States*, 389 U.S. 347 (1967).

Phone booths are largely relics of the past; we have now moved to the point where a federal appeals court has determined that a civil litigant had no expectation of privacy in a call that was inadvertently "butt-dialed." *Huff v. Spaw*, 794 F.3d 543 (6th Cir. 2015).

Certainly, mobile devices offer features that support greater privacy rights. The Supreme Court's decision in *Riley v. California*, 134 S. Ct. 2473 (2014), revealed its recognition of the vast breadth of data that may be accessed by a cellphone. The high court wrote that cellphones "are in fact microcomputers" that "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps or newspapers."

The *Riley* court acknowledged that the nature of the data kept on and accessible through cellphones has significant implications for privacy. The court determined that the "search incident to arrest" doctrine, which provides an exception to the Fourth Amendment's warrant requirement, could not justify warrantless searches of cellphones absent exigent circumstances.

But *Riley*, decided under Fourth Amendment principles, analyzed the cellphone searches in criminal cases, with the attendant constitutional protections. The import of those concerns, save for analogizing the expectation of privacy, fade in the context of private employment.

In this arena, the question of whose device is it anyway is significant.

In *Mintz*, an employer argued that its former employee did not have any expectation of privacy in his cellphone because the employer paid the phone bills and its employee manual said the employer had "the right to review all email, voice mail and telephone messages." However, the question of ownership was not clear because the employee paid some of the phone fees and had used the cellphone number prior to his employment.

In *Riley*, the court turned its attention to the significant complication presented by cloud computing, which it described as "the capacity of Internet-connected devices to display data stored on remote servers rather on the device itself." When searches involving computers were isolated to hard drives, courts were comfortable applying the analogy of a file cabinet to document storage on a computer. *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001).

The Supreme Court in *Riley* pointed out that "officers searching a phone's data would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud."

The critical point — that the device itself is no longer necessarily the focus of the expectation of privacy — can most certainly have implications in the private workplace.

A recent case that highlights these issues created by these technological developments is *Sunbelt Rentals Inc. v. Victor*, 43 F. Supp. 3d 1026 (N.D. Cal. 2014). Sunbelt employed Santiago Victor as a salesman. It provided him with a corporate iPhone and iPad for work and personal use. Not surprisingly, Victor created — at his own expense — an Apple account that was accessible and used on both devices. Victor returned the devices when he left Sunbelt to join a competitor. The new employer gave Victor a new iPad, and when he registered it he discovered that his Sunbelt phone was still linked to his account.

Sunbelt sued Victor, claiming that he stole trade secrets from it. Victor filed counterclaims against Sunbelt, charging that it had accessed his private communications, including those in the cloud, through his old device. Although the counterclaims were dismissed because Victor failed

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to set forth factual allegations to support them, the potential for the loss of private information described in this case raises significant concerns.

Simply put, employees must be concerned about more than just the device because the accessible information and data will be the focus of any inquiry. The court in *Victor* specifically rejected the contention that in *Quon* the Supreme Court held an employee had a reasonable expectation of privacy in text messages sent on the employer-owned device.

The role of Fourth Amendment jurisprudence discussing reasonable expectation of privacy in electronic devices has become common in court decisions in the civil context. One of the key concepts is that a person who is aware of the potential to expose communications through an electronic device and intentionally or negligently disregards that risk undercuts his ability to assert a reasonable expectation of privacy.

For example, in *Huff*, the butt-dial case, the plaintiff acknowledged that he was aware of the possibility of accidental pocket-dialed calls and had, in fact, made calls inadvertently. The 6th U.S. Circuit Court of Appeals noted that the plaintiff could have locked his phone, set up a passcode or even downloaded an app that would have stopped such a call from occurring. Because the plaintiff did not take any of these steps, the court found he did not establish a reasonable expectation of privacy.

Huff demonstrates the potentially high stakes in this new area of electronic privacy. James H. Huff had been the chair of Kentucky's Kenton County Airport Board, which controls the Cincinnati/Northern Kentucky International Airport. His pocket-dial from a hotel balcony in Italy to the phone of an executive assistant who worked for him resulted in the overhearing of 90 minutes of conversation, including substantial discussions about sensitive personnel matters.

As methods of communication and data transfer continue to develop, more and more doors will open. Courts will be required to evaluate expectations of privacy, their reasonableness, and the intentional, reckless or negligent exposure of communications and information.

There is no single corporate policy approach that fits all. Businesses must carefully assess their particular operations to keep up with the times, technology and the law. WJ

Jay Shapiro co-chairs the cyberlaw and data protection practice of **White and Williams** in New York. A white-collar prosecutor for two decades, Shapiro was one of the first participants in the federal Electronic Crimes Task Force, which launched some of the earliest investigations into cybercrimes.