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**ATTORNEY-CLIENT PRIVILEGE
& EMPLOYEE INTERVIEWS
IN INTERNAL INVESTIGATIONS**
by
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INTRODUCTION

Since the creation of the Corporate Fraud Task Force in July 2002, the Department of Justice and other member agencies have instituted hundreds of investigations, secured over five hundred corporate fraud convictions or guilty pleas, and charged over nine hundred defendants.¹ In the same zeal for corporate accountability, federal regulatory agencies, such as the Securities & Exchange Commission (“SEC”), and state attorneys general are also expanding their involvement in this area through strengthened standards and increased enforcement activity.² With such sweeping government focus on corporate America, “internal investigation attorneys are becoming a dreaded necessity for

¹See Second Year Report to the President: Corporate Fraud Task Force (July 20, 2004).

²See Abbe David Lowell and Kathryn C. Arnold, *Corporate Crime after 2000: A New Law Enforcement Challenge or Déjà vu?*, 40 AM. CRIM. L. REV. 219, 233 (2003) (“The various Wall Street scandals have caused federal prosecutors, state Attorneys General, various regulatory agencies, and private plaintiffs to simultaneously respond to their respective constituencies and demand action - all of which aims at the same individuals and the same pocket of funds.”).

a growing number of public companies.”³

At the same time, the probability that companies will have to waive the attorney-client privilege and/or offer information regarding culpable employees to the government is increasing. The result is that as companies face the increased prospect of having to turn over the results of internal investigations to the government, employees are beginning to look upon internal investigations and, in particular, employee interviews by counsel with increased suspicion. This chilling effect on employees’ willingness to cooperate can make it difficult for companies to unearth all the facts surrounding an alleged incident, and can impede the company’s ability to rectify the problem or, in certain circumstances, make a voluntary disclosure to the government.⁴ Regardless of the increased difficulties companies face as a result of the government’s current enforcement strategies, companies must quickly respond to potential wrongdoing and must think about the future when making decisions regarding how the investigation will progress and the relationship that will exist between the company and its employees.

While there are various pitfalls and perils in corporate internal investigations, few areas present as many hazards that may lead to significant

³Leigh Jones, *Call for Internal Probes Growing*, NAT’L LAW J., Nov. 22, 2004, at 1.

⁴As examples, see the Department of Justice Corporate Leniency Policy with regard to antitrust violations and the Environmental Protection Agency Leniency Program. *See also* Gary R. Spratling, *Symposium: Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Detering Misconduct: Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798, 801 (2001).

negative ramifications for the company as the employee interview.⁵ Investigating counsel must remember during such interviews that counsel represents the interests of the corporation, not any individual employee. In fact, as discussed above, the corporation may eventually find itself at odds with the employee being interviewed. Counsel must, therefore, carefully fulfill his duty of loyalty to the company and not become conflicted by a sense of duty to others, particularly a duty imposed as a result of a purposeful or inadvertent establishment of an attorney-client relationship. By the same token, the company must carefully weigh the risks associated with multiple representations before agreeing to allow investigating counsel to also represent employees during the investigation. The difficulty in navigating the terrain of employee interviews and the attorney-client privilege in today's enforcement environment is well illustrated by a recent U.S. Court of Appeals for the Fourth Circuit decision, *In re Grand Jury Subpoena* ("AOL case").⁶

IN RE GRAND JURY SUBPOENA

In March 2001, AOL hired a national law firm to conduct an internal investigation. As part of the investigation, as is common in such matters,

⁵For a discussion of the various pitfalls and perils in corporate internal investigations, see Paul B. Murphy and Lucian E. Dervan, *Watching Your Step: Avoiding the Pitfalls and Perils of Corporate Internal Investigations*, Vol. XVI, No. 2 ALAS LOSS PREVENTION JOURNAL (Summer 2005).

⁶415 F.3d 333 (4th Cir. 2005)

investigating counsel interviewed several employees, including Kent Wakeford, John Doe 1, and John Doe 2. Before each interview, investigating counsel gave a version of the following disclaimer:

We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company.⁷

Counsel also informed each employee that the investigating law firm could represent them if no conflicts of interest existed.

Almost a year later, the SEC began its own investigation, and as a result, Wakeford and AOL entered into a written “common interest agreement.”⁸ Wakeford was later called to testify before the SEC, and during that testimony, the SEC asked him about his discussions with AOL’s investigating counsel in 2001, to which his personal counsel asserted the attorney-client privilege.⁹ Upon further examination, Wakeford claimed that “he believed, at the time of the interviews, that the investigating attorneys represented him and the company.”¹⁰

⁷*Id.* at 336.

⁸*Id.*

⁹The opinion states that AOL’s general counsel and AOL’s investigating counsel each told the SEC during the testimony that they represented Wakeford “for purposes of [the] deposition.” *Id.*

¹⁰*Id.* at 337. The opinion does not state whether AOL’s general counsel or investigating counsel made any comment on Wakefield’s assertion that he was represented by investigating counsel at the time of his interview.

Another two years passed, and in late February 2004, the SEC served a subpoena on AOL for documents related to the employee interviews conducted by AOL's counsel. While AOL agreed to the request in an effort to cooperate, personal counsel for the three employees moved to quash, each arguing that an attorney-client relationship existed between the employees and investigating counsel and, therefore, they were entitled to prevent waiver of the privilege. Wakeford also asserted a claim based on his "common interest agreement."

The district court denied all three appellants' motions, finding that neither John Doe 1 nor John Doe 2 established an attorney-client relationship with investigating counsel and finding that Wakeford did not establish his common interest relationship until after the interviews took place. The matter was appealed to the Fourth Circuit, which affirmed the holdings of the lower court. In rendering its opinion, the Fourth Circuit focused on four aspects of employee interviews - (a) Establishing an Attorney-Client Relationship, (b) *Upjohn* Warnings,¹¹ (c) Joint Defense Agreements, and (d) Waiver and Cooperation. Through examination of these four areas, one learns of both the risks presented to corporations and their counsel by employee interviews and the potentially significant perils resulting from the establishment of an attorney-client relationship with an employee during an internal corporate investigation.

¹¹See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

A. Establishing an Attorney-Client Relationship

The court in the AOL case began its discussion by examining the basic principles of the attorney-client privilege, a privilege that applies only to “[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance.”¹² The court described the “classic test” for whether an attorney-client relationship has been established as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.¹³

While the court made clear that the relationship hinges on the client’s belief that such a relationship exists, this subjective belief is not in and of itself sufficient.¹⁴ According to the court, “[T]he putative client must show that his subjective belief that an attorney-client relationship existed was *reasonable*

¹²*Id.* at 338 (quoting *Fisher v. U.S.*, 425 U.S. 391, 403 (1976)).

¹³*In re Grand Jury Subpoena*, 415 at 339 fn. 3; *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

¹⁴*See In re Grand Jury Subpoena*, 415 at 339 (“An individual’s subjective belief that he is represented is not alone sufficient to create an attorney-client relationship.”).

*under the circumstances.*¹⁵ In reaching its conclusion, the court found the “essential touchstones for the formation of an attorney-client relationship” missing. The court continued, “There is no evidence of an objectively reasonable, mutual understanding that the appellants were seeking legal advice from the investigating attorneys or that the investigating attorneys were rendering personal legal services.”¹⁶

Understanding how attorney-client relationships are formed is vital for investigating counsel because establishing an attorney-client relationship with an employee, even inadvertently, can have significant ramifications for the company. Absent an existing conflict of interest, it is permissible to represent both a corporation and its employees.¹⁷ In fact, in the AOL case, investigating counsel actually informed employees before each interviews that they could represent the employee.¹⁸ When conducting an internal investigation, however, it may be difficult for counsel to recognize actual or potential conflicts of

¹⁵*Id.* at 339 (emphasis added); see also *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1445 (E.D. Wis. 1993) (“A party establishes an implied attorney-client relationship if it shows (1) that it submitted confidential information to a lawyer, and (2) that it did so with the reasonable belief that the lawyer was acting as the party’s attorney.”).

¹⁶*In re Grand Jury Subpoena*, 415 at 338.

¹⁷See ABA MODEL RULES OF PROF’L CONDUCT R. 1.13(g). Such multiple representations are also consistent with the United States Supreme Court’s pronouncements on effective assistance of counsel. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

¹⁸See *In re Grand Jury Subpoena*, 415 at 336 (investigating counsel told John Doe 1 that, “We can represent [you] until such time as there appears to be a conflict of interest, [but] ...the attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it.”).

interest until the facts are unearthed or until the government decides to pursue some enforcement action against the company. For instance, the SEC did not subpoena AOL until three years after investigating counsel told employees they could be represented.

Counsel must also consider the potential long term negative consequences of multiple representations in the investigatory setting. For instance, multiple representations during an investigation can result in a future conflict that prevents counsel from continuing to represent either the company or its employee absent their consent.¹⁹ While counsel may receive such consent, the government has begun moving with greater frequency to disqualify defense counsel because of prior representations that may impede counsel's work and lead to ineffective assistance claims.²⁰ Furthermore, even if counsel obtains consent to continue the representations, counsel may continue to have a duty to maintain the confidentiality of information obtained from the employee.²¹ This sustaining duty of loyalty means the company may be prevented from

¹⁹See ABA MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client.").

²⁰See *In re Paradyne Corp.*, 803 F.2d 604, 608 n.7 (11th Cir. 1986) ("The government has standing to seek disqualification of defense attorneys facing potential conflicts of interest due to the government's interest in preventing reversals of convictions on sixth amendment grounds....").

²¹See ABA MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."); see also ABA MODEL RULES OF PROF'L CONDUCT R. 1.9 (Duties to Former Clients).

cooperating with the government through waiver of the attorney-client privilege with regard to communications between investigating counsel and the represented employee without the employee's consent, the issue that was litigated in the AOL case. As it is becoming increasingly common for the government to request information learned during the investigation, this can create an insurmountable hurdle to the company's ability to cooperate. The significant risks associated with multiple representations during an internal investigation should give pause to both company and counsel before subjecting the corporation to these potential hazards.

B. *Upjohn* Warnings

The creation of even an inadvertent attorney-client relationship presents the same potential risks for the company, and counsel should take steps to ensure an implied relationship is not established, especially during employee interviews. One means by which investigating counsel can protect himself from inadvertently establishing an attorney-client relationship is by giving an *Upjohn* warning such as the one given in the AOL case. In discussing the effects of the *Upjohn* warning provided by investigating counsel to the employees, the court remarked, "Nor, in light of the investigating attorney's disclosure that they represented AOL and that the privilege and the right to waive it were AOL's alone, do we find investigating counsel's hypothetical pronouncement that they *could* represent appellants sufficient to establish the reasonable understanding

that they *were* representing appellants.”²² The court goes on to note that the appellants were “fully apprised that the information they were giving could be disclosed at the company’s discretion.”²³ In this situation, the *Upjohn* warning prevented the inadvertent establishment of an attorney-client privilege between the employees and the investigating counsel, a demonstration of the vital importance of giving a thorough and precise warning before every interview.²⁴

A typical *Upjohn* warning, also known as “Corporate *Miranda*,” contains the following elements:

- the attorney represents the corporation and not the individual employee;
- the interview is covered by the attorney-client privilege, which belongs to and is controlled by the company, not the individual employee; and
- the company may decide, in its sole discretion, whether to waive the privilege and disclose information from the interview to third parties, including the government.

The *Upjohn* warning serves two critical purposes. First, the warning assists an attorney in fulfilling her ethical obligation not to mislead an employee

²²*In re Grand Jury Subpoena*, 415 at 338 (“Accordingly, we find no fault with the district court’s opinion that no individual attorney-client privilege attached to the appellant’s communications with AOL’s attorneys.”).

²³*Id.* at 339.

²⁴Making reference to the possible confusion created by investigating counsel’s statement that they could represent the employees, the court noted that its decision should not be read as an “implicit acceptance of the watered-down ‘Upjohn warnings’ the investigating attorneys gave the appellants. It is a potential legal and ethical mine field.” *Id.* at 340.

with interests adverse to those of the corporation.²⁵ As discussed before, it is extremely difficult in the investigative setting to determine whether an employee's interests are in accord with the corporation's. Attorneys should, therefore, give a thorough *Upjohn* warning before each interview to ensure they are fulfilling their ethical obligations. Second, the warning makes the communications between the investigating counsel and the employee privileged and protects the company's control of that privilege. A failure to give an adequate *Upjohn* warning can result in the employee holding the privilege jointly with the corporation, a situation that can prevent the company from waiving privilege as a means of cooperation.

In September 2004, the DOJ charged the former CEO and Chairman of the Board and the former Head of Worldwide Sales for Computer Associates International, Inc. with securities fraud conspiracy, obstructions of justice, and conspiracy to obstruct justice. The obstruction charges resulted from the government's contention that the defendants purposefully misled investigating counsel with the intent that "the Company's Law Firm would present these false and misleading justifications to the United States Attorney's Office, the SEC and FBI."²⁶ As a result of the Computer Associates case, some counsel have begun

²⁵Under ABA Model Rule of Professional Conduct 1.13(f), "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

to include a statement in their *Upjohn* warning that employees may be prosecuted for misleading an internal investigation. The other ramification of the Computer Associates prosecution and the revised *Upjohn* warning is to further chill employees' willingness to cooperate with investigating counsel, thus increasing the tension between the company and its employees and potentially handicapping the company's fact-finding ability.

C. Joint Defense Agreements

Joint defense agreements can also create difficulties for companies. In the AOL case, Wakeford claimed that his "common interest agreement" with the company prevented disclosure of the information he gave to investigating counsel without his consent. If a common interest privilege had applied to the interview, Wakeford would have been correct. Joint defense agreements protect "communications between parties who share a common interest in litigation" and create a potential impediment to a corporation's ability to reveal information learned from an employee with whom a common interest agreement is formed.²⁷ In the AOL case, however, the court ruled that an

²⁶Information, *United States v. Kaplan*, Cr. No. 04-330 (E.D.N.Y. Apr. 2004); see also DOJ Press Release, *Former Computer Associates Executives Indicated on Securities Fraud, Obstruction Charges, Former General Counsel Pleads Guilty, Company Enters Into Cooperation Agreement* (Sept. 22, 2004).

²⁷*In re Grand Jury Subpoena*, 415 at 341. Note that various Circuits have different standards for establishing the existence of a joint defense privilege. The Ninth and Fourth Circuits are considered to have extended the doctrine the furthest. See *U.S. v. Weissman*, 1996 U.S. Dist. LEXIS 19066, 20-28 (S.D.N.Y. 1996); see also *U.S. v. Montgomery*, 1993 U.S.

“employee’s cooperation in an internal investigation alone is not sufficient to establish a common interest.”²⁸ Rather, Wakeford only established a common interest privilege when he entered into the agreement with investigating counsel in 2002. While entering into a joint defense agreement may sometimes be necessary and/or advantageous for investigating counsel, serious consideration should be given before affirmatively entering into an agreement that may prevent a corporation from making a beneficial disclosure. Furthermore, investigating counsel must ensure, through precautions such as the *Upjohn* warning, that a joint defense privilege is not inadvertently created during employee interviews. As might be expected, heightened concerns about entering into joint defense agreements is just one more reality of the new enforcement environment that has created increased tension between corporations and their employees.

D. Waiver and Cooperation

In today’s enforcement environment, various parties have an interest in receiving materials collected or created during an internal investigation. When making a decision regarding whether to provide such information, the company and investigating counsel must carefully weigh the risks and advantages of such

App. LEXIS 5832 (9th Cir. 1993); *In re Grand Jury Subpoenas, 89-3 and 89-4*, 902 F.2d 244, 249 (4th Cir. 1990); *Hunydee v. U.S.*, 355 F.2d 183, 185 (9th Cir. 1965).

²⁸ *In re Grand Jury Subpoena*, 415 at 341 (the court continued, “rather ‘some form of joint strategy is necessary.’”).

disclosures. Often, making disclosures of investigatory materials to the government requires waiving the attorney-client privilege. While providing privileged information creates risks in itself, including the possibility that a selective waiver will become a disclosure of the information as to all third parties, the potential advantages offered by this type of cooperation can be significant.²⁹ The Department of Justice’s Federal Principles of Prosecution of Business Organizations (“Thompson Memo”), revised in January 2003, informs prosecutors to consider, when making charging decisions, “the completeness of [the corporation’s] disclosure including, if necessary, a wavier of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between officers, directors and employees with counsel.” In situations where disclosure does not result in a declination of prosecution, benefits are still available with regard to criminal

²⁹While some courts have embraced the notion of selective waivers of privilege, the overwhelming majority of courts have rejected such efforts. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002) (explicitly rejecting selective waiver in all its forms and finding waiver of both the attorney-client and work product protections despite confidentiality agreement); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997) (attorney-client privilege waived by voluntarily disclosing documents to the Defense Contract Audit Agency); *Genentech, Inc. v. United States Internat’l Trade Comm’n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (“A small number of courts have recognized, in circumstances not present here, a limited waiver that enables the attorney-client privilege to survive certain breaches of confidentiality... This court, however, has never recognized such a limited waiver.”); *In re Martin Marietta Corp.*, 856 F.2d 619, 623, *cert. denied*, 490 U.S. 1011 (1989) (“The Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege.”); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (court rejected selective waiver, arguing this would permit manipulation of the privilege); *but see Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (voluntary disclosure to the government results in only a “limited waiver” of the attorney-client privilege). Other risks include the possibility that the material disclosed contains admissions or other information that is detrimental to the corporation or the investigating attorneys.

exposure. Under the Federal Sentencing Guidelines (“Guidelines”), a corporation’s fine can be reduced as a result of cooperation. In discussing this benefit, the Guidelines state, “Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score... unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”³⁰

While the increasing frequency with which companies are waiving the attorney-client privilege can chill employee cooperation during the investigation, neither the company nor investigating counsel should make any assurances to employees that their information will not be disclosed in return for cooperation without first considering the ramifications. The company and investigating counsel must act prudently so as not to jeopardize the benefits of the disclosure option as discussed above. One of the most significant risks to these rewards comes from the limitations imposed on a corporation if the attorney-client privilege is held jointly with an employee. As has been examined, such limitations might result from not clearly informing the employee that investigating counsel represents only the company and that the company may disclose the information learned during the interview at its discretion. The AOL court stated, “Had the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their statements

³⁰*U.S. Sentencing Guidelines Manual* § 8C2.5 cmt. 12 (Culpability Score) (Nov. 1, 2004).

to the appellants professed they could, they would not have been free to waive the appellants' privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another."³¹ Once again, counsel must remember the vital importance of an *Upjohn* warning before each employee interview and the significant risks posed by entering into an attorney-client relationship with an employee.

CONCLUSION

In re Grand Jury Subpoena underscores the difficult terrain both the corporation and investigating counsel must navigate during internal investigations and, in particular, employee interviews. Each potential hazard brings not only immediate consequences for the attorney and the corporation, but can result in cascading ramifications in the future. Investigating counsel must ensure that precautions are taken throughout the investigation, and particularly during employee interviews, to preserve the company's control of the attorney-client privilege, so as not to jeopardize potentially valuable options for the future.

³¹*In re Grand Jury Subpoena*, 415 at 340.