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The Department of Justice and the Securities and Exchange Commission (SEC) have been raising the bar for companies seeking to cooperate with their investigations. Increasingly, the Department and the SEC have demanded that cooperation which includes waiver of the attorney-client privilege and production of the results of the company's internal investigation to the government. This creates new tensions between a company and its employees, and greatly complicates the process of conducting internal investigations.

Once a company suspects that its employees may have been involved in illegal activity, speed in conducting the internal investigation is essential. Often the most critical component of an effective internal investigation is promptly conducting employee interviews. To facilitate investigation by counsel, it is usually appropriate for the company to require employees to participate in these interviews. It may even be appropriate to advise employees that they are subject to discipline and/or termination should they decline. A recent Fourth Circuit decision, *In Re Grand Jury Subpoena*, provides important lessons regarding the attorney-client privilege for counsel conducting employee interviews as part of internal investigations.¹

In order to protect the company's attorney-client privilege and to avoid inadvertently creating an attorney-client relationship between outside corporate counsel and the company's employees, at the outset of each interview counsel must make an effort to ensure that employees understand:²

- Investigating counsel represents the company and not the employee
- The interview is covered by the company's attorney-client privilege
- The company may waive that privilege at any time without notice to the employee

In addition, at the beginning of an internal investigation, companies must consider a host of issues, including how investigating counsel should respond when employees ask whether they need individual counsel

and whether to advise employees of the likelihood that the company will waive its attorney-client privilege and work product protections.

In Re Grand Jury Subpoena

In *In Re Grand Jury Subpoena*, the Fourth Circuit upheld the trial court's refusal to quash grand jury subpoenas that sought outside counsel's reports on interviews conducted as part of an internal investigation. The case arose out of a familiar fact pattern. Outside counsel was conducting an internal investigation for AOL Time Warner (AOL) that focused on AOL's relationship with PurchasePro. Presumably, AOL had some notion that certain of its employees may have been engaged in illegal conduct.

Investigating counsel sought to interview a number of employees during its internal investigation so that the company could quickly ascertain whether any wrongdoing had occurred, and whether it would consider disclosing such wrongdoing to the government to demonstrate the company's cooperation with the government's investigation.

During the internal investigation, investigating counsel stated during one employee interview:

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.³

Memoranda from the interview indicated investigating counsel also explained they "could" also represent the employee, "as long as no conflict appeared."⁴ The employee was interviewed again by investigating counsel three days later. At the beginning of this interview, investigating counsel reiterated that they represented the company, that the privilege belonged to the company, and that the employee could retain personal counsel at the company's expense.

Similar statements regarding representation by outside counsel were made during an interview of two other employees. Specifically, investigating counsel stated to both employees:

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We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. You are free to consult with your own lawyer at any time. 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 or waive it.⁵

At the end of the interview, one of the employees asked whether he needed personal counsel. One of the investigating attorneys stated that he did not recommend it, but that he would tell the company not to be concerned if the employee retained personal counsel.⁶

The SEC launched an investigation of AOL and PurchasePro, which was followed by a criminal investigation. AOL ultimately agreed to waive the attorney-client privilege and to produce documents in response to a grand jury subpoena seeking material about its internal investigation of the AOL-PurchasePro relationship. After AOL agreed to waive the privilege, the employees moved to quash the subpoenas on the grounds that each employee had an individual attorney-client relationship with outside counsel. This claim was based upon statements made by outside counsel in the interview that it “can” or “could” represent each employee.

The district court refused to quash the subpoenas. This decision was affirmed by the Fourth Circuit, which based its decision on three factors:

- There was no evidence that outside counsel told the employees that they represented them or that the employees asked to be represented by them.
- There was no evidence that the employees ever sought personal legal advice from the investigating attorneys, nor was there evidence that personal legal advice was rendered.
- The employees were each advised that the information they were providing to the company’s outside counsel could be disclosed at the company’s discretion.⁷

The Importance of Clearly Articulated and Comprehended *Upjohn* Warnings

The set of statements or warnings to be given at the outset of an interview has come to be known as the *Upjohn* warnings. The name derives from the Supreme Court decision in *Upjohn Co. v. United States*, in which the Court held that the attorney-client privilege

between a company and investigating counsel protected communications between investigating counsel and the company’s employees.⁸ The Court recognized that a protected mechanism for gathering facts from employees was necessary for the company to obtain legal advice from investigating counsel.

In the wake of *Upjohn* it has become common practice for the following steps to be taken at the outset of an employee interview:

- Investigating counsel must clearly state that counsel represents the company and does not represent the employee being interviewed.⁹
- Investigating counsel must state that the information learned during the interview is privileged to the company, and that the company alone will determine, without consulting the employee, whether to provide such information to the government.
- Investigating counsel must make clear to the employee that the information discussed at the interview is to be kept confidential so that the company’s privilege can be preserved; this explicitly reinforces that the information covered in the interview is covered by the company’s privilege.
- Each employee interviewed should affirmatively state that he or she understands the warnings given by investigating counsel.

In Re Grand Jury Subpoena reinforces how important it is for investigating counsel to give the full *Upjohn* warnings and to see that the employees being interviewed understand that they are not being represented by investigating counsel. Because the Fourth Circuit found no facts in the record supporting the existence of an attorney-client relationship between investigating counsel and the employees, the failure of investigating counsel to give the full *Upjohn* warnings did not, in this case, have adverse consequences for the company. The Fourth Circuit, however, clearly indicated that it did not endorse what it referred to as the “watered-down” *Upjohn* warnings issued by counsel conducting the AOL-PurchasePro internal investigation.¹⁰

A non-watered-down version certainly would have included a definitive statement that outside counsel did not represent the individual employees. It also would not have included a statement to the effect that counsel “could” represent the individual or the expression of counsel’s opinion that the individual did not need separate representation. If investigating counsel had clarified

these issues better, the employees interviewed likely would have had a better understanding that investigating counsel represented the company and not the individual employees. If these steps had been taken by investigating counsel, the employees would not have been able to argue that an attorney-client relationship between investigating counsel and the employees had been formed and the litigation would have been avoided.

The Feared Question: Do I Need a Lawyer?

One of the complexities of internal investigations is that they often create situations which require not only legal judgments but also strategic and corporate policy considerations as well. One situation is when an employee asks investigating counsel whether he or she needs a lawyer. An employee in *In Re Grand Jury Subpoena* asked this very question. Investigating counsel, after previously indicating that he “can” represent the employee individually, responded by saying “I don’t recommend it.”

The Fourth Circuit, in summary fashion, declared that investigating counsel had not provided personal legal advice to any of the employees and that the employees had not sought such advice.¹¹ The latter point is debatable given that at least one employee asked whether he needed his own lawyer. In addition, the court, without explanation, concluded that the response, “I don’t recommend it,” did not constitute personal legal advice. On these facts, a court could have found, at least as to this employee, that personal legal advice had been rendered. This statement could have created the basis for a finding that an attorney-client relationship existed between investigating counsel and the employee.¹²

Handling the “do I need a lawyer” question is a potential minefield for the company and investigating counsel. From the company’s perspective, there are potential problems with either a “yes” or “no” answer. A “yes” answer risks slowing down the internal investigation considerably while the employee seeks counsel. A “no” answer may lead to claims against the company and/or investigating counsel if the employee ultimately suffers legal consequences as a result of participation in the interview without counsel.

As it commences its internal investigation, the company may decide that investigating counsel should decline to answer the “do I need a lawyer” question. This response, of course, risks alienating the employees being interviewed. Alternatively, if the company is concerned that some of its employees will ask the “do

I need a lawyer” question, it may wish to take steps at the outset of the internal investigation to make sure that separate counsel will be available if employees ask whether they need separate representation.¹³

The company may not be in a position to adopt either of these approaches at the outset of an internal investigation. Often investigating counsel must have candid discussions with the company’s senior executives to help the company frame the internal investigation and to determine how the company should proceed. In these discussions, and perhaps in other discussions between investigating counsel and company employees, the company may want to allow investigating counsel to respond to the “do I need a lawyer” question.

The following steps can be taken to address the question while minimizing the risk that a court will find that personal legal advice was rendered, thus preventing the basis for finding the existence of an attorney-client relationship between investigating counsel and company employees:

- Address the nature of the internal investigation and the possible responses of the company to any investigation of the conduct at issue by the government, making it clear that such statements are being made in investigating counsel’s role as counsel to the company;
- Address the likelihood that the interests of the company may conflict with the interests of the employee or some group of employees, again making clear that this assessment is being made on behalf of the company; and
- Advise the employee whether or not the company will consider paying for personal legal counsel for employees.

These responses clearly provide information which will enable the employee to address the “do I need a lawyer” question without giving a “yes” or “no” answer. Certainly the circumstances of the representation will often dictate whether other responses would be appropriate to help the employee address this all-important question.

Waiver of the Attorney Client Privilege by the Company

Prosecutors are, with increasing frequency, demanding that companies waive the attorney-client privilege and work product protections as part of their cooperation.¹⁴

Indeed, the Department of Justice, through a letter written by then Deputy Attorney Larry Thompson (widely referred to as “the Thompson Memorandum”) specifically states that waiver is a factor in the decision of whether to charge a company with a criminal violation.¹⁵ In keeping with the Thompson Memorandum, a number of recent high-profile prosecutions have resulted in deferred prosecution agreements that have required companies to waive attorney-client and work product protections.¹⁶ The SEC has similarly expressed that waiver of the attorney-client privilege is a factor in evaluating whether to seek penalties against a company for the actions of its employees.¹⁷

This reality has complicated the role of investigating counsel and has the potential to put the interests of the company at odds with the interests of its employees—especially the employees that investigating counsel need to interview as part of an internal investigation. When faced with an internal investigation, a company must consider the very real possibility that it will be asked to waive attorney-client and work product protections. It must decide whether to advise employees being interviewed of the likelihood of this happening.

In this environment, the company faces a difficult dilemma. On the one hand, the company has an interest in quick and efficient resolution of the internal investigation to maximize its chances of receiving favorable treatment from the government. Disclosing the likelihood of waiver may frustrate this goal. In addition, the company must require investigating counsel to take careful steps to avoid creating an attorney-client relationship with employees. This is critical to maintaining the company’s ability to waive its attorney-client privilege to cooperate with the government’s investigation.

On the other hand, the company should be aware of the possible unintentional consequences of making decisions based solely on the goal of conducting a quiet and efficient internal investigation. The company may not be well-served (internally or externally) by the perception that it turned its back on its employees in the face of scrutiny by the government. Often, the goodwill of key employees is one of the most valuable assets to a company. Indeed, careful and considerate handling of such employees in an internal investigation may be critical to the company’s future viability.¹⁸

There is no playbook to consult in helping companies handle these types of issues. Resolution of these issues will depend on the type of internal investigation

being conducted, the nature and status of the government’s investigation, and the underlying facts at issue. In any event, it is crucial for the company to carefully consider the above potentially-competing interests at the very beginning of the internal investigation. Doing so will help minimize surprises (from both the company’s and its employees’ perspectives) and will help the company and investigating counsel focus on learning the facts and determining the best course of action for the company.

Notes

1. In Re Grand Jury Subpoena, Nos. 04-4410, 04-4411, 04-4673 (4th Cir. July 18, 2005).
2. Creating an attorney-client relationship with an employee may pose problems for both the company and investigating counsel. Indeed, In Re Grand Jury Subpoena, the court stated, “the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees.” Slip op. at 10. There may, however, be situations in which investigating counsel can represent employees in proceedings subsequent to the internal investigation, where there is no basis to conclude there is a conflict.
3. *Id.* at 3.
4. *Id.*
5. *Id.* at 4.
6. *Id.*
7. In Re Grand Jury Subpoena, slip op. at 9.
8. 449 U.S. 383 (1981)
9. Given the possibility that an employee interview could result in the interests of the employee diverging from the interests of the company, this warning should be issued as part of the investigating attorney’s ethical obligations. Rule 1.13(d) of the ABA Model Rules of Professional Responsibility provides 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 it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”
10. In Re: Grand Jury Subpoena, slip op. at 10.
11. In Re: Grand Jury Subpoena, slip op. at 9.
12. This is more than a theoretical possibility. For example, in In Re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998), the Tenth Circuit upheld the existence of the personal attorney-client privilege between investigating counsel and an officer of the company. The privilege was based upon “confidential communications between [the officer and investigating counsel] as to his personal situation.” If a court finds that a personal attorney client privilege exists between investigating counsel and an employee, the company may not be permitted to waive its attorney-client privilege. See *United States v. Walters*, 913 F.2d 388, 393 (7th Cir. 1990).

13. Companies using this approach should try to take steps to see that employees understand that separate counsel is being provided for their protection and that the company's decision to do so does not mean that the company believes that they have done something wrong.

14. This trend has drawn significant opposition. For example, recently, a number of former Department of Justice officials penned a letter to the Honorable Ricardo Hinojosa, the Chairman of the U.S. Sentencing Commission, to oppose a proposed revision to the Sentencing Guidelines that would authorize and encourage the government to require entities to waive their attorney-client and work product protections to demonstrate cooperation with the government (referred to herein as "the Former DOJ Official Letter." The Letter can be found at: http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/08/attorneyclient_.html.

15. Memorandum from Deputy Attorney General Larry D. Thompson to United States Attorneys, Subject: Principles of Federal Prosecution of Business Organizations, § VI (Jan. 20, 2003), available online at www.usdoj.gov/dag/cftf/corporate_guidelines.htm

16. See, e.g., KMPG, Letter to Robert S. Bennett, Esq. § 7(3); *United States v. Computer Associates International, Inc.*, Cr. No. 04-837 (ILG), Deferred Prosecution Agreement § 6(c); *United States v. Bristol-Meyers Squibb Co.*, Mag. No. 05-6076, Deferred Prosecution Agreement, §31(d).

17. See Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (commonly referred to as "the Seaboard Report"). Available online at http://www.sec.gov/litigation/investreport/34-44969.htm#P16_499.

18. The Former DOJ Official Letter's description of the role of counsel cogently captures the importance of communications between counsel and company personnel at all levels:

Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel so they may represent the entire entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By enabling routine demands for waiver of the attorney-client and work product protections, the amendment discourages personnel from within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This, in turn, will harm not only the corporate client, but the investing public and society as well.

Supra note 14 at 2.