

CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XX

Summer 2015

No. 1



Internal Investigations:

*Privilege,
Pitfall,
and Ethical
Issues*

See article on page 2



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CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XX

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Internal Investigations: Privilege, Pitfall, and Ethical Issues¹

by: Christopher G. Moorman
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Chris began practicing law in 1992 with the Atlanta litigation firm Webb, Carlock, Copeland, Semler & Stair. His work in the areas of personal injury and professional liability continued at James L. Ford, P.C., where Chris also handled employment and civil rights matters. Chris opened his own practice in Buckhead in 1999, The Law Office of Christopher G. Moorman, where he remained until 2008, when Moorman Pieschel LLC was formed. Having handled many different types of plaintiff and defense litigation matters over the years, Chris's practice currently involves litigation and trial work, pre-litigation counseling, and appellate advocacy in employment, business, tort, personal injury, professional liability, and civil rights matters. In addition to serving as lead counsel in complex jury trials in State and Federal Court, Chris has significant appellate experience. For the past several years, Chris has taken on the role of Special Counsel and conducted numerous internal investigations for publically traded companies, private companies, and municipal entities.

I. Introduction

The internal investigation is the critical tool by which companies and their boards learn about violations of law, breaches of duty, and other misconduct that may result in civil liability, criminal liability, and regulatory problems. Studies show that nearly half of all U.S. companies have engaged outside counsel to conduct internal investigations.² The phrase "internal investigation" generally implies that it is (1) initiated by a company for its own use and/or for potential use in court and/or for use by a third party such as a regulatory or government agency; and (2) conducted by in-house counsel, a company employee, or by desig-

nated outside ("special") counsel. This paper examines many of the obvious issues that arise when the need to conduct an internal investigation is identified, as well as less obvious issues, including the ethical constraints guiding special counsel investigators. The focus here is less on the *what questions should be asked* aspect of an investigation and more on the issues that are important during the planning and subsequent use stages.

II. Investigation Triggers

A myriad of circumstances may trigger the need for an internal investigation: evidence of irregular stock trades, allegations of employ-

ment discrimination, the results of an internal audit, board member suspicion, a shareholder demand, a civil suit, a request by a government agency like OSHA to conduct an on-site inspection or employee interviews, an anonymous tip about billing irregularities, receipt of a whistleblower letter, the sudden departure of a key employee, a customer complaint, a media or "watchdog" inquiry, a civil investigative demand, and a grand jury subpoena, to name a few.

The purpose of the internal investigation is generally to evaluate risk, understand problems that may have become systemic within an organization, or to mitigate legal exposure. The goal at the outset is to endeavor to determine (1) has

“Great Corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with these institutions... the first requisite is knowledge, full and complete.”

misconduct or a violation of law occurred? (2) the nature and scope of any misconduct/violation (3) who is responsible? (4) why did the misconduct occur? and (5) is the problem isolated or systemic? Depending on the answers to these questions, corporate decision-makers may have to address additional questions such as (6) what remedial steps should be taken? (7) should employees be disciplined or terminated? (8) should corporate compliance measures be implemented or improved? and (9) must or should the corporation disclose misconduct found to state or federal authorities?

Sometimes, there is no choice but to conduct an internal investigation. For example, an employee grievance alleging unlawful workplace harassment mandates a company investigation if the employer desires to make use of the *Faragher-Ellerth* affirmative defense in a subsequent discrimination lawsuit.³ Section 10A of the Securities Exchange Act requires external auditors who become aware that an illegal act has or may have occurred to determine whether it is likely such an illegal act has occurred and the effect of the illegal act on the company's financial statements.⁴ Likewise, the “reporting up” provisions of the Sarbanes-Oxley Act require in-house counsel to ensure that the company takes appropriate steps to address allegations of wrongdoing.⁵

III. Planning

Once the need for an internal investigation arises and its objective is defined, a number of questions arise about who should conduct it how it

should be conducted. Not surprisingly, lawyers generally recommend that lawyers perform the investigation, the principal justifications being (1) that legal expertise is needed to assess whether the acts and omissions in question amount to violations of law and (2) the enhanced availability of attorney-client privilege and work product protections. In-house attorneys often consider that their work may be construed as unprivileged business advice, that outside counsel may be in a better position to investigate on an expedited basis and provide objectivity on the parameters and goals of the investigation, and that the involvement of an outside investigator will relieve them from the burden and discomfort associated with investigating senior managers and co-workers. There are certainly occasions, however, where companies are well served by non-lawyer investigators such as H/R representatives.⁶

The logistics of an investigation will depend on factors such as urgency, geographic location of employees and records, extent to which business will be disrupted, resources and funds available to pay for the investigation, and the preferences of those who retain outside counsel.

Decisions about the methodology of the investigation -- how it should be conducted and what the investigator will be asked to do -- are the most important questions to ask at the outset. The answers depends upon how the company believes it will or may use the results of the investigation. In more extreme situations, the existence or likelihood of external events such as a parallel

investigation by the EEOC, OSHA, DOJ, SEC, NYSE, state attorney general or local district attorney will influence how an investigation is conducted and documented.

IV. Authority to Initiate and Control

When possible, the Board of Directors should participate in decisions relating to an internal investigation, including (1) whether to initiate the investigation; (2) the scope of the investigation; (3) revising the scope as new facts unfold; (4) who will conduct the investigation; (5) whether the report will be oral or written; and (6) the resulting actions, if any, taken by the corporation. Corporate governance documents may speak to and require Board approval. Senior management, an audit committee, a special committee of disinterested directors, or General Counsel may be the appropriate initiators of communications leading to Board approval. Often, when an allegation is vague, an informal initial investigation is needed to learn sufficient information to make a proper determination about whether to call the Board's attention to a matter. This is usually done by a compliance officer or an in-house attorney.

The level of participation by management and the Board in an investigation is generally dictated by the nature of the allegations investigated. If the focus of the investigation will be on senior officers or board members, or the corporate entity is the target of a government inquiry, it may be advisable that management,

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Dancing with Mary Jane: What Family Courts are Making of Medical Marijuana Use in Custody Cases

by: Mark Jones



Mark Jones is a lawyer who practices family law and criminal defense as well as injury law in Columbus, Georgia and Phenix City, Alabama. In 2013, Mark opened his own law firm with nothing but a dream and his small life savings. Mark now has grown his firm to consist of four paralegals, a receptionist, and is currently looking for an associate attorney. Notably, Mark did a local Superbowl ad in the Columbus market in 2015 with a rapper that garnered over 150,000 hits on YouTube. Prior to opening his own law firm, Mark worked as an associate at a personal injury firm for three years. Prior to that, Mark clerked for a Superior Court Judge in Muscogee County.

Introduction

When I first started practicing family law in Georgia, I was utterly amazed at the sheer power wielded by a Superior Court Judge where children are involved. Superior Court Judges pursuant to the injunctive powers granted to them by the Georgia General Assembly under OCGA § 9-11-65(e) truly are the gatekeepers to our children's best interests. Under that code section, a Superior Court Judge may issue interlocutory injunctions concerning the custody of children, "with or without notice or bond, and upon such terms and conditions as the court may deem just." *Id.* In this code section, our legislature handed our Superior Court Judges a blank check to issue extraordinary and oftentimes ex parte injunctive relief when a child's best interests are at risk.

As the father of three young children, I am still slightly shocked at how much power this code section grants our judges. There is no doubt that these judges are responsible for ensuring our children are protected from threats to their best interests, regardless of whether the threat comes in the form of a prescription pill, a bottle at a liquor store, or a plant prescribed medicinally.

With the Georgia House and Senate passing a limited medical marijuana bill, my position is that medical and recreational marijuana use akin to the western states will eventually be in effect in Georgia – although the

authors of the medical marijuana bill that passed the House and Senate swear that this is not the case.¹ The reason Georgia will eventually adopt a more extensive form of medical or recreational marijuana use is because of the tax revenue associated with it. Medical and recreational marijuana sales as a source of tax revenue, while initially underperforming, appear to be rising as a significant source of tax revenue in states that have legalized it.² Medical and recreational marijuana taxes will prove too lucrative for state legislators to ignore. *Id.*

Furthermore, regardless of whether Georgia does or does not pass medical or recreational marijuana laws akin to Colorado or Washington State's, given that everyone has a fundamental right to travel³ and relocate to such a state, Georgia's family court system will inevitably have to address the issue of medical or recreational marijuana use in the family law context in the event one parent to a custody dispute decides to move to such a state while the other parent remains in Georgia with the child.

Custody cases centered on medical marijuana use in states that permit such use involve a fascinating interplay between a parent's federal constitutional right to raise his/her children as he/she sees fit,⁴ a parent's state-based statutory or state constitutional right to use marijuana,⁵ and the age-old best interests of the child standard, which ensures that a child is raised in a healthy, wholesome

environment.

With this in mind, one must address the issue of how medical and/or recreational use of marijuana will impact the largest subset of the legal industry: the family law system.

This article examines what family law courts are doing in states that have legalized medical or recreational marijuana in making custody determinations. In examining the appellate decisions, it is fair to say that the following axioms hold true:

- A family court cannot make a custody determination solely on the basis of a parent's medical or recreational marijuana use in states where such is legal; and
- Factors a family court judge will consider in making a custody determination include whether: (a) the parent using medical or recreational marijuana uses the drug around the child; (b) the parent using medical or recreational marijuana keeps the drug locked up and out of reach of the child; (c) the parent seeking custody abuses marijuana; (d) the parent's medical condition for which the parent uses medical marijuana; and (e) any other factor associated with the parent's marijuana use that impacts the health and welfare of the child; and

The article then concludes by suggesting that family law judges should still employ traditional tools at their disposal in making custody determinations, regardless of the legality of marijuana use in those states that permit it.

A Custody Determination Cannot Be Made Solely on the Basis of One Party's Marijuana Use Without a Showing of Specific Harm to the Child's Best Interests by the Parent's Marijuana Use

In states where medical or recreational marijuana use is legal, the appellate courts have uniformly held that a family judge cannot make a custody determination solely on the basis of one parent's marijuana use,⁶ despite marijuana possession being illegal at the federal level.⁷ Even illegal marijuana use, i.e., use without a prescription, in such states is still not enough by itself to warrant a custody denial or modification.⁸

Indeed, in some states, such as Michigan, the medical marijuana laws actually codify this principle that mere use of marijuana, without more, does not justify a custody modification or finding of child endangerment.⁹ The same holds true for Maine, although the legislature there specifically included a reference that a court could consider a party's marijuana use if it impacted the best interests of the child.¹⁰

Nevertheless, even in states that permit marijuana use, the family courts still consider marijuana as a factor in making a custody determination under current case law if the parent's marijuana use constitutes substance abuse or creates a risk of physical or mental harm to the child.¹¹ There must be some specific nexus, however, between the parent's marijuana use and the best interests of the child. Further, one must also remember that substance abuse in a clinical setting means, "a] maladaptive pattern of substance use leading to clinically significant impairment or distress ... occurring within a 12-month period."¹² In other words, in order for a parent's legal marijuana use to impact a custody determination, there must be some evidence that the parent's

marijuana use endangers the child or is substantially and specifically connected to the parent's parenting skills or judgment.¹³ The parent's marijuana use must effect the best interests of the child.

Several Common Factors Used by Courts Appear in Cases Where a Parent's Marijuana Use is at Issue

Because the best interests of the child standard is traditionally a vague, squishy legal standard, each case involving a child custody determination and a parent's medical marijuana use is heavily fact intensive. However, certain common factors do appear in the appellate decisions in these cases. Generally, these factors center on whether the marijuana use by the parent constitutes substance abuse or somehow impacts the health and welfare of the child.¹⁵

Examples of specificity that warrants denying or modifying custody based on medical marijuana use include:

- whether the parent uses marijuana around the child;¹⁶
- the form of marijuana used by the parent;¹⁷
- how secure the parent keeps the marijuana stored;¹⁸
- the parent's attitudes towards marijuana use;¹⁹
- whether the parent exercising custody has a history of substance abuse;²⁰
- whether the parent's friend or known associates use marijuana; and²¹
- lapses in parental judgment linked to marijuana use.²²

Medical marijuana use by a

continued on next page

Dancing with Mary Jane:

continued from previous page

parent also begs the question of *what exactly* is the medical issue the parent using medical marijuana is suffering from because a parent's physical health is surely a factor to consider in determining best interests of the child.²³

In sum, factors the courts consider in making a custody determination where a parent uses marijuana legally generally revolve around whether the parent is abusing marijuana or whether the parent's legal marijuana use exposes the child to risk of harm.

Suggestions for Family Court Judges

In cases where a parent is using marijuana legally, a family court judge should not consider her hands tied. Rather, she should still employ traditional means of monitoring a parent for drug use such as drug tests²⁴ and drug counseling,²⁵ depending on the extent of the parent's marijuana use. A drug test for THC metabolites will still show the extent of a parent's marijuana use and drug counseling would be warranted where there is specific evidence of substance abuse or a need

for parental education concerning the impact of marijuana use when children are around.

A judge absolutely can restrict a parent from using marijuana while in the presence of the child,²⁶ whether the use is legal or not and may even be able to restrict the parent's marijuana²⁷ use to a specific form of marijuana to prevent ill effects on the child. Though the appellate courts in states where some form of marijuana use is legal have uniformly rejected a per se custody denial or modification rule simply because a parent uses marijuana, they have also uniformly held that the child's health and well-being is the paramount concern in a custody dispute.²⁸

In short, in custody cases, family court judges should continue to use the tools at their disposal to monitor parents who are using marijuana legally but should be sure to include specific findings of fact in the event of a modification or denial of primary custody where a parent legally uses marijuana.

Conclusion

Like it or not, family court judges throughout the United States will

continue to be confronted with a parent's legal marijuana use in family law cases because more states will continue to pass laws permitting medical or recreational marijuana use. As a general rule, even though marijuana use in any form remains illegal at the federal level, the case law is clear that marijuana use by a parent, without more, is not sufficient to warrant denying a parent custodial rights or modifying custody to a child. Rather a specific nexus between harm to the child's best interests and the parent's marijuana use must be shown. Common factors family courts have used in making custody decisions where a parent uses legal marijuana all center on whether a parent's marijuana use constitutes substance abuse or otherwise harms the child. Regardless of whether a parent's marijuana use is lawful, family court judges should continue to use traditional items in their judicial toolbox to monitor and otherwise regulate a parent's marijuana use in family law cases.

FOOTNOTES

1. See Ga. S.B. 185 (2015-2016) ("nor is this legislation to be construed as any intent of the General Assembly to be moving in the direction of the legalization of the recreational use of marijuana or other controlled substances.").
2. See, e.g., Hernandez, Elizabeth Colorado's Record January Marijuana Sales Yield 2.3 Million for Schools, *The Denver Post* available at: <http://www.thecannabist.co/2015/03/11/colorado-pot-tax-results-january-2015/31462/> (noting "January's [2015] school-designated pot excise tax is more than 10 times the amount in January 2014, when the state first collected the tax on wholesale marijuana transfers.").
3. See generally, *Crandall v. Nevada*, 73 U.S. 35 (1868) (noting "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.").
4. See generally, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Pierce* is generally regarded by constitutional scholars as providing parents with a fundamental right to raise their children as they see fit pursuant to the parent's liberty interest under the 14th Amendment.
5. For example, a citizen of Colorado has a constitutional right to use marijuana pursuant to the Colorado Constitution, article XVIII, § 14.
6. *In re Alexis E.*, 171 Cal.App.4th 438, 90 Cal. Rptr. 3d 44 (Cal. App., 2009) ("mere use of marijuana by a parent will not support a finding of risk to minors.").
7. See 21 U.S.C. §§ 841, 844; see also *Gonzales v. Raich*, 545 U.S. 1 (2005) (US Congress may criminalize marijuana use despite state permitting medicinal use).
8. *Los Angeles County Dept. of Children and Family Services v. Cornelius*, No. LK04159 (Cal App. 2010) (unpublished) ("Several cases indicate that the mere use of marijuana, even illegally, is not alone sufficient ...").
9. See, e.g., *In re Beeler*, No. 321648 (Mich. Ct. App.) (unpublished) (noting, "Michigan's Medical Marijuana Act ... provides in part, 'A person shall not be denied custody or visitation of a minor for acting, in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.'").
10. 22 M.R.S. § 2423-E(3) ("a court may not use a parent's lawful use of medical marijuana as the reason to deny parental rights and responsibilities.").
11. *In re David M.*, 134 Cal App. 4th 822 (Cal App. 2005) ("The record on appeal lacks any evidence of a specific, defined risk of harm to either David or A. resulting from mother's or father's mental illness, or mother's [marijuana] abuse.").
12. *Jennifer A. v. Superior Court*, 117 Cal App. 4th 1322, 1346 (Cal App. 2004) (citing *American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders* (4th ed.2000) p. 199).
13. *Cornelius*, supra note 9 ("There was no testimony linking the mother's marijuana use to her parenting judgment or skills. There was no evidence of a diagnosis by a medical professional or any clinical evaluation and determination that the mother had a substance abuse problem based upon her use of marijuana.").
14. *Daggett v. Sternick*, 2105 ME 8 (2015) ("the best interest of the child necessarily involves considering whether a parent's ability to care for his or her child is impaired, including by his or her marijuana use.").

15. See *Dept. of Human Servcs v. Radiske*, 144 P.3d 943 (Or. App. 2006) (noting “Children have a right to grow up in a wholesome and healthy environment, free from abuse, injury, or neglect ...”).
16. Cf. *Parr v. Lyman*, 240 P.3d 509 (Colo. App. 2010) (father objected to family law judge’s condition that father refrain from marijuana use while exercising parenting time).
17. See, e.g., *Riverside County Dept. of Pub. Soc. Servcs v. L.M.*, E061396 (Cal. App. 2015) (noting father exposed child to second hand marijuana smoke).
18. *Daggett*, supra note 15 (parent stored “voluminous” amounts of marijuana in areas where child could access).
19. *Cornelius*, supra note 9 (father testified that he was “not worried about [the child] eating marijuana.”).
20. *Id.*
21. *Los Angeles Cnty. Dep’t of Children & Family Servs. v. Anthony O.* (In re S.U.) (Cal. App., 2011) (court noted that father no longer associated with friends who used marijuana).
22. *Jennifer A.* supra note 13.
23. *Demski v. Petlick*, (Mich. App. 2015) (noting, “the mental and physical health of the parties” as a factor in relation to a parent’s medical marijuana).
24. *Jennifer A.* supra note 13 (court used drug tests to monitor extent of parent’s medical marijuana use).
25. See, e.g., *Anthony O.* supra note 22 (court ordered drug counseling as part of reunification plan).
26. *Parr* supra note 17.
27. Cf. *State v. Nelson*, 195 P.3d 826 (Mont. 2008) (court restricted probationer to pill form of marijuana despite medical marijuana prescription).
28. *In re Marriage of Wieldraayer*, No. 59429-0-I (Wash. App. 12/22/2008) (Wash. App., 2008) (“Merely because Cameron is entitled to use marijuana to improve his medical condition under [the law] does not mean that such use is not detrimental to his young daughters. In the family law setting, the best interests of the child are of paramount importance.”).

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Foreseeing Crime

by: Stephen D. Apolinsky



Stephen D. Apolinsky is the founder of Apolinsky & Associates, LLC. The firm handles wrongful death and serious injury cases with an emphasis on premise liability, nursing home neglect and car or truck collisions. With offices in Decatur and Atlanta, Steve practices throughout Georgia and Alabama. Steve is AV rated by Martindale, has been recognized as one of the top trial lawyers in Georgia, has been a columnist for the Atlanta Journal & Constitution's "Ask the Experts" and recently appeared on the radio program "Atlanta Legal Experts." Steve lives in Druid Hills with his wife and two children.

Years ago, Johnny Carson had a recurring bit, Carnac the Magnificent. He would hold an envelope to his head, give an answer, then open the envelope to reveal the question. For those of you who are too young to have seen him on television, I encourage you to Google it. The skit worked because he knew what was in the envelope and he was able to craft a clever answer.

Premises liability law in Georgia for an attack upon a person is similar. If you are going to pursue these cases, you need to know the answer to whether prior similar acts occurred on the premises and whether management or ownership knew or should have known.

The owner of the premises and the management company/occupier of the premises are liable under O.C.G.A. § 51-3-1 for failing to keep the premises and approaches safe for their invitees. The key is that a proprietor's duty to exercise ordinary care to protect invitees against third-party criminal attacks extends to foreseeable criminal acts, that is, acts which the proprietor had reason to anticipate. FPI Atlanta, L.P v. Seaton, 240 Ga. App. 880 (1999).

The incident causing the injury must be substantially similar in type to the previous criminal activities occurring on or near the premises so that a reasonable person would take ordinary precautions to protect his or her tenants against the risk posed by that type of activity. Vega

v. La Movida, Inc., 294 Ga. App. 311 (2008). The prior criminal activity does not have to be identical to the present crime, but it does have to be sufficient to attract the landlord's attention to the dangerous condition which resulted in the litigated incident. Id. at 317.

Establishing a history of prior substantially similar acts is not the only way to show foreseeability; otherwise, it would amount to a "first bite rule." There have been other ways to establish foreseeability such as Shoney's, Inc. v. Hudson, 218 Ga. App. 171 (1995) (rev'd on other grounds) where a restaurant owner acknowledged before the attack on a person that there was a potential for attacks on customers in its parking lot and Piggly Wiggly Southern v. Snowden, 219 Ga. App. 148 (1995) where testimony of employees that they considered the store parking lot unsafe, had repeatedly suggested hiring security, walked female employees to their cars at night and would not allow their wives to go to the store alone at night was sufficient to create a jury question as to foreseeability. However, without direct evidence that a premises owner/manager has notice of the unsafe condition, prior substantially similar acts have proven to be the mainstay for establishing foreseeability. Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 222 Ga. App. 169 (1996).

In a case I resolved earlier this year, we used the following techniques to

show that criminal conduct was foreseeable: The case involved a young woman who had walked to a neighboring apartment complex to visit friends when she was shot and killed. We showed that the owner and manager were on notice of substantially similar crime using four methods:

Crime statistics showed similar crimes in the area;

“Courtesy officers” patrol logs showed criminal activity;

Google searches of reviews showed that crime was a problem; and

Testimony from employees showed ongoing crime.

When we accepted the case, we started by gathering and analyzing crime statistics. We sent open records request to the local city and county public safety departments. This

complex had an extensive history of crime.

Next, we looked for other lawsuits and talked to people involved in those cases to understand prior crimes and what changes, if any, were made to deter our criminal act.

Next, we did extensive Google searches on ownership, management and what people said about the complex.

Armed with this information, we filed suit and started to conduct discovery. We learned that there were courtesy officers who kept patrol logs. The logs showed almost daily criminal conduct.

We methodically deposed a number of people who currently or formerly worked at the complex. Maintenance employees testified about

crime as well as conceding problems with the gate, lighting and doors to units.

Management testified that they looked at online reviews as well as the patrol logs. Clearly, they were on notice of prior criminal acts.

Defense never moved for summary judgment because they knew we had enough information to create a jury question. Further, the case settled at mediation when we showed that our criminal act was foreseeable and steps should have been taken to prevent it from happening.

Johnny Carson may no longer be with us, but you too can be Carnac the Magnificent. For more information, feel free to email me at steve@aa-legal.com.



THIS COULD BE
YOUR LAST CALENDAR CALL

PAY YOUR SECTION DUES NOW
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ADA Suits are Heading This Way: How to Make Sure Your Clients are Protected

by: Bill Merchant



Bill Merchant is a 2014 graduate of Mercer University's Walter F. George School of Law. Upon graduation, he began working for the Finley Firm, P.C. in Columbus, GA before accepting a Superior Court Clerkship for the Honorable William C. Rumer and Honorable Frank J. Jordan, Jr. of the Chattahoochee Judicial Circuit.

Since the enactment of the Americans with Disabilities Act more than 20 years ago, businesses around the country have faced an ever-growing challenge of lawsuits for failure to comply with accessibility requirements set forth under Title III of the ADA. Geographical areas such as the state of California and South Florida have seen thousands of lawsuits filed against small and large businesses alike over the past several years. This increase in litigation comes as a result of plaintiff attorneys taking advantage of the confusion by business owners surrounding ADA compliance along with the fact that the Act permits the recovery of attorneys' fees. In order to limit this abuse of litigation, businesses can protect themselves by having a greater understanding of the law and by familiarization with some of the misconceptions under Title III of the ADA.

Section 1: Americans With Disabilities Act of 1990

First things first, what exactly are we talking about here? The Americans with Disabilities Act ("ADA") was passed into legislation by Congress in 1990 to further protect disabled American citizens who were being discriminated against and isolated by society at large. Considered a defining piece of civil rights legislation, the Act prohibits discrimination and guarantees that individuals with disabilities will have the same opportunities to enjoy and participate in mainstream American life, unassisted, as the rest of the population. Largely modeled after the Civil Rights Act of 1964, the ADA provides that disabled individuals will have the same employment opportunities, will be able to enjoy the same goods and services, and will be able to participate in the same state and local government programs and services as those

without disabilities. This reform affects employers, public entities, and private organizations that provide public accommodations and services.

Who specifically qualifies as "individuals with disabilities?" A person with disabilities, whose comprehensive civil rights are protected under the Americans with Disabilities Act, is a person who: (1) Has a physical or mental impairment that substantially limits one or more *major life activities*,¹ (2) has a record of such an impairment, or (3) is regarded as having such an impairment.² Those currently engaging in the illegal use of drugs are not protected by the ADA when the action is taken based solely on their illegal activity.

Section II: What is a Title III ADA Claim?

Although both Titles I and II of the Act deserve attention from both employers and business owners, the largest area of concern where

plaintiff suits are rapidly expanding, is Title III addressing places of public accommodation.³ Title III of the ADA prohibits persons who own, lease, lease to, or operate places of public accommodation from discriminating against individuals with disabilities. Additionally, Title III requires owners, who construct new building or alter previously-existing buildings, to make alterations in such a manner as to make them readily accessible to and usable by individuals with disabilities to the maximum extent feasible.

What exactly is a place of public accommodation? A place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within certain categories. These categories include, but are not limited to, establishments for lodging, serving food or drink, places of exhibition or entertainment, places of public gathering, sales and rental establishments, service establishments, stations used for specified public transportation, places of public display or collection, parks and places of recreation, places of education, social service center establishments, and any place of exercise or recreation.⁴

Any owner or operators of a place of public accommodation (which are not limited to actual physical structures with definite physical boundaries) is prohibited from discriminating against individuals based on physical handicap. Discrimination results in actions or failure to take action by an entity when (1) an individual with a disability is screened out from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations; (2) there is a failure to make reasonable modifications in policies, practices or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities; (3) a failure to ensure that no individual with a disability is excluded, denied services, segregat-

ed, or otherwise treated differently than others because of the absence of auxiliary aids and services; (4) a failure to remove architectural barriers which are "readily achievable"; or (5) where the removal of a barrier is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods.

Who has standing to bring suit? "A disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered 'actual injury.' Similarly, a plaintiff who is threatened with harm in the future because of existing or imminently threatening non-compliance with the ADA suffers 'imminent injury.'"⁵ No physical injury has to be shown. In determining whether a plaintiff's likelihood of returning to a particular establishment is sufficient to confer standing, courts have generally focused on four factors: (1) the proximity of the place of public accommodation to plaintiff's residence, (2) plaintiff's past patronage of defendant's business, (3) the definitiveness of plaintiff's plan to return, and (4) the plaintiff's frequency of travel near defendant.⁶

Under the ADA, "disability" means "a physical or mental impairment that substantially limits one or more major life activities."⁷ An individual is substantially limited "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."⁸

Title III requires removal of physical barriers so that goods and services are available for people with disabilities in the same respects available to those without disabilities. The ADA sets forth specific minimum technical requirements for new construction and alterations to existing facilities. Failure to abide by these requirements is evidence of intentional discrimination.⁹

However, "[t]he Act imposes a less rigorous standard of compliance on 'existing facilities,' constructed before its enactment on January 26, 1993."¹⁰ For existing facilities, public accommodation shall remove such barriers where removal is "readily achievable," i.e., easily accomplishable and able to be carried out without much difficulty or expense.¹¹ In considering what is readily-achievable, factors to consider include: cost, financial resources, number employed at a facility, the financial resources and size employment by the covered entity, and the type of operation(s).¹²

Section III:

How Will This Affect Your Clients?

Currently, Title III of the ADA does not have a provision requiring plaintiffs to exhaust all administrative remedies or provide notice before bringing suit in federal court. Lack of notice allows a plaintiff to bring suit without giving the defendant time to remediate violations and come into compliance with the ADA. Once an action has been filed, the defendant would not only be liable for costs of renovation to bring their business or establishment into compliance, but would be on the hook for the plaintiff's attorneys' fees as well as the fees of their own counsel. While most of the business community would support a requirement that plaintiffs give owners and operators the opportunity to address accessibility issues before incurring unnecessary litigation expenses, many proponents of disabled people argue that the ADA was passed over 20 years ago and defendants have effectively been on notice since.

So how do you convince your clients that making costly structural changes will be worth their while? The Internal Revenue Service (IRS) has codified **two separate tax incentives** to help cover the costs of making access improvements to already-existing facilities. The first, a tax credit, can be

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used for removing architectural and communication barriers that prevent accessibility, providing measures to deliver materials to individuals with hearing impairments, and visual impairments, and acquiring or modifying equipment or devices. In the case of eligible businesses (\leq \$1,000,000 in revenue or \leq 30 full-time workers), the amount of the credit for any taxable year is fifty (50) percent of the eligible access expenditures that exceed \$250 but not to exceed \$10,250.¹³

The second incentive is a deduction that businesses of ANY size may use for the removal of architectural or communication barriers.¹⁴ An Architectural and/or transportation barrier removal expense is "an expenditure for the purposes of making any facility or public transportation vehicle owned or leased by the taxpayer for the use in connection with his trade or business more accessible to and usable by handicapped and elderly individuals."¹⁵

Although the deduction cannot exceed \$15,000.00 for any taxable year¹⁶,

small businesses can use both the tax credit and the deduction in combination if the expenditures qualify under both Section 44 and 190. For example, a small business makes \$20,000.00 in access improvements such as rest room improvements, entrance ramps, and doors widened. The business would be able to take a tax credit of \$5,000 (based on \$10,250.00 of expenditures) and a deduction of \$15,000.00 (the deduction equaling the difference between the total expenses and the credit claimed). The deduction is equal to the difference between total expenditure and the amount of the credit claim. These incentives attempt to benefit both the owners and business patrons, making facilities more accessible for the public at-large.

Section IV Conclusion

Until Congress amends the Act to include notice requirements before initiation of a lawsuit against business owners, the best course of action would be to advise your current cli-

ents of their potential exposure to liability for non-compliance with Title III of the Act. If, upon inspection, a client finds that his facilities are not "up to snuff," swift and comprehensive action should be taken to eliminate the risk. Most licensed builders and contractors are knowledgeable of ADA requirements and should be able to provide information regarding the feasibility of bringing a particular facility into compliance.

Although renovation might be considered costly by most small business owners, failure to do so can lead to additional and unnecessary costs, over and above those required for renovation itself. Advising your client of unnecessary exposure and the possible tax breaks can ensure that they are fully informed and can handle the situation head on. Lawsuits in this area are inevitably coming your way and being proactive is the only current viable solution.

FOOTNOTES

1. Includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
2. *Title III Highlights*, U.S. Department of Justice, Civil Rights Division <http://www.ada.gov/t3highlight.htm>
3. See 42 U.S.C. § 12183 (1994) (requiring readily accessible facilities); 28 C.F.R. §§ 36.401-403 (1994) (providing regulations pursuant to Title III).
4. For a Complete List, See 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104 (1994).
5. *Gaylor v. Greenbriar of Dahlonga Shopping Ctr., Inc.*, 975 F. Supp. 2d 1374, 1383 (N.D. Ga. 2013); *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1138 (9th Cir.2002).
6. *Norkunas v. Seahorse NB, LLC*, 720 F.Supp.2d 1313, 1316 (M.D.Fla.2010), *aff'd*, 444 Fed.Appx. 412 (11th Cir.2011) (quoting *Fox v. Morris Jupiter Assocs.*, No. 05-80689-CIV, 2007 WL 2819522, at 9 (S.D.Fla. Sept. 21, 2007)).
7. 42 U.S.C. § 12102(1)(A)
8. 28 C.F.R., pt. 36, App. C.
9. *Ass'n for Disabled Ams., Inc. v. Concorde Gaming Corp.*, 158 F.Supp.2d 1353, 1362 n. 5 (S.D.Fla.2001).
10. *Access Now, Inc.*, 161 F.Supp.2d at 1362.
11. 28 C.F.R. § 36.304 (a); for a list of "21 examples of modifications that may be readily achievable" listed by the ADA, See ADA Technical Assistance Manual Section III-4.4200.
12. *Gathright-Dietrich*, 452 F.3d at 1273; *Colorado Cross*, 264 F.3d at 1002-3; *Fla. Stadium Corp.*, 161 F.Supp.2d 1357, 1363 (S.D.Fla.2001).
13. 26 U.S. Code § 44(a)
14. 26 U.S. Code § 190
15. 26 U.S. Code § 190(b)(1)
16. 26 U.S. Code § 190(c)

Resolving Healthcare Liens – Gathering the Information You Need to Know Your Client’s Rights

by: Ben Price



Ben Price is a partner at Jarrett & Price, LLC in Savannah and is a graduate of Georgia State University School of Law. A primary emphasis of Ben’s practice is working with other plaintiff’s firms to investigate and resolve healthcare liens on their client’s recovery proceeds.

To lack intelligence in battle is to enter the ring blindfolded. This common military maxim also applies to plaintiff’s lawyers when attempting to negotiate healthcare liens on their client’s recovery proceeds. Not all healthcare plans are treated equally when it comes to reimbursement. Therefore, the attorney needs to know some essential information about a healthcare plan before entering into negotiations to reduce the plan’s lien. However, efforts to obtain healthcare plan information often leads to disappointing results that don’t tell the attorney important facts he or she needs to know, such as how the plan is funded, or how the plan’s contracts are written regarding the reimbursement rights. This frustrates the lawyer into negotiating with the plan without knowing whether the plan truly has a right to be reimbursed at all. Without some vital information about the plan, the lawyer is essentially entering this important portion of the client’s case blindfolded. The trick to removing the blinders knowing where to go to obtain the all-important plan documents, and knowing what to look for once those documents arrive in the office.

Start Early to Investigate the Plan

Many practitioners wait until late in the case before they ever worry about a healthcare lien lurking somewhere in the client’s file. This is a bad habit in today’s environment

when healthcare providers are so aggressive when seeking reimbursement. If the client is treating with private healthcare, the plaintiff’s lawyer will receive letter-after-letter from the healthcare plan’s representatives reminding them the plan must be reimbursed if-and-when the lawyer successfully recovers for the client. In most cases, the plan’s representatives will insist that the plan is entitled to “dollar-for-dollar” reimbursement for every treatment it paid for related to the accident. Despite the plan’s typical claims, dollar-for-dollar reimbursement rights are never a given. Therefore the plaintiff’s lawyer is required to perform some due diligence to find out what the plan’s rights truly are before ever agreeing to repay the plan a cent.

A good place to start gathering intelligence about a healthcare plan is in the initial client meetings. I recommend adding some preliminary questions about healthcare to new client intake sheets. Be sure to ask whether an employer provides the healthcare, and if so, whether the employer is a government or private corporation or company. If the client works for a government agency such as a public school system and is treating with state health insurance, this is vital information for the case. The reimbursement rights of state government healthcare plans are regulated by state law and are subject

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to a defense commonly known as Georgia's "made whole" rule. This code section will only allow the plan to be reimbursed if the client is fully compensated for all economic and non-economic damages out of their share of the proceeds, i.e. "made whole."¹ This code section can save a huge chunk of the client's eventual recovery proceeds and can be a game-changer for the entire liability case. If the attorney knows the made whole rule is likely going to apply in the client's case, he or she can proceed with settlement talks knowing the client is going to keep funds out of the recovery that otherwise would flow back to the healthcare plan. Always look for this code section to apply if a client's benefits are provided by a government entity, or the client is paying for healthcare individually.² The problem is, most private healthcare plans provided to employees in this country are exempt from Georgia's statute. So if the client's healthcare is not obviously a government benefit plan or an individual policy, the lawyer has some extra digging to do.

Requesting the Documents

Most private healthcare plans in this country are governed by the Federal code section known as The Employee Retirement Income and Security Act of 1974 (ERISA)³. This is a federal code section that, unfortunately for plaintiffs, expressly preempts Georgia's made-whole statute referred to previously. However, not every healthcare plan provided by a private employer is governed by ERISA. And not every ERISA plan is written with the appropriate contract language to reject the "made whole" rule and other arguments against dollar-for-dollar reimbursement. The trick for the plaintiff's attorney is obtaining the documents needed to make these arguments.

Identify the "Plan Administrator"

If a client is treating with employer-based insurance regulated by ERISA,

the client has the right under 29 U.S.C. 1024 to obtain numerous documents from the plan's designated "Plan Administrator."

The plan administrator is a person or entity designated by the healthcare plan that has a *duty* to provide the client with numerous documents related to the plan. Note, that in most cases this is not the same entity that calls every week to remind your firm of the plan's lien. The calls usually come from hired third-parties who have no duty to provide the documents referenced in this code section. While it is fine to eventually negotiate with these third-parties, they are not usually very helpful in obtaining documents about the plan. The main information to gain from the plan's third-party representatives is the contact information for the plan's designated "plan administrator," and a copy of the most recent "Form 5500" for the plan.

The Form 5500 is a document every plan regulated by ERISA is required to file each year with the U.S. Department of Labor. If and when a Form 5500 is received, the plan administrator's name and address is usually listed in box "3A" of this form. Once the plan administrator's contact information is known, that is where to go mining for documents and information.

What to Request

Send a request to the plan administrator for all documents related to the plan pursuant to 29 U.S.C. 1024(b). The plan administrator has a duty to provide these documents for each year that the client received benefits. I usually put the following language in my request:

"I am making this request on my client's behalf, pursuant to her rights under the Employee Retirement Income Security Act (ERISA), United States Code 29 U.S.C § 1001-1461, specifically code section 29 U.S.C. 1024.

Pursuant to the act, please provide:

- Copies of the entire Summary Plan Description (SPD) and other Plan Documents relating to my client's health insurance coverage for the years, 2013 and 2014;
- Copies of the entire healthcare plan/contract for the above-referenced insurance plan for years 2013 and 2014.
- Copies of the Form 5500, including all attached schedules, filed with the U.S. Dept. of Labor for the years 2013 and 2014.
- An itemized list of payments the above-referenced plan paid for benefits which you maintain are related to her injuries from this accident.
- The Administrative Services Contract prepared by the above-referenced healthcare plan for the years 2013 and 2014.
- Copies of all contracts including, but not limited to: insurance contracts, Stop Loss Contracts, Health Insurance Contracts, Insurance Intermediary Services Contracts and Administrative Services Contracts related to the above-referenced plan serving Georgia for 2013 and 2014; and
- Any amendments to the Plan Documents for the above-referenced plan (including but not

"I am making this request on my client's behalf, pursuant to her rights under the Employee Retirement Income Security Act (ERISA), United States Code 29 U.S.C § 1001-1461, specifically code section 29 U.S.C. 1024.

limited to the Summary Plan Description) for the years 2013 and 2014; and

- Copies of the SMM (Summary of Material Modifications) statements for the years 2013, and 2014; and

Please provide the above documents in accordance with the ERISA act within the next 30 business days, or the plan administrator will be personally liable to my client for \$110 a day penalty for every day you fail to provide these documents, pursuant to the ERISA Act. In a good faith effort to resolve this claim quickly, I would request you provide these documents well prior to 30 days if at all possible.

Note that there is a penalty referenced at the end of this document that asserts a fine of \$110 a day for failing to provide the requested documents.⁴ If the plan administrator does not provide the requested documents within 30 days, be sure to remind of them of their oversight. In that follow up letter, be sure to cite case law showing that Courts have enforced this penalty against the plan administrator in the past.⁵

What to Look For

If the plan states there is no plan administrator, or if the document request produces no results after 30 days, that may actually be a good thing for the client. The documents may not exist because the plan is not regulated by ERISA after all. When requests go unanswered, it is best to take a strong position that the plan is not really a self-funded plan regulated by ERISA, and Georgia's made whole doctrine in Georgia Code Section 33-24-56.1 will therefore apply. Remember that just because the health insurance is provided by an employer, it does not automatically mean the healthcare plan is regulated by ERISA. Small businesses will often offer employees health-care plans that are not actually self-funded by the employer, but rather

healthcare arrangements available to the employees at discounted rates or where portions of the monthly premiums are paid for by the business. If that is the case, there's a strong argument O.C.G.A. § 33-24-56.1 will apply. The plan has the burden of proof showing otherwise, so leave it up to the plan disagrees with this position by providing the documents to prove it.

If the request to a plan administrator does result in the office being bombarded with plan documents, it is important to look for the following:

Is the Plan Self-Funded?

Does the plan contribute to the cost of funding the plan and does it pay the claims directly? There should also be some type of explanation in the plan language as to how the plan is set up and funded through a trust or a similar type of mechanism. If you don't see this language, it's possible the employer may simply promote the plan to its employees and pays portions of the premiums each month like the situation mentioned above. Again, if that is the case, then it is appropriate to argue ERISA does not apply and the plan is subject to the O.C.G.A. § 33-24-56.1 and Georgia's made whole rule.

Does the Plan Reject the Made Whole Doctrine?

Even if the plan is truly a self-funded ERISA plan, it's possible the made whole rule can still apply depending on the wording in the plan language. The 11th Circuit rule is that the made-whole doctrine is a traditional equitable defense that applies in every case, unless it is expressly rejected in the plan documents.⁶ If you don't see an express rejection of this rule in the plan documents, argue the plan has no right to reimbursement.

Does the Plan reject the "Common Fund Doctrine?"

The common fund doctrine is the traditional equitable defense that the plan should have to contribute to the plaintiff's cost of obtaining the recovery by reducing its lien by a pro-rata share of the plaintiff's attorney's fees and expenses. If this is not specifically rejected in the plan language, argue the doctrine applies.⁷

Does the Reimbursement Language Identify a "Specific Fund?"

The plan must identify the funds from which it is seeking reimbursement. For example, simply stating "a reimbursement right" without identifying a particular fund, can be deemed unenforceable.⁸ However, a simple change to the wording of the contract to add "out of the recovery" from the third party, will likely mean the lien is enforceable.⁹

Is There Other Favorable Language in the Plan?

When reading through the statement of reimbursement rights, look for express limitations on the lien. Sometimes plans will include language that it will reduce by the share of attorney's fees and expenses. Obviously if that language is in the plan, use it to your advantage.

Compare the SPD and Other Plan Language

Always look both at the summary plan description (SPD) and the actual plan contract, if a contract is provided. The Supreme Court recently clarified the role of these two documents in Cigna Corp. v. Amara.¹⁰ Amara holds that in the event of a conflict between the terms of the SPD and the terms of the actual plan document, the plan document controls. For example, if the right to reimbursement is stated only in the SPD – and not in the plan language -- then there is no right to

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reimbursement. If the made-whole doctrine is rejected in the SPD, but not in the actual plan language, the doctrine should apply. In my experience, plan representatives often state that Amara has been overruled by the more recent case of U.S. Airways v. McCutchen.¹¹ I am quick to point out that the first footnote in the majority's opinion in McCutchen specifically states it does not overrule the Cigna Corp. v. Amara decision regarding conflicts between the summary plan description and the plan.¹²

Negotiate the Liens Before Settling the Case

By far the greatest benefit investigating a healthcare plan early in the case is that it takes the guesswork out of repaying liens when it is time to settle the liability claims. How can a lawyer effectively negotiate a liability settlement, without a clear idea of how much of the client's recovery will have to be used to repay healthcare. And if after making all these requests and reviewing all the relevant documents, it appears the healthcare plan's reimbursement rights really are strong, the lawyer can at least leverage the fact that the liability

claim has not yet settled. The lawyer should notify the healthcare plan's representatives that settlement numbers are on the table, and those numbers cannot be accepted unless there is some significant downward movement on the lien. In a low-policy limits case where a stubborn healthcare plan is threatening to take most of the recovery, the lawyer and client can even threaten to walk away and leave the plan holding out an empty bag. The healthcare plan will sometimes budge in order to take something from the client's case rather than nothing at all.

FOOTNOTES

1. O.C.G.A. § 33-24-56.1
2. Georgia's made whole rule in O.C.G.A. § 33-24-56.1 arguably applies to Federal government plans as well. See *Empire Healthcare Choice v. McVeigh*, 126 S.Ct. 2121 (2006) and *Blue Cross Blue Shield Health Care Plan of Georgia v. Gunter*, 541 F.3d 1320 (11th Cir. 2008)
3. United States Code 29 U.S.C § 1001-1461
4. 29 U.S.C. 1132 and 29 CFR § 2575.502c-1
5. *Curry v. Contract Fabricators Inc.*, 891 F. 2d 842 (11th Cir. 1990); and *Hamilton v. Mecca Inc.*, 930 F. Supp. 1540, 1557 (S.D. Ga. 1996).
6. *Cagle v. Bruner*, 112 F. 3d 1510, 1522 (11th Cir. 1997) and a host of other precedent. See also *Parker v. Ross*, 147 F. Supp. 2d 1376 (M.D. Ga. 2001); *Adelstein v. Unicare*, 31 Fed Appx. 935 (11th Cir. 2002) and *Summerlin v. Georgia-Pacific*, 366 F. Supp. 2d 1203 (M.D. Ga. 2005).
7. See *Bombadier Aerospace v. Ferrer, Poirot & Wasnbrough*, 354 F. 3d 348 (5th Cir. 2003); *U.S. Airways Inc. v. McCutchen*, 133 S. Ct. 1537 (2013).
8. *BlueCross BlueShield of S.C. v. Carillo*, 372 F. Supp. 2d 628 (N.D. Ga. 2005)
9. *Popowski v. Parrott*, 461 F. 3d 1367 (11th Cir. 2006).
10. *Cigna Corp. v. Amara*, 131. S. Ct. 1866 (2011).
11. *U.S. Airways v. McCutchen*, 133 S. Ct. 1537 (2013)
12. *Id.*

Forum Defendant Removal prior to being properly “joined and served”: Avoiding the “Jack Rabbit” Removal Trap

by: Shaun O’Hara



Shaun O’Hara was born in Columbus, Georgia and graduated Cum Laude with a B.A. from LaGrange College in 2007. While at LaGrange, Shaun played baseball, received honors on the All-Conference Academic Team, was an Academic All-American, and was the winner of the Malcolm Shackelford Award as LaGrange College’s Top Male Scholar-Athlete. Shaun spent a year working in Columbus before furthering his studies at Mercer University, Walter F. George School of Law where he graduated Cum Laude in 2011. While in law school, Shaun served as a research assistant and clerked for the Honorable Hugh Lawson in the U.S. District Court for the Middle District of Georgia. Shaun also served as a member of the Wagner Labor and Employment Law moot court team.

After graduation, Shaun joined the law firm of Pope McGlamry and focused his career on representing plaintiffs in personal injury, wrongful death, products and pharmaceutical liability, class actions and mass torts actions. In April 2015, Shaun joined the Charles A. Gower law firm, and now focuses his career on civil litigation representing plaintiffs in personal injury, wrongful foreclosure, wrongful death, and class actions.

Shaun is active in the community, serving as an assistant baseball coach at Peach Little League and on the Columbus Museum Board. He also serves as treasurer of the Columbus Young Lawyers. Shaun is married to Whitney Johnson O’Hara. She is an attorney at the law firm of Page, Scramton, Sprouse, Tucker & Ford, P.C.

Overview: This article addresses the forum-state exception to the removal statute, which prohibits removal of diversity actions from state to federal court if even one “properly joined and served” defendant is a citizen of the forum state. Crafty forum defendants, however, have attempted to manipulate the rule by removing lawsuits prior to being served, and recent District Court decisions are split on the legitimacy of this tactic, while the Courts of Appeals have been silent on the issue. The Courts of Appeals’ silence is likely to continue for at least two reasons. First, an order remanding a case to state court is statutorily non-reviewable on appeal, unless

removal was sought under the Class Action Fairness Act (“CAFA”). Second, for those cases tried in federal court and subsequently appealed, judicial economy counsels against the reviewing court’s voiding of an entire federal proceeding only to remand it for re-adjudication in state court.

This article sheds light on forum defendant “jack rabbit removal” tactics and hopefully provides guidance on how to avoid their trap.

I.

The Removal Statute:

Under the current removal statute, 28 U.S.C. § 1441, “any civil action

brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” *Id.* A federal court has subject-matter jurisdiction over a diversity of citizenship case pursuant to 28 U.S.C. § 1332, but not every diversity case is removable.

A non-federal question case “shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b). Under

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the forum-defendant rule, a defendant may remove a case to federal court only when there is complete diversity of citizenship “between all named plaintiffs and all named defendants, **and no defendant is a citizen of the forum State.**” *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84, 126 S. Ct. 606 (2005). The forum-defendant rule provides:

A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest **properly joined and served** as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b)(2) (emphasis added).

Crafty forum defendants have attempted to exploit the forum defendant rule by monitoring the electronic filing systems that some state courts now utilize and filing notices of removal as soon as cases are filed, often on the day or day after the case is filed, before a plaintiff has the opportunity to serve the complaint. Forum defendants have also started filing answers to complaints prior to service so as to prevent plaintiffs from voluntarily dismissing their complaint in federal court. These tactics have forced many plaintiffs’ lawyers to perfect service of process on forum defendants the same day that they file their lawsuits. The hypothetical below illustrates forum defendants’ jack-rabbit removal tactics.

II.

How it works

Plaintiffs filed their Complaint against Defendant Whitney and its parent company, Johnson (collectively, “WJO”) in the Superior Court of Muscogee County, Georgia on Thursday, September 18, 2014.

Plaintiffs’ counsel knew and had developed a professional relationship with WJO’s counsel from prior cases. Thus, as a professional courtesy, Plaintiffs’ counsel emailed WJO’s counsel on September 17, 2014 to let him know another Georgia complaint would be filed. The Complaint was filed on September 18, 2014, and the summonses to WJO were issued on the same day, for service. On the afternoon of September 19, 2014 at 2:38 p.m., the summonses to WJO, addressed to the Registered Agent for WJO, Corporation Service Company in Columbus, Georgia, were sent for service of process.

At 4:33 p.m., before WJO’s Registered Agent received the summonses, WJO removed the case to the United States District Court for the Middle District of Georgia. Both WJO entities have their principal places of business at the same location in Columbus, Georgia. Nonetheless, WJO argued that, because they were not served with process prior to removal, removal was proper.

At 11:24 a.m. on Monday, September 22, 2014 – the morning of the next business day following removal – WJO answered the Complaint. Because WJO answered the Complaint – two business days after it was filed – Plaintiffs could not, absent WJO’s consent or an Order of the Court, dismiss the case without prejudice. *See* Fed. R. Civ. P. 41(a)(1)(A)(i) (allowing a plaintiff to file a unilateral notice of dismissal only prior to the filing of an answer). Thus, WJO’s race to remove and answer could deprive Plaintiffs of their choice of forum.

III.

Cases

The above hypothetical demonstrates how forum defendants seek to avoid application of the forum-defendant rule by racing to remove lawsuits to federal court prior to

being properly served. Once the forum defendant files its removal motion, the plaintiff has several options. The first option could be to voluntarily dismiss the case and refile. This option, however, as illustrated by the above hypothetical may not be available if the forum defendant files an answer prior to the dismissal. If the forum defendant files an answer then the plaintiff can seek leave of court to dismiss without prejudice. Alternatively, the plaintiff can seek to have the case remanded to the trial court. The discussion below addresses these options and explains how courts have dealt with removal in this context.

A. Remanded or Voluntarily Dismissed

It is well-settled in the Eleventh Circuit that removal statutes are narrowly construed. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 766 (11th Cir. 2010). The Eleventh Circuit recognizes that “there is a presumption against the exercise of federal jurisdiction, such that all uncertainties as to removal jurisdiction are to be resolved in favor of remand.” *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001).

The Eleventh Circuit has not directly addressed the issue of whether a forum defendant can avoid the forum defendant rule by removing prior to being served. However, in *Goodwin v. Reynolds*, 757 F.3d 1216, 1221 (11th Cir. 2014), on appeal from a District Court’s grant of a plaintiff’s motion to voluntarily dismiss after an answer was filed, the court held that the forum-defendant rule clearly contemplated Plaintiff’s ability to defeat Defendants’ purported right of removal.

In *Goodwin*, the forum defendants removed the case to federal court prior to being served. The District Court held that under the plain language of the statute, the defendant’s

removal was proper. Goodwin v. Reynolds, No. 2:12-CV-0033-SLB, 2012 WL 4732215, at *5 (N.D. Ala. Sept. 28, 2012). However, as a compromise, the District Court allowed the plaintiffs to voluntarily dismiss the action and refile in state court.

On appeal, the Eleventh Circuit held that it was undisputed that if defendants had been served before removal, the forum-defendant rule would have barred removal. The only reason the case was in federal court was that the non-forum defendants accomplished a pre-service removal by exploiting, first, Plaintiff's courtesy in sending copies of the complaint and, second, the state court's delay in processing Plaintiff's request for service.

The Northern District of Georgia addressed the issue in Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361, 1372 (N.D. Ga. 2011). In Hawkins, the sole defendant, a resident Georgia corporation, removed the case to the district court prior to being served. 785 F. Supp. 2d at 1364. Although plaintiffs and defendant were diverse, plaintiffs argued it was improper for a forum defendant to remove. *Id.* Plaintiffs conceded that the plain language of Section 1441 favored defendant's position as an unserved forum defendant but argued that such a result was absurd. *Id.* at 1365. Despite plaintiffs' concession, the Hawkins court found that under a plain reading of the statute, the placement of the phrase "none of the parties in interest" in front of "properly joined and served" "implies that there is at least one defendant that is a party in interest that has been properly joined and served." *Id.* at 1369. The Hawkins court thus concluded that because the sole defendant was unserved, there was no "party in interest" thereby making removal improper under a plain reading of the statute.

Id.

The forum defendant rule was designed to keep plaintiffs from naming – but never serving complaint or litigating – against a nominal in-state

defendant. Thus, the "joined and served" language was included to prevent plaintiffs from forum shopping and gaming the system to keep a case in state court. See FTS Int'l Servs., LLC v. Caldwell-Baker Co., No. 13-2039-JWL, 2013 WL 1305330, at *3 (D. Kan. Mar. 27, 2013) (courts "reading of the text of the statute in the legislative history and purpose of the removal statute, including evidence that the "properly joined and served" language was included in 1948 to prevent plaintiffs from defeating removal through improper joinder of a forum defendant rather than incentivizing defendants to race to a federal forum.") Now, corporate defendants are gaming the system to avoid their own home state courts in preference for federal court by racing to remove prior to being properly served.

B. Caution

Some courts have denied motions to remand when the forum defendant removes prior to being served. Those courts generally have held that the text of the removal statute is not ambiguous and because there is no ambiguity, the plain meaning of the statute permits an unserved forum defendant to remove an action based on diversity. An exemplar of a decision in this vein is Yocham v. Novartis Pharmaceuticals Corp., No. 07-1810-JBS, 2007 WL 2318493, at *1-2 (D.N.J. Aug. 13, 2007). In Yocham, a Texas plaintiff filed suit against a New Jersey defendant in New Jersey superior court. Prior to service, the New Jersey defendant filed a notice of removal premised on diversity. The district court ruled that the case was properly removed.

As support for this conclusion, the Yocham court cited several other opinions from the District of New Jersey, including: Thomson v. Novartis Pharms. Corp., No. 06-6280-JBS, 2007 WL 1521138, at *4, 2007 U.S. Dist. LEXIS 37990, at *15 (D.N.J. May 22, 2007) (allowing removal by a forum defendant where

all defendants were unserved New Jersey residents and plaintiffs were Georgia residents); Frick v. Novartis Pharms. Corp., No. 05-5429-DRD, 2006 WL 454360, at *2-3, 2006 U.S. Dist. LEXIS 9178, at *6-7 (D.N.J. Feb. 22, 2006) (relying on "literal language of the statute" to allow removal by single unserved forum defendant). The conclusion of all three decisions is that § 1441(b) is not ambiguous. The statute's plain meaning prevents removal by a forum defendant only when that defendant "has been 'properly joined and served.'" Yocham, 2007 WL 2318493 at *3.

IV.

Conclusion

Because the issue of whether jack-rabbit removal is permissible or simply gamesmanship has been resolved differently by different courts and by different judges on the same court, plaintiffs who intentionally select a defendant's home state court must tread carefully and quickly to remain in state court. Unfortunately, caution now counsels against providing a courtesy copy of the complaint -- or even a notice of an anticipated filing -- to opposing counsel. For the best chance of keeping a case in the state court, all forum defendants should be served immediately after filing. This practice can even require enlisting assistance from a process server across the state, for example, when a defendant is located in one city but has its registered agent for service in another that is hundreds of miles away. If service of a copy of the Summons and Complaint is permitted under state law and counsel are concerned about the possibility of a quick removal defeating the choice of forum, plaintiff's counsel might be well served to have a file-stamped copy immediately scanned and emailed to a process server who can quickly serve the registered agent.

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including the General Counsel's office, not be or be perceived to be in charge of the internal investigation. In such cases, it may be appropriate to delegate the task of overseeing the investigation and retaining special counsel to investigate to the Audit Committee of the Board or non-implicated board members forming a Special Committee.⁷ The company is best served when the government, independent auditors, the courts, the media, and the investment community appreciate the company's commitment to integrity and to uncovering the facts.

Other issues to be discussed at the earliest stage are to whom investigators will report their findings and whether the results of the investigation and the investigation report should be delivered in writing or orally.

V.

Preserve, Gather, and Notify

When the need for an internal investigation is first identified, immediate steps should be taken to (1) gather and review relevant documents and information and (2) prevent the destruction of potentially relevant material by (a) suspending systems that may automatically delete or erase digitally stored information (process driven spoliation) and (b) notifying employees who may possess relevant material that they should preserve same. A "Non-Destruct Memorandum," instructing employees not to discard relevant information, is commonly used.

Depending on the nature of the allegations, a notice to preserve may in fact prompt spoliation by culpable employees. If this potentiality is appreciated, consideration should be given to involving IT professionals, including an outside forensic IT consultant/expert if necessary, in an effort to preserve relevant material before any notice is sent to employees. Conceptually,

it is important to differentiate the universe of items that should be *preserved* from the universe of items that should be *collected*.

Emails, text messages, cell phone audio recordings, photographs, card-key entry data, surveillance video, and voice mail messages are the types of things that may be destroyed by process or intent (or that employees may believe are capable of being destroyed), and consideration must be given to the potential need to preserve such things. Depending on how discreet the matter to be investigated is and the chosen methodology for the investigation, the first conversation with the selected investigator should make reference to (1) the categories of items that have been gathered; (2) what efforts were made to gather, preserve, and notify; and (3) identification of additional materials that are relevant but could not be obtained or preserved. It is good practice to Bates label the materials gathered for the purpose of an internal investigation.

VI.

Communications with Employees.

If an independent committee is controlling the investigation, it should handle the communications with employees. Otherwise H/R, or perhaps General Counsel, would likely be the appropriate communicators. The non-destruct / Notice to Preserve memo sent to affected employees should include general information about the nature of, purpose of, and expected length of the investigation. It should also explicitly communicate what the company's expectations are as to employee cooperation during the investigation, including the requirement of submission to interviews by Special Counsel. Investigations may have the effect of lowering employee morale, and those who communicate with employees should keep this in mind.

Consideration should be given to the extent to which company employees will be authorized to retain separate counsel whose fees will be advanced or indemnified by the company pursuant to an existing policy, bylaws, state law, or an ad hoc decision to indemnify for the duration of the investigation.⁸

VII.

Who will Investigate

Depending on the circumstances, it may be appropriate for a range of folks to handle the investigation, including a line manager, self-directed human resources employees (sometimes in teams), H/R employees under the direction of counsel, in-house counsel, regular outside / litigation counsel, special counsel, or a non-lawyer outside investigator. Decisions about who is called upon should be heavily influenced by the type of investigation needed and potential uses of the investigation report, subjects which are covered in detail in below.

"Regular" outside litigation counsel who attempts to serve in the dual capacity of neutral investigator and litigation advocate may jeopardize both the integrity of the investigation (because his role as advocate makes him less objective) and his ability to serve as advocate.⁹ On many occasions, investigating litigation attorneys have been made witnesses in civil cases, a prospect that may not sit well with companies in a defensive litigation posture.¹⁰

Choosing independent or special counsel with few, if any prior ties to the company has become commonplace and is generally regarded as the first step in convincing outside parties of the authenticity of the company's desire to conduct a meaningful investigation.

VIII. Scope of Investigation

Based on various factors, including cost concerns, decisions must be made regarding the scope of Special Counsel's mandate, and this should be clearly set forth in counsel's retention agreement, as well as the agreed upon reporting procedures and protocols for documenting the investigation (including whether communications will be labeled as "ATTORNEY-CLIENT PRIVILEGED" and/or "ATTORNEY-WORK PRODUCT". Will Special Counsel be given a broad mandate to investigate any and all suspected wrongdoing or a narrower mandate, at least at the outset, to examine only specific matters?

IX. The Different Types of Investigations¹¹

Given the reliance placed on internal corporate investigations, the trustworthiness of their conclusions is of fundamental concern. But since the investigator is retained and compensated by the company that is the subject of the investigation, there may be skepticism that the investigation is result oriented. Effort should be made to take measures which enhance reliability. This begins with an appreciation of the nature of different types of investigations attorneys do and the presence or absence of *truth standards* that apply to each.

There are four basic types of investigations attorneys conduct: the *counseling* investigation, the *due diligence* investigation, and *reliance* and *duty* investigations.¹² Not all of these pose the same level of truth and reliability concerns; and categorization depends upon how information from the investigation will be used.

A. Counseling Investigation

The counseling investigation involves the attorney's routine investigation of a client matter in order to

learn information to advance a legal position or counseling objective. The investigation is not necessarily commenced in order to fulfill corporate management's duty to investigate, and the attorney's and client's interests are the same. Responding to a pre-litigation demand letter is a situation that commonly begets a counseling investigation. Though the attorney is bound to report candidly to the client, exercise independent professional judgment, and act within the standard of care, there are no special truth standards in place.

B. Due Diligence Investigation

The due diligence investigation is best exemplified by the investigation that precedes an opinion letter provided to a client to be used in connection with some proposed transaction. Opinions may relate to such things as the enforceability of a non-compete agreement, whether security proposed in contemplation of a financial transaction is adequate, whether there is a basis to proceed with trademark infringement claims, or whether a transaction is subject to tax exemption. The representations by counsel are focused and precise, and often designed to fulfill a condition precedent to a transaction.¹³ Though the attorney could be liable for negligent mis-statements, the risk of conflict between attorney and client in the opinion setting is still relatively minimal. The client also has the opportunity to recognize and cure inaccuracies or faulty conclusions before the opinion is utilized. Thus, the due diligence investigation involves fewer truth and reliability risks than Reliance and Duty investigations.

C. Reliance and Duty Investigations

Reliance and duty investigations, and the special truth standards imposed by these categories, are appropriate when companies (1) plan to share findings from an internal investigation with third

parties who are invited to rely on the results, such as a government agency, regulatory body, the courts, or the public; and/or (2) have a duty to investigate.¹⁴

1. Third Party Reliance

Allegations of corporate wrongdoing often trigger the need for a reliance investigation, the results of which are presented to third parties for reliance thereon. Given the reality that a company funded investigation may draw skepticism as a result oriented exercise, the investigation process and its conclusions must stand up to critique. The investigation must have integrity. It must be probative, candid, and complete. In addition to providing the service that special counsel was engaged to deliver - a neutral evaluation - an upright investigation will minimize skepticism. Though infrequently consulted, attorney ethics rules directly apply and assist us in analyzing outside/special counsel's responsibilities in connection with a reliance investigation.

Model Rule 2.3 of the *Model Rules of Professional Conduct* deals with "Evaluation for Use by Third Persons." It allows an attorney with client consent to conduct an "evaluation of a matter affecting a client for the use of someone other than the client."¹⁵ The Comments to the Model Rules clarify that 2.3 applies to attorneys who are retained by a client "whose affairs are being examined." Under the rule, a lawyer may conduct an evaluation if "the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client."

There are three aspects to Rule 2.3: an "evaluation" by an attorney of a "matter affecting a client" for the "use of someone other than the client." Thus, the investigator must represent or imply that his findings are the result of an "evaluation." The third party "use" element is

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generally not satisfied by merely communicating information that is learned from an investigation. In that situation, there has been no claim of *provenance* and Rule 2.3 is not implicated.¹⁶ Instead, Rule 2.3 is implicated “when the information disclosed, even if only summary, is expressly or impliedly represented as being based on an internal investigation.”¹⁷

For example, an investigation to be used in court proceedings in support of a *Faragher-Ellerth* defense to allegations of unlawful workplace harassment clearly implicates Rule 2.3. Likewise, a corporation that responds to public allegations of wrongdoing by publicizing exonerating investigative findings rather than simply denying wrongdoing -- perhaps for public relations reasons -- implicates Rule 2.3 because the public is invited to “use” the findings. Likewise, companies that fear sanctions as a result of suspected violations of anti-trust laws, SEC regulations, EPA regulations, or corporate criminal laws and desire leniency in exchange for timely and voluntary disclosure of wrongdoing will also be motivated to commission investigations that are bound by the strictures of Rule 2.3.

Model Rule 1.6, which regulates how an attorney must treat information obtained during an internal investigation, also becomes important in the context of *Reliance* investigations (or any investigation that will result in the sharing of investigation materials). Rule 1.6 obligates attorneys to treat “information relating to the representation of a client” as confidential unless (1) the client gives informed consent to disclosure, (2) the disclosure is impliedly authorized in order to carry out the representation, or (3) the disclosure is necessary to comply with other law or a court order.

Even when an investigation report is, by design, something

that a company expects to voluntarily produce to a third party -- implicating Rule 1.6(2)'s implied disclosure authority -- it is prudent to require (and so state in Special Counsel's engagement letter) that the investigation materials and report (1) will be delivered upon conclusion of the investigation to a specified individual/constituent at the company (usually the independent committee overseeing the investigation or General Counsel); (2) are subject to attorney-client and work product protections; and (3) that any disclosure to third parties will be made by the company at its discretion. This maximizes the option of keeping the report confidential if circumstances so dictate.

Decision-makers may ultimately decide that the risks that accompany disclosure of the report to potential claimants or civil adversaries, which will occur during litigation if a court determines that waiver of privilege occurred via voluntary production to a third party (such as the media, OSHA, EEOC, SEC, or DOJ) are greater than the fallout associated with not publicizing investigation materials for outside use. One concern with this approach is that Special Counsel's engagement letter, and the fact that the company reserved the right to control privilege, will likely be discovered during litigation. This may have a tendency to make the company look insincere, only willing to disclose of the result of an investigation if favorable.

2. Duty to Inquire

The second type of internal investigation that poses particular concerns about truth and reliability is the *duty* investigation -- one initiated “in furtherance of the legal requirement of the corporation to inquire or keep informed.”¹⁸ Under the Sarbanes-Oxley Act, for example, publically traded companies are required to investigate in certain circumstances.¹⁹

The duty to investigate may also arise from the duty of care imposed by corporate law. “The duty requires directors to keep reasonably informed and to implement systems to monitor compliance.”²⁰ As in the case of reliance investigations, the duty investigation insists on a reasonable inquiry and must rebut concerns about reliability.

As a practical matter, it makes sense to impose truth standards on all internal investigations, even if they may not be required. A company may not know at the outset how it will use the results, but if third party reliance is a possibility, that option is best preserved when truth standards are employed. Moreover, given that an outside investigation is often a substantial undertaking, there should automatically be an overwhelming incentive to insist on compliance with truth standards. The more reliable and accurate the investigation report, the better off the company will be at identifying real problems.

X.

The Truth Standards

A. Accurate account

The first standard imposed on the investigator conducting a reliance or duty investigation is to develop an accurate account. The investigation is neither the place for advocacy, personal opinions, nor speculation. Rather, through a process of inquiry, the internal investigation is based on the “justified and true belief” of the investigator such that the investigator vouches for the information he offers.²¹ The report must neither disserve the client who called for an outside investigation by unfairly implicating the client, nor disserve the third party asked to rely on it by unfairly exonerating the client. “An accurate account is the only safe harbor between the interests of the client and the interests of the third party.”²²

Lawyers are typically concerned with advocacy, not objectivity. In an investigative role, however, special counsel is confined to objectivity and professional judgment. He must understand the facts relating to the allegations and the legal standards brought to bear, discern the controlling facts, and by application of facts to legal principles determine whether a violation of law/policy/regulation occurred.

Though our system of justice presumes there to be objective factual truths, the outside investigator's conclusions cannot be measured against "some Platonic ideal." Rather, it is well argued that "the investigator's legal analysis and conclusions -- like those of a judge -- are constrained by professional standards of analysis and interpretation."²³ The investigation report is a prediction of how a situation would be judged by the legal system; and it loses value when it "strays beyond the boundaries of acceptable professional interpretation of the materials."²⁴

Unlike the adversarial approach to truth finding, where the fact-finder's conclusion about what *really* happened is aided by the "clash of interests, factual accounts, and legal arguments" presented by opposing sides, the investigative realm involves only one actor.²⁵ The investigator must be sensitive to the absence of the traditional process and achieve objectivity another way -- through independence, sufficient inquiry, evidentiary reliability, and the exercise of professional judgment. These are the "tools of accuracy."²⁶

1. Independence

The accurate account standard requires avoidance of conflicts of interest that may undermine an investigation's credibility. There are two primary potential conflicts.²⁷ "Advocacy conflicts" arise when counsel attempts to switch from the role of advocate, not being principally concerned with impartiality

and objectivity but with advancing client interests, to the role of investigator, one confined to objectivity. Thus, special counsel investigating a matter should have no simultaneous advocacy functions and should not have participated in advising the client previously regarding the matters/transactions to be investigated. "Biasing interests" such as longstanding employment by the client, a financial interest in the client, and strong personal relationships with investigation targets or probable interviewees must also be identified and generally avoided, though it is possible that an investigator could rise above his or her bias.

The bias element of independence does not automatically preclude an internal investigation by in-house counsel. Indeed, it has been suggested that "the ability to render honest, dispassionate advice, favor notwithstanding, likely ranks among the higher callings of inside counsel."²⁸ Frequently, though, the bias concerns related to in-house counsel's desire for continued employment make him an unwise choice for a reliance or duty investigation. Likewise, "regular" outside counsel may have a motive to avoid criticizing senior management, a source of potential future law firm revenues.

The *Model Rules of Professional Conduct* offer guidance with respect to the issue of bias in an analogous situation. Rule 1.7, one of the conflict of interest rules, requires that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, an example of which is where there is a "significant risk" that the representation will be "materially limited" by "a personal interest of the lawyer." Thus, counsel should decline to conduct an internal investigation if there is a substantial risk that the "interests, incentives, or obligations of investigative counsel arising out of the relationship with the client would materially divert the inves-

tigator from providing an accurate account."²⁹

2. Sufficient Inquiry

Recognizing that cost concerns will often impose a limit on the extent of the scale of the inquiry, to best ensure an accurate account, it is incumbent on the investigator to inquire into the facts "until additional investigation no longer presents a genuine prospect of gaining information that will materially affect the findings."³⁰ Though the client has authority to define the scope of the representation and to place reasonable limits on fees (See Model Rule 1.2(a)), client-imposed limitations that will prevent investigative counsel from complying with the sufficient-inquiry standard should be rejected.

3. Evidentiary Reliability

The investigative process lacks the adversarial process's benefit of cross examination. The investigator must assume the (challenging) concurrent roles of direct examiner, respectful cross examiner, judge, and jury in order to determine what is authentic and reliable.

4. Professional Judgment

The investigator must do more than offer his or her *take* on the issues. He must "employ accepted professional standards of legal interpretation and reasoning to analyze and apply law, and to reach legal conclusions."³¹

B. Appropriate Degree of Certainty

Even when truth standards are satisfied, there is no guarantee of accuracy. What then, is the appropriate degree of reliability to which investigators should be held? It has been suggested that the *reasonable degree of professional certainty or probability* standard adopted by most jurisdictions in connection

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with the admission of expert testimony is an appropriate measuring stick. The investigator's conclusions are reasonably reliable when he has "adhered to reliable procedures and engaged in a professional interpretation of the law."³² The reliability of the investigation process and its conclusions should be evident through the analysis provided in the investigation report.

C. Appropriate Reliability Qualifications

The attorney's duty of candor requires that he list any material conditions that limit the reliability of a reliance or duty investigation.³³ It is suggested that "an investigator who does not know whether or how limitations on the investigation affected the reliability of his conclusions has not engaged in a sufficient deliberation about the truth standards to deliver a report."³⁴ Where there have been external limitations potentially affecting reliability (unavailability of witnesses due to illness or death, client's barring of access to critical information, or the urgent need to issue a report at the expense of a more thorough investigation), but special counsel nonetheless believes he is able to deliver a reliable report, the report should identify the external limiting factors and explain why its conclusions are reliable in any event.

D. Transparency

The reader of an investigation report is entitled to more than the investigator's conclusions alone. The value of the investigation report "lies not only in its commitment to the truth standards and professional judgment, but in its detailed explanation of the evidence, reasoning, and interpretation that gave rise to the conclusions."³⁵

XI. Attorney-Client Privilege and Waiver

In general, the attorney-client privilege protects from disclosure communications from the client to the attorney made in confidence for the purpose of obtaining legal advice. When outside/special counsel conduct an internal investigation, if the investigation is undertaken in response to and for use in defending against a known or contemplated claim, it is presumptively privileged (i.e., communications with counsel and counsel's notes and reports are protected from disclosure). By contrast, a human resources investigation that occurs as a matter of course following a workplace grievance (perhaps to determine appropriate discipline) is probably not privileged.

Whether or not a waiver occurs will depend on how the investigation is used. A waiver likely occurs if the employer affirmatively makes an issue out of the investigation within the context of the ensuing litigation, perhaps by touting that it responded appropriately to the grieving employee's complaint by commissioning an "independent" investigation. Likewise, a waiver will result from the employer's voluntary production of reports or information from its investigation to third parties such as government agencies, law enforcement, or the media.

A. Privilege Basics

The attorney-client privilege is one of the oldest recognized privileges³⁶ for confidential communications. 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 the administration of justice. *Upjohn Company v. United States*,

449 U.S. 383, 389, (1981). Because the attorney-client privilege is an exception to the general rule that the law is entitled to "everyman's" evidence, courts construe the privilege narrowly and place the burden of establishing each element of the privilege, by a preponderance of the evidence, on the party claiming the privilege.³⁷ Either Federal law or state law may govern the law of privilege, depending on whether Federal or state claims are asserted.³⁸ Federal common law privilege rules apply in federal courts, unless state law supplies the rule of decision in which case state privilege law applies. Fed.R.Evid. 501.

Federal law begins with the proposition that "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed.R.Civ.P. 26(b)(1). This broad scope of permissible discovery is limited by the attorney work-product doctrine and any relevant privileges, including the attorney-client privilege. The privilege protects from disclosure "communications from the client to the attorney made in confidence for the purpose of obtaining legal advice." *Wells v. Rushing*, 755 F.2d 376, 379 n. 2 (5th Cir.1985). It shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney. The mere existence of an attorney-client relationship or the mere exchange of information with an attorney does not necessarily give rise to a claim of privilege.

Georgia attorney-client privilege law has, in part, been codified. Georgia's new evidence code, which went into effect on January 1, 2013, did not change the rules relating to privilege.³⁹ Former O.C.G.A. § 24-9-21(2) became O.C.G.A. §24-5-501(a)

“There are certain admissions and communications excluded on grounds of public policy. Among these are . . . communications between an attorney and a client . . .”

(2), the substance of which remained the same:

The attorney-client privilege applies not only to communications with outside counsel but also to communications between a corporate client and its inside counsel. In the seminal U.S. Supreme Court case, *Upjohn, supra*, a corporation’s inside counsel questioned certain lower-level employees in order to determine whether the company had made bribes or other illegal payments, and to advise the company accordingly. The Supreme Court held that these communications were protected by the attorney-client privilege because they “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.” 449 U.S. at 386-87.

Under Georgia law, the “corporate client” privilege is governed by *Marriott Corp. v. American Society of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981). Under *Marriott*, communications between corporate counsel and members of the corporation’s “control group” – those whose job respon-

sibilities include working with counsel, are generally privileged. Communications with employees who are not part of the “control group” are also privileged if the following five requirements are met: (1) the communication was for the purpose of securing legal advice for the corporation; (2) the communication was made at the direction of corporate superiors; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee’s corporate duties; and (5) the communication must have been confidential and kept confidential, with distribution limited to those in the corporation with a need to know.

B. Waiver.

The attorney-client privilege belongs solely to the client and the client may waive it, either expressly or by implication. Once a party waives the privilege as to a communication, the waiver generally extends to all other communications relating to the same subject matter. Once waived, the attorney-client privilege cannot be reasserted. A waiver may occur when a party voluntarily discloses otherwise priv-

ileged communications or testifies as to those communications. *Outside the Box Innovations, Inc. v. Travel Caddy, Inc.*, 455 F.Supp.2d 1374, 1376-77 (N.D.Ga. 2006). Simply testifying about facts will not waive the privilege.

Further, because it is designed to be used as a shield and not a sword, a party may waive the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications. *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994). A defendant may not use the privilege to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes. *Mohawk Industries Inc. v. Interface, Inc.*, 2008 WL 5210386 (N.D.Ga. 2008). As noted in *Mohawk Industries*,

Mohawk Industries, supra, at *8. To waive the attorney-client privilege by voluntarily injecting an issue into the case, a defendant must do more than merely deny a plaintiff’s allegations. The holder must “inject a new factual or legal issue into the case.” *Mohawk Industries, supra*, citing *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987).

The Georgia Supreme Court’s decision in *Zielinski v. Clorox Co.*, 270 Ga. 38, 504 S.E.2d 683 (1998) is instructive. In *Zielinski*, an employee named Zielinski sued his former employer, Clorox, and a plant supervisor, Castleberry, for false light invasion of privacy and tortious interference with employment rela-

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“The great weight of authority holds that the attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.”

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tionship after the supervisor made statements at an all-plant meeting allegedly implicating the plaintiff in an embezzlement scheme. At trial, Zielinski attempted to impeach his supervisor with a transcript of a meeting that occurred prior to the all-plant meeting that was facilitated by and attended by Clorox's litigation counsel.

Defense counsel objected to the admissibility of the transcript on attorney-client privilege grounds, claiming that the meeting occurred after the firm had been retained to investigate the embezzlement scheme at the plant. Although counsel acknowledged that a copy of the transcript of the meeting had been forwarded to the local district attorney by Clorox, he argued that the communications evidenced by the transcript were privileged as to Castleberry and that dissemination of the transcript by Clorox could not act as a waiver of Castleberry's privilege. The trial court ruled that Castleberry had an attorney-client privilege with respect to communications at issue, that Clorox had not waived Castleberry's privilege, and that Zielinski could not use the transcript to impeach Supervisor Castleberry.

Following a jury trial and an appeal, the Georgia Supreme Court took up the case to examine privilege and waiver issues. The Court assumed that a corporate attorney-client privilege existed with regard to the subject meeting, but held that "it is clear that the corporation waived its privilege by forwarding the transcript of the meeting to the district attorney's office." *Zielinski, supra*, 270 Ga. at 40. The Court further found that Castleberry was not in a position to assert the privilege because, unless he could establish a personal attorney-client privilege⁴⁰ with regard to the meeting, the privilege belonged to the corporation and was the corporation's to waive. *Id.*

A waiver has been found to occur in other situations that bear mention. See *Mikart, Inc. v. Marquez*, 211 Ga. App. 209, 438 S.E.2d 633 (1993) (Closely held corporation waived attorney-client privilege concerning letter from corporation's attorney to its president by making letter part of corporation's minutes and producing letter in response to demand by stockholder); *AHF Community Development, LLC v. City of Dallas*, --F.R.D--, 2009 WL 348190 (N.D.Tex., 2009) (E-mail communications between city employees and assistant city attorney which contained attorney's legal advice and opinions related to the city's response to a fair housing complaint and confidential information provided to enable attorney to prepare the city's response were protected by attorney-client privilege; but defendants voluntarily waived privilege with respect to attorney-prepared documents which were used as exhibits at one defendant's deposition and served as the basis for questioning); *S.E.C. v. Roberts*, 254 F.R.D. 371 (N.D.Cal. 2008) (Motion to compel production of notes held by outside counsel hired to conduct internal investigation into company's stock option backdating scheme granted in part; the court specifically finding that to the extent attorneys orally disclosed to the government factual information contained in attorneys' written notes, the attorney-client and work product privileges were waived); *S.E.C. v. Brady*, 238 F.R.D. 429 (N.D.Tex. 2006) (Company waived attorney-client privilege with respect to report prepared by law firm hired to conduct internal investigation and give legal advice concerning potential claims against company where report was intentionally disclosed to S.E.C. in connection with S.E.C.'s investigation); *Conkling v. Turner*, 883 F.2d 431 (5th Cir. 1989) (Waiver found where plaintiff "injected into the litigation

the issue of when he knew or should have known" of the falsity of certain assertions made by the defendant and plaintiff first learned of the falsity through communications with counsel); and *Hearn v. Rhay*, 68 F.R.D. 574 (E.D.Wa. 1975) (By asserting qualified immunity as a defense, defendants impliedly waived the right to assert the attorney-client privilege with respect to any legal advice or confidential communications with the Washington Attorney General that related to the issues of malice toward plaintiff or knowledge of plaintiff's constitutional rights).

Recognizing that the nature of the at-issue exception to attorney-client privilege "prevents its mechanical application," one Federal District Court formulated a test to determine when waiver is appropriate. See *Koppers Co. v. Aetna Cas. and Sur. Co.*, 847 F.Supp. 360 (W.D.Pa. 1994), *Mandamus Granted and Order Vacated* at 40 F.3d 1240 (1994) (holding the exception to privilege applies where (1) assertion of the privilege was a result of some affirmative act by the asserting party; (2) the ordinarily-privileged information is relevant to the case; and (3) the likelihood of chilling the type of ordinarily-privileged communication is outweighed by the unfairness to the seeking party if privilege is found).

C. Appeals.

In a significant case to come out of the Eleventh Circuit Court of Appeals, the U.S. Supreme Court ruled in 2009 that a trial court's order that a party disclose materials supposedly covered by the attorney-client privilege is not immediately appealable. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009).

D. Selective or Partial Waiver

The general rule with respect to waiver of the attorney-client privilege is that any disclosure of the

confidential communication waives the privilege for all communications relating to that matter. Thus, once the corporation waives the privilege as to the government, the privilege will likely be deemed to be broadly waived, including as to private, opposing litigants. "The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002). *But see Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (recognizing selective waiver doctrine).

Some courts have hinted that a partial or selective waiver may occur (thus maintaining protection) where the right to subsequently assert the privilege is specifically reserved at the time the disclosure is made.⁴¹ Most jurisdictions will reject the notion that there may be a selective or partial waiver. Thus, it is suggested, "if it is in the best interest of a corporation to assert the attorney-client privilege, the safest road is to assert the privilege against all parties, including the government. Depending on the circuit, a confidentiality agreement with a government entity may be effective, but the outcome is far from certain."⁴²

E. Inadvertent Waiver

The two circuits that have ruled on the question of inadvertent disclosure have reached conclusions. The Ninth Circuit held that inadvertent disclosure did not constitute waiver and the Eighth Circuit held that that it *did*.⁴³

F. "Culture of Waiver"

In the post-Enron era, attorney-client confidentiality has come under attack.⁴⁴ Corporate prosecu-

tions⁴⁵ give regulatory and enforcement bodies tremendous leverage in causing corporations to voluntarily investigate suspect conduct/transactions, produce information, and hand over guilty employees in exchange for leniency. The "low threshold for corporate criminal liability combined with the collateral consequences of conviction increase the pressure on the corporation to cooperate and avoid indictment for any alleged wrongdoing on the part of its employees."⁴⁶

The Department of Justice defined "cooperation" for many years to include voluntary waiver of attorney-client privilege and work product protections. This position enabled the DOJ to threaten corporate prosecutions if companies did not cooperate with criminal investigations by turning over copies of internal investigation reports and witness interview information. This tactic saved the government money, allowed for more efficient prosecutions of individuals, and led to what many have called a "culture of waiver."⁴⁷ With cooperation from companies, "the successful completion of a complex white collar prosecution, including resolution of corporate as well as individual charges, could very well be reduced from a matter of years to a matter of months."⁴⁸

It has been reported that "over the four-year period from 2002 to 2006, federal prosecutors brought charges against more than 200 chief executive officers, company presidents, and chief financial officers, and obtained over 1100 convictions or guilty pleas in white collar cases."⁴⁹ But the DOJ's aggressive stance regarding privilege waiver, which caused corporations to feel obligated to waive privilege out of fear that failure to do so will result in unfavorable treatment by prosecutors, "subordinated the interests of the corporation to the prosecutorial interests of the DOJ."⁵⁰

In 2008, in response to widespread

criticism of coercive DOJ tactics, then-Deputy Attorney General Mark R. Filip made several revisions to DOJ policy (as stated in the United States Attorney's Manual). The "Filip Memo" made four changes to past DOJ policies (supplanting the previous Holder, Thompson, and McNulty Memoranda) regarding what factors prosecutors may consider when assessing a corporation's cooperation.⁵¹ First, corporations may receive credit for providing "relevant facts" without having to waive attorney-client privilege or work product protection. Second, the government may not consider "whether a corporation has advanced attorneys fees to its employees, officers, or directors" (indemnification used to be a strike against the company). Third, prosecutors may not consider whether a joint defense agreement is in place between the corporation and its employees. Fourth, the government may not consider whether a corporation disciplined or terminated employees. Thus, so long as prosecuting attorneys ask only for the relevant facts and never specifically request waiver of the attorney-client privilege, the prosecutor has not violated the guidelines.

Although an improvement over prior corporate charging guidelines, the attorney-client privilege remains vulnerable. The Filip Guidelines don't apply widely to all government agencies (the SEC is not bound by the DOJ policy and could require a corporation to waive privilege). Further, the U.S. Attorney Manual is not enforceable in any court and there are limited avenues for redress in cases where prosecutors stray from appropriate "cooperation" considerations. Moreover, there is an inherent problem in attempting to "oversee prosecutorial decision-making without infringing on prosecutorial discretion."⁵²

In 2009, to address the prob-

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lems that remained, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2009 in the Senate.⁵³ “The purpose of the ACPA is to institute ‘clear and practical limits’ to safeguard the attorney-client privilege and work product protection.”⁵⁴ Earlier versions of the bill were released in 2007 and 2008, but to date, no law has been passed.

G. Internal Investigation as State Action

As part of the Sarbanes-Oxley Act of 2002, prosecutors became enabled to prosecute for obstruction of justice as long as a guilty act was committed “in contemplation of” an official investigation. 18 U.S.C. §1519. Given the “culture of waiver” that has evolved in the realm of corporate wrongdoing, “sharing privileged information with an internal investigation is akin to sharing information with the DOJ.”⁵⁵ In more extreme terms, the internal investigation is effectively transformed into a state action. Given this reality, §1519 potentially exposes corporate actors like in-house counsel, officers, directors, and employees to potential criminal liability if they destroy or alter discard any information that is generated in connection with the internal investigation.

H. Self-Evaluative Privilege

The “self-evaluative” privilege, also known as the privilege of self-critical evaluation, has evolved as an arguably separate and independent basis to protect documents that reflect an organization’s internal self-analysis or self-evaluation from public disclosure. It generally extends only to the “subjective opinions, impressions, and recommendations” of the individual or group conducting the evaluation and not to objective factual or statistical information⁵⁶ and is justified on the basis that disclosure of internal eval-

uations would have a “chilling effect on self-critical analysis that might benefit the public.” *Walker v County of Contra Costa*, 227 F.R.D. 529, 532 (N.D.Cal 2005).

First recognized in the 1970s, lower federal courts have upheld the privilege in a number of circumstances, including internal reviews of hiring policies, employment safety reviews, analyses of defective products, and in securities litigation.⁵⁷ The *peer-review* privilege in the physician / hospital realm is a well established variation of the self-evaluative privilege. However, “(c)ases are all over the map” on whether the privilege exists in the employment discrimination area. *Walker*, 227 F.R.D. at 532. As a common law *and not statutory* privilege, courts have analyzed it on a case by case basis; and no Federal Circuit Court of Appeals has explicitly recognized the self-evaluative privilege as an independent basis to protect a corporate internal investigation from compelled disclosure.

The prevailing test used by courts recognizing the privilege requires that (1) “the information must result from a critical self-analysis undertaken by the party seeking protection”; (2) “the public must have a strong interest in preserving the free flow of the type of information sought”; (3) “the information must be of the type whose flow would be curtailed if discovery were allowed” and (4) “that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential.” *Reid v. Lockheed Martin Aeronautics Co.*, 199 F.R.D. 379, 386 (2001).

The privilege was recognized in a 1971 Northern District of Georgia discrimination case, *Banks v. Lockheed-Georgia*, 53 F.R.D. 283 (N.D.Ga. 1971) as basis to protect from disclosure a company’s internal report analyzing its lack of progress with affirmative action hiring. *Banks*, however, has been

called into doubt on multiple occasions. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the U.S. Supreme Court implicitly rejected the privilege in connection with the EEOC’s bid to obtain via enforcement subpoena confidential peer review materials relating to the tenure review process of a former faculty member who alleged to have been the victim of race and sex discrimination. Nonetheless, some courts and commentators have reasoned that “*University of Pennsylvania* does not constitute a rejection of the self-critical analysis privilege, and its holding should be limited to its facts, i.e., to the educational institution context.” *Johnson v. United Parcel Service, Inc.*, 206 F.R.D. 686, 691 (2002).

The Eleventh Circuit Court of Appeals has not addressed the self-critical analysis privilege in any context. District court decisions that have dealt with the issue in the context of employment discrimination have reached different conclusions. In *Reid v. Lockheed Martin Aeronautics Co.*, 199 F.R.D. 379 (2001), the Northern District of Georgia recognized the self-critical analysis privilege, applied it in the context of a Title VII employment discrimination claim, and concluded that “reports produced for [the defendant’s] Diversity Council relating to the company’s work culture [were] clearly protected under the [self-critical analysis privilege].”⁵⁸

In contrast, in *Abdallah v. Coca-Cola Co.*, 2000 WL 33249254 (N.D.Ga.), the court declined to recognize the self-critical analysis privilege in a Title VII employment discrimination case, finding that “the self-critical analysis privilege is neither widely recognized nor firmly established and is of doubtful viability in light of the decision in *University of Pennsylvania*.” Likewise, in *Johnson v. United Parcel Service*, 206 F.R.D. 686 (2002), a Title VII race

case, the Middle District of Florida declined to recognize the privilege as a way to protect from discovery computer generated reports and employee comments from employee surveys. The court noted that since the Supreme Court's decision in *University of Pennsylvania*, recognition of the self-critical analysis privilege has become a minority position.

To the extent the self-evaluative privilege is successfully established, it would be subject to the same waiver problems that accompany the attorney-client privilege.

XII. Employee Interviews

The pivotal element of most internal investigations is the employee interview. Employees have the most informative information and provide background and context for all other information to be considered. At the same time, interviews are the most stressful aspect of investigations. Employees asked to participate have little choice since refusal to participate may result in termination. In most states, a refusal to cooperate with an internal investigation "constitutes a breach of the employee's duty of loyalty to the corporation" and provides an appropriate basis for termination.⁵⁹

A. Upjohn warnings

There are two particularly important ethical principles to consider in connection with employee interviews. Model Rule 4.3 of the Model Rules of Professional Conduct concerns communications with an unrepresented person. The rule states that when the attorney knows

or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer shall make "reasonable efforts to correct the misunderstanding." The rule further cautions that the lawyer should provide no legal advice to the unrepresented individual except advice to obtain counsel.

Model Rule 1.13(f) states that "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."

From the perspective of the employee to be interviewed, these ethical duties become critical. The employee may have individual exposure to prosecution under criminal laws, but nonetheless reveals incriminating details to investigating counsel because he does not appreciate counsel's role or the possibility that his revelations may be subsequently communicated to government third parties with an interest in prosecuting him. If the company waives privilege and voluntarily produces its internal investigation report to the government (perhaps for the purpose of seeking leniency with regard to corporate prosecution), the unknowing employee has effectively been deprived of his 5th Amendment right to avoid self-incrimination and 6th Amendment right to have an attorney present.⁶⁰

Because the role of the outside investigator is so often misperceived, it is appropriate and incumbent on the investigator to provide an *Upjohn* warning⁶¹ to the employee to be interviewed, prior to the inter-

view, advising the following: (1) the corporation, not the employee, is the attorney's client; (2) the conversation is privileged but the corporation controls attorney-client privilege and may choose to waive it; and (3) the employee may not assert the privilege.⁶² It is also suggested that if investigating counsel has made a good faith assessment that the matter under investigation poses a risk of criminal liability for the organization or its constituents, he should (4) inform the interviewee of the option of retaining personal counsel to be present in the interview.⁶³

Likewise, if the employee interviewed asks "do I need my own lawyer?" counsel should advise that it is in the employee's best interest to obtain individual representation if counsel has enough information to make a judgment and reasonably believes that this is so. Otherwise, counsel should inform the employee/constituent either that counsel lacks information sufficient to make a judgment, or that only the employee can make this decision.⁶⁴

B. Memorializing or transcribing the interview

Commentators suggest that interviews should be memorialized in a manner consistent with the attorney work-product doctrine.⁶⁵ Generally, it is preferable to avoid transcribing employee interviews because in the event the company identifies the need to invoke privilege, there will be less of a chance that investigating counsel's memoranda regarding employee interviews become discoverable than raw interview recordings or transcripts (which will be deemed to be purely factual, and without the mental impressions of counsel)

FOOTNOTES

1. Theodore Roosevelt, State of the Union Message (Dec. 3, 1901).
2. Fulbright & Jaworski LLP, *7th Annual Litigation Trends Survey Findings* 28 (2010).
3. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998); and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257

(1998)(affirmative defense available where employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and employee failed to take advantage of preventive or corrective measures.

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Internal Investigations (footnotes)

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4. Securities Exchange Act §10A, 15 U.S.C. §78j (2006).
5. See Sarbanes-Oxley Act, Pub. L. 107-204, 116 Stat. 745 (2002); "Implementation of Standards of Professional Conduct for Attorneys," Exchange Act Release Nos. 33-8185; 34-47276; IC-25919, 17 Fed. Reg. §205 (Aug. 5, 2003).
6. See *Baldwin v. Blue Cross / Blue Shield of Alabama*, 480 F.3d 1287 (11th Cir. 2007) (employer's summary judgment affirmed based on *Faraher-Ellerth* affirmative defense where human resources representatives handled the internal investigation)
7. David M. Brodsky, *Recommended Practices For Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 72, 83 (2009).
8. See Brodsky, *supra* note 7, at 88.
9. Once the privileged nature of the investigation is deemed to be waived, counsel becomes a witness; and the advocate-witness rule set forth in Model Rule 3.7 may lead to his subsequent disqualification as an advocate.
10. See *Pray v. New York City Ballet Co.*, 73 Fair Empl. Prac. Cas. (BNA) 1714, 71 Empl. Prac. Dec. (CCH) 44795, 1997 WL 266980 (S.D.N.Y.1997) (employer's litigation defense counsel who also conducted internal investigation of discrimination complaints subject to deposition; client's assertion of thoroughness of investigation as defense in sexual harassment litigation employer caused waiver of attorney-client privilege); *Volpe v. US Airways, Inc.*, 184 F.R.D. 672 (M.D.Fla. 1998) (employer relying on thoroughness of internal investigation as defense against sexual harassment charge must disclose to plaintiff notes taken during such investigation); *Johnson v. Rauland-Borg Corp.*, 961 F.Supp. 208 (N.D.Ill.1997) (employer's attorney who investigated complaint of sexual harassment may testify at trial but employer waives any privilege for attorney's pre-litigation legal advice by raising its internal investigation as defense to harassment claim); *Harding v. Dana Transport, Inc.*, 914 F.Supp. 1084 (D.N.J.1996) (employer waived attorney-client privilege protection for results of sexual harassment investigation conducted by outside counsel by asserting thoroughness of investigation as defense to harassment claim); and *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 68 Cal.Rptr.2d 844 (2d Dist.1997) (investigation documents normally covered by attorney-client privilege or work-product doctrine discoverable because defendant waived protections in raising adequacy of investigation as defense to discrimination claim). *But see Kaiser Foundation Hospitals v. Superior Court*, 66 Cal.App.4th 1217, 78 Cal.Rptr.2d 543 (1st Dist.1998) (attorney-client privilege not waived by employer pleading adequate investigation of sex discrimination complaint if employer has produced substance of relevant in-house investigation by non-attorney personnel pursuant to stipulation that privileges were not waived and seeks to protect only specific communication between those personnel and employer's attorneys).
11. This section as well as section X draws heavily from Kevin H. Michels, *Internal Corporate Investigations and the Truth*, 40 SETON HALL L. REV. 83 (2010)
12. *Id.* at 89-91.
13. *Id.* at 91-91.
14. *Id.* at 91.
15. Georgia Rule of Professional Conduct 2.3 is nearly identical.
16. Michels, *supra* note 11, at 93.
17. *Id.* at 93.
18. *Id.* at 97.
19. Attorneys who discover the "material violation of securities law or breach of fiduciary duty or similar violation" are required to report same to the company's CLO and CEO; and in turn, the "chief legal officer. . . shall cause such inquiry into the evidence of material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur" and direct the company to "adopt an appropriate response." 17 C.F.R. §205.3(b)(2) (2009).
20. Michels, *supra* note 11, at 99, citing *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).
21. *Id.* at 102.
22. *Id.* at 103.
23. *Id.* at 108-109.
24. *Id.* at 109.
25. *Id.* at 111.
26. *Id.* at 111.
27. *Id.* at 112.
28. *Id.* at 131.
29. *Id.* at 115.
30. *Id.* at 116.
31. *Id.* at 120.
32. *Id.* at 121.
33. See Model Rule of Professional Conduct 4.1 (prohibiting knowing misstatements by counsel to a third party), Model Rule 3.3(a)(1) (prohibiting knowing misstatements to a court), and Model Rule 2.1 (requiring candor and independent professional judgment in advising a client).
34. Michels, *supra* note 11, at 124.
35. Michels, *supra* note 11, at 127.
36. An attorney's ethical and contractual duty to maintain client secrets is separate from the attorney-client privilege in context of civil discovery and evidence law. Regarding the ethical duty to maintain confidential information, see Georgia Rule of Professional Conduct 1.6(a), which provides that "a lawyer shall maintain in confidence all information gained in the professional relationship with a client . . . unless the client consents after consultation. . . ." Conceptually, Rule 1.6 is broader than the attorney-client privilege. The attorney-client privilege applies only if the communications are intended to obtain legal advice or counsel, while a lawyer's duty of confidentiality shields all information relating to the client's representation.
37. Conversely, the burden of proving a waiver of work-product protection lies on the party asserting the waiver. See *McKesson Corp. v. Green*, 279 Ga. 95, 96 (2005).
38. Federal Rule of Evidence 501 provides that "(I)n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, . . . privilege . . . shall be determined in accordance with state law." Otherwise, actions in Federal court are governed by Federal privilege law.
39. ICLE Program Materials 2012, *Georgia's New Evidence Code* at p.123
40. The Court adopted the test used in Federal court for determining when a corporate employee may establish an individual attorney-client privilege with respect to the employee's communications with corporate counsel. First, the employee must show that he approached counsel for the purpose of seeking legal advice. Second, he must demonstrate that when he approached counsel, he made it clear that he was seeking legal advice in his individual capacity rather than in his representative capacity. Third, the employee must demonstrate that corporate counsel saw fit to communicate with the employee in his individual capacity, knowing a possible conflict could arise. Fourth, the employee must prove that his conversations with counsel were confidential. And, fifth, the employee must show that the substance of his conversations with counsel did not concern matters within the general affairs of the company. The employee defendant in *Zielinski* failed to make this showing. 270 Ga. at 41.
41. See *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997); *United States v. Billmyer*, 57 F.3d 31 (1st Cir. 1995); and *In re Steinhart Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993).
42. M. Mears, *Great (But Mislplaced) Expectations: The Scope of the Attorney Client Privilege in the Corporate Setting*, 4 FLA. ST. U. BUS. REV. 175, 193 (2005).
43. *Transamerica Computer v. IBM Corp.*, 573 F.2d 646 (9th Cir. 1978); and *Weil v. Investment/Indicators, Research Mgmt., Inc.*, 647 F.2d 18 (8th Cir. 1981).
44. This comes as no surprise, since "attorneys were in bed with corporate thieves, failed to report fraud, turned a blind eye to pervasive wrongdoing, and legitimized sham transactions." Mears, *supra* note 42, at 177.
45. While organizations cannot be imprisoned, they can be fined, placed on probation, required to make restitution to victims of corporate wrongdoing, subjected to forfeiture statutes, or debarred from doing business with the government.
46. Katrice Bridges Copeland, *Preserving the corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199, 1202 (2010).
47. *Id.* at 1199.
48. Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney Client Privilege*, 49 B. C. L. REV. 1, 21 (2008).
49. *Id.* at 3, citing statistical sources.
50. Robert Buchholz, *When Your Best Friend is Your Worst Enemy: How 18 U.S.C. §1519 Transforms Internal Investigations Into State Action and Unexpected Waiver of Attorney-Client Privilege*, 46 NEW ENG. L. REV. 811, 819 (2012).

51. *Id.* at 820.
52. Bridges, *supra* note 46, at 1238.
53. S. 445, 111th Cong. (2009).
54. Bridges, *supra* note 46, at 1233.
55. Buchholz, *supra* note 50, at 811.
56. Theodore R. Lotchin, *No Good Deed Goes Unpunished? Establishing a Self-Evaluative Privilege For Corporate Internal Investigations*, 46 WM & MARY. L. REV. 1137, 1160 (2004).
57. *Id.* at 1160.
58. The court also held that certain types of documents were not protected by the privilege, principally because the documents did not constitute subjective analysis (i.e., the information contained in the documents was primarily factual).
59. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and The Employee Interview*, 2003 COL. BUS. L. REV. 859, 907 (2003).
60. Conversely, corporations do not have a Fifth Amendment privilege. Thus, "corporations must comply with all government document requests during an ongoing investigation even if it means turning over documents that clearly establish the corporation's criminal liability." Bridges, *supra* note 46 at 1203.
61. In *Upjohn Co. v United States*, the U.S. Supreme Court explicitly held that the attorney-client privilege could apply to communications between in-house counsel and corporate employees during an internal investigation. 449 U.S. at 396. The privilege applies to both upper-level management and to lower-level employees upon whose knowledge management relied when making decisions. *Id.* at 394. The Court emphasized that the privilege extends only to communications and not to facts. In *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985), the Court clarified that the privilege belongs to the corporation, not its employees, and is the corporation's to waive. See Bridges, *supra* note 46, at 1204-05.
62. Timothy M. Middleton, "Watered Down Warning": *The Legal and Ethical Requirements of Corporate Attorneys in Providing Employees with "Upjohn Warnings" in Internal Investigations*, 21 GEO. J. LEGAL ETHICS 951, 960 (2008).
63. Duggin, *supra* note 59, at 960.
64. *Id.* at 960.
65. Brodsky, *supra* note 7, at 96.

NOTES

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